ABA Antitrust Section | Global Private Litigation Committee

Global Private Litigation Bulletin

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Inside this Issue

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***The Committee also thanks the contribution of Meegan F. Hollywood, Robins Kaplan LLP (Young Lawyers Division Representative).**

LETTER FROM THE EDITORS

Is it Privileged?

One of the foundations of the legal profession is the lawyer's ability to safeguard legitimately confidential information. In litigation, important questions can arise as to the scope of protection afforded to, for example, communications seeking or providing legal advice, communications among lawyers or entities sharing a common litigation interest, or the protection of attorney work product.

This edition of the Global Private Litigation Bulletin examines those issues from the perspective of multiple jurisdictions. The first two articles examine US law, with the first article written by a lawyer who mainly represents plaintiffs and the second by lawyers who mainly represent defendants, to provide varying perspectives. From there, we take a tour through Europe, with a series of articles examining the ways in which different jurisdictions (the EU, Germany, Italy, the Netherlands, and the UK) treat these privileges and professional obligations, taking into account the impact of the EU's Antitrust Damages Directive.

We hope you enjoy this issue as we approach the Spring Meeting. Below are a few of the great programs which are cosponsored by our committee or have committee speakers/chairs:

Wednesday, April 11th

10:45 am	Views from the Bench-Non-Mergers
1:45 pm	ACPERA in Civil Cases: The Cooperation Conundrum
3:30 pm	Collective Redress Outside the U.S.
3:30 pm	Negotiating Cartel Fines and Civil Settlements

Thursday, April 12th

8:30 am	Recent Developments in Global Class Actions
3:15 pm	Is Cartel Leniency Still Worth It?

We also encourage you to reach out to us at any time if you have ideas or topics that you propose we explore in our upcoming Global Private Litigation Bulletins.

Sincerely yours,

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MISCONCEPTIONS ABOUT PRIVILEGE RELATING TO EVERYDAY AGREEMENTS

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Introduction

This article discusses common misconceptions about privilege as it relates to client retention agreements and common interest agreements. The popular belief is that client retention documents are privileged because they involve communications between attorney and client while common interest agreements are privileged because they extend the attorney-client or work-product privilege to third parties with common interests. In fact, client retention agreements are not privileged absent special circumstances, and whether privilege applies to common interest agreements varies considerably from court to court.

Client Retention Documents

The discoverability of client retention documents is a frequent topic in class action litigation. During discovery, defendants will often serve a document request on plaintiffs seeking documents pertaining to their retention of counsel. Defendants will argue that client retention documents, such as engagement letters and fee agreements, are not privileged and are relevant at the class certification stage. In contrast, Plaintiffs will argue that these documents are privileged and irrelevant because they merely provide for the fee arrangement and the payment of expenses between attorney and client. Given that client retention documents are part of every case, the law should be transparent. Nevertheless, this topic's regular appearance at discovery showdowns suggests otherwise.

Plaintiffs assume client retention documents are privileged because they relate to the arrangement under which representation of the client by the attorney takes place. Client retention documents are not privileged, however, because they fail to reveal confidential communications between attorney and client. Courts have consistently held that the general subject matters of clients' representations are not privileged.[1] Absent special circumstances, privilege does not extend to client retention documents.[2] Attorney meet-and-confers regarding the privileged nature of client retention agreements are therefore usually not productive.

The discoverability of client retention documents actually turns on relevance—not privilege. As to relevance, defendants often cite *Rodriguez v. West Publ'g Corp.* for the proposition that the monetary agreement between a named plaintiff in a class action and their attorney is relevant to the adequacy, bias, and conflicts inquiries at the class certification stage.[3] *Rodriguez* was an antitrust class action involving objections relating to incentive agreements that were entered into at the onset of litigation between class counsel and five named plaintiffs.[4] The *Rodriguez* court noted, "The arrangement [incentive agreements entered into as part of the initial retention of counsel in this case] was not disclosed when it should have been and where it was plainly relevant, at the class certification stage."[5] Although the Ninth Circuit affirmed the settlement agreement, it held that the incentive agreements, wherein the class representatives would be compensated on a sliding scale tied to the size of the settlement, was a conflict of interest that should have been disclosed in the class certification stage.[6] Defendants may suggest *Rodriguez* establishes that client retention agreements are always discoverable at class certification.

In turn, Plaintiffs may respond that many courts decline to read *Rodriguez* for such a sweeping proposition even if fee arrangements are relevant to class certification issues. For example, in *Larsen v. Coldwell Banker Real Estate Corp.*, the district court denied a motion to compel retainer agreements in the absence of evidence showing conflict or suspect relationship between class representatives and class counsel.[7] Similarly, in *In re Google AdWords Litig.*, the trial court found, "While *Rodriguez* does state that the existence of an incentive agreement would be relevant at the class certification stage, the Court does not believe that it can be read to stand for the broad proposition that the fee arrangements between named plaintiffs and plaintiffs' counsel should be discoverable without any reason to think there is a potential conflict."[8] Thus, while defendants have a strong argument that client retention documents are not privileged, it will be difficult to seek such documents unless they can show evidence of conflict between named plaintiffs and class counsel.

In any event, if there is a document request for client retention documents during discovery negotiations, the parties can best use their time and resources discussing relevance; privilege, which may seem like the obvious choice, is ultimately a red herring.

Common Interest Agreements

The discoverability of common interest agreements occasionally arises in class litigation as well, where complex cases and multiparty negotiations often result in such agreements. The most prevalent common interest agreements are joint defense agreements, though joint prosecution agreements are becoming more typical. These agreements provide privileges for documents and communications between parties and counsel with aligned interests.

The common-interest privilege is an extension of the attorney-client and/or the work-product privilege; it does not confer an independent privilege.[9] Cases that have addressed discoverability of common interest agreements are, quietly frankly, all over the place.[10] Some courts have found that the joint defense privilege protects joint defense agreements.[11] Others have found the opposite.[12] And other courts have ruled that joint defense agreements are irrelevant and therefore non-discoverable.[13] The threshold question appears to be whether common interest agreements are relevant to the parties' respective claims or defenses. Various courts have found these agreements irrelevant and have not reached the privilege analysis.[14]

To enjoy the benefits of common interest agreements, and to ensure privileges apply, the key is to determine how specific courts view them and how to form such agreements. In some districts, common interest agreements are presumptively not privileged.[15] In districts that extend the common interest privilege to such agreements, however, attorneys should at a minimum verify that (1) the attorney-client or work-product privilege applies to such agreements; (2) the formation of such agreements is, indeed, in furtherance of common interests; and (3) the privilege has not been waived.[16] Note that it is possible that a common interest agreement may serve more than one purpose and that some portions of the agreement may be irrelevant or privileged while another part may be relevant and discoverable.[17]

Attorneys should carefully analyze the law governing the common interest agreement and consider choice of law before entering into such agreements as courts can dramatically differ on decisions regarding motions to compel such agreements.

Conclusion

In summary, make no assumptions about privilege as it relates to everyday agreements like client retention agreements and common interest agreements. If you must, assume they are not privileged—and only include information in them that you would be willing to produce in discovery.

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[1] *See*, *e.g.*, *In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir. 2000) ("the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure"); *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992).

[2] *See*, *e.g.*, *In re Shargel*, 742 F.2d 61, 63 (2d Cir. 1984); *In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982) (noting bills, ledgers, statements, time records, and the like that reveal the nature of the services provided, such as researching particular areas of law, should fall within the privilege).

[3] *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009); *see also In re Sheffield*, 280 B.R. 719 (Bankr. S.D. Ala. 2001).

[4] *Rodriguez*, 563 F.3d at 954-55.

[5] *Id.* at 959.

[6] *Id.*

[7] *Larsen v. Coldwell Banker Real Estate Corp.*, No. SACV 10-00401-AG (MLGx), 2011 WL 13131127, at *3 (C.D. Cal. Oct. 4, 2011).

[8] *In re Google AdWords Litig.*, 2010 WL 4942516, at *4-5 (N.D. Cal. Nov. 12, 2010).

[9] *See*, *e.g.*, *GeoMetWatch Corp. v. Hall*, No. 1:14-cv-60-JNP-PMW, 2016 U.S. Dist. LEXIS 91274, at *5 (D. Utah July 12, 2016).

[10] *Steuben Foods, Inc. v. GEA Process Eng'g, Inc.*, No. 12-CV00904(S)(M), 2016 WL 1238785, *1 (W.D.N.Y. Mar. 30, 2016).

[11] *See*, *e.g.*, *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164, 2007 U.S. Dist. LEXIS 22090, at *38 (D.Kan. Mar. 26, 2007).

[12] *See*, *e.g.*, *Rodriguez v. Gen. Dynamics Armament and Technical Prod., Inc.*, Civ. No. 08- 00189, 2010 WL 1438918, *3 (D. Haw. Apr. 7, 2010).

[13] *See*, *e.g.*, *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215, 218 (W.D. Ky. 2006).

[14] *See*, *e.g.*, *GeoMetWatch*, 2016 U.S. Dist. LEXIS 91274, at *8; *Warren Distrib. Co. v. InBev USA L.L.C.*, No. Civil No. 07-1053 (RBK), 2008 WL 4371763, *6 (D.N.J. Sept. 18, 2008).

[15] *See*, *e.g.*, *Pacific Coast Steel v. Leany*, 2011 WL 4572008, *3 (D. Nev. 2011).

[16] *See*, *e.g.*, *In re Grand Jury Proceedings*, 156 F.3d 1038, 1043 (10th Cir. 1998); *United States v Bergonzi*, 216 F.R.D. 487, 495-96 (N.D. Cal. 2003).

[17] *Jeld-Wen, Inc. v. Nebula Glasslam Int'l*, No. 07-22326-CIV, 2008 U.S. Dist. LEXIS 18821 (S.D. Fla. Mar. 11, 2008).

DARE TO SHARE? WAIVER ISSUES IN CROSS-BORDER JOINT DEFENSE COMMUNICATIONS

Christopher B. Hockett, Partner, Joshua S. Cohn, Associate, and Jonathan A. Huberman, Associate, Davis Polk & Wardwell LLP

Most U.S. lawyers know very little about foreign laws governing the attorney-client privilege or work product doctrine. However, ignoring those laws might, in certain circumstances, make confidential cross-border joint defense communications vulnerable to a claim of waiver, even in a U.S. proceeding. This article explains these risks, and offers some suggestions for mitigating them.

Information Sharing Under the Joint Defense Doctrine

Under U.S. law, the attorney-client privilege bars discovery of confidential communications between a client and counsel made in connection with obtaining or providing legal advice.[1] The privilege exists to encourage open communication between the attorney and client, a cornerstone of effective representation.[2] However, if an otherwise privileged communication is shared with strangers to the attorney-client relationship, then courts are likely to find a waiver of the privilege.[3] Similarly, an attorney's work product – material prepared in

anticipation of litigation – should also be kept confidential to remain protected from discovery, although work product protection is not as easily waived by disclosure to outsiders.[4]

The joint defense or "common interest" doctrine is a widely – though not universally – recognized extension of the attorney-client privilege and work product doctrine.[5] Although the doctrine varies from jurisdiction to jurisdiction, in general it provides a mechanism for clients and lawyers to share privileged information with third parties that share a common interest without causing a waiver of otherwise applicable legal privileges.[6] A key requirement of an effective joint defense agreement is that it bars participants from disclosing confidential information received from others pursuant to the agreement.[7]

It is extremely common for joint defense groups in price-fixing matters to rely on common interest agreements to protect confidential communications and information shared among participants. These efforts help parties coordinate their defenses and design effective strategies in response to price-fixing claims and investigations – which frequently involve companies, counsel and enforcement agencies located in many different jurisdictions around the world.

However, some jurisdictions outside of the U.S. do not recognize the joint defense doctrine, or provide the same high level of protection for attorney-client communications or work product as under U.S. law. What, then, happens when joint defense information is shared with participants located in jurisdictions like these? Even if the information is shared in confidence pursuant to a joint defense agreement that prohibits its disclosure, is it reasonable for the sharing party to rely on privileges and non-disclosure promises that the receiving parties' jurisdictions would not uphold? If not, could sharing such information waive otherwise applicable privileges, even as interpreted by U.S. courts under U.S. law?

Foreign Privilege Law

It is beyond the scope of this article to address all of the variations in the law of privilege in non-U.S. jurisdictions.[8] However, there are many important jurisdictions that afford significantly less protection for attorney-client communications and attorney work product than does U.S. law. The EU, for example, recognizes a "legal professional privilege," which allows a party under investigation by the European Commission to withhold communications with an external lawyer who is qualified to practice in a member state within the European Economic Area in relation to the subject-matter of that investigation (even if the advice was provided prior to commencement of the investigation). However, legal professional privilege does not attach to an internal communication between an in-house counsel and the company, unless it merely reports advice provided by an external lawyer which is privileged, nor does it attach to communications with non-EU-qualified counsel. There is also an open question as to whether EU courts would recognize the common interest privilege. China, meanwhile, affords even less protection to attorney-client communications: while an attorney has a professional obligation to maintain the confidentiality of client information, she, along with "all work units and individuals that have knowledge of the circumstances of a case," can be required to "give testimony in court" and disclose that confidential information (and could face professional discipline or even jail time if she refuses to do so).[9]

As a result of these varying degrees of protection throughout different jurisdictions, there could be some risk in relying on U.S. law to protect confidential attorney-client communications, attorney work product, and joint defense material shared with joint defense participants located in multiple jurisdictions. One way that risk could manifest itself is if enforcement authorities or private litigants in the foreign jurisdictions were to compel disclosure of the shared joint defense information.[10] However, the risk could also arise in the context of a claim of privilege or work product waiver in a U.S. proceeding. That is our next topic.

The Analogy To Non-Private Email

Viewed broadly, the question is whether a privilege can be maintained with respect to communications or work product that is meant to be shared in confidence with joint defense participants, but which the sharing party knows, or should know, *might* be disclosed to adverse third parties in the future because those adverse third parties *might* (or already *do*) have access to the communication.

An analogous situation has arisen under U.S. law in the employment context, where an employee uses a company email account, or a company computer, to communicate with personal (i.e., non-corporate) counsel about an employment dispute. Virtually all U.S. companies have access to emails sent or received via their email exchanges, and are also able to access saved computer files. Moreover, many companies have policies in place expressly reserving the right to monitor employee email and computer use, including the contents of communications and files maintained on company systems. Accordingly, there have been a number of decisions finding that employees had no reasonable expectation of privacy with respect to their use of these systems.[11]

In the privilege context, employees' emails with their personal counsel have been sought in discovery by employers based on a claim of waiver. And although an employee using company computers to communicate with his or her personal attorney may have believed that the communications were privileged and confidential, that privilege claim does not always hold up.

The leading case is *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005), which sets forth four factors for courts to consider in evaluating a claim of waiver in these circumstances: "(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies."[12] In *Asia Global*, the court determined that the employee had not been informed of the company's monitoring policies and therefore had no reason to doubt that his communications with personal counsel were confidential; thus, he had not waived privilege by emailing on the company's system.[13]

Subsequently, however, a number of courts have followed *Asia Global*'s reasoning and decided that employees *had* waived privilege by using company systems that they knew, or had reason to know, were being monitored.[14] Indeed, the court in *In re Royce Homes, LP*, 449 B.R. 709 (Bankr. S.D. Tex. 2011), went so far as to find that using the company email system effected a waiver of the *entire subject matter* of the employee's communications, not merely a waiver as to the communications made with the company system.[15] As a result, a key employee in the bankruptcy proceeding was forced to disclose thousands of emails with his attorney.[16]

So, in the context of cross-border joint defense communications, is it objectively reasonable for a party to share joint defense information with foreign parties or counsel who cannot effectively assert attorney-client privilege or the work product doctrine to protect that information from disclosure to potential adversaries? And if not, could the rationale of *Asia Global* be applied in such cases to support a finding of waiver – in a U.S. court – of otherwise clearly applicable privileges and protections?

As explained below, we believe that the better argument is that a waiver should not be found in these circumstances. However, to our knowledge the issue has not been litigated, so the outcome is difficult to predict with certainty.

Below we review the relevant *Asia Global* factors[17] to see whether applying them could support a waiver argument regarding joint defense communications with unprotected foreign participants.

Notice: As noted at the outset of this article, most U.S. lawyers are not familiar with the privilege law of other countries, and thus might not have actual notice that some countries do not recognize the attorney-client privilege or work product doctrine. However, U.S. lawyers might reasonably be expected to know about privilege protections that apply (or do not apply) to the other members of their joint defense group. In other words, subjective ignorance of lowered protections may not be a sufficient excuse for lack of "notice."[18]

Monitoring and Access: In the employment context, an employer's ability to "monitor" an employee's computer or email use connotes ongoing or at-will inspection rights regarding the communications at issue.[19] Obviously, that sort of monitoring would be highly unusual in the joint defense context, as adversarial third parties such as enforcers or private litigants normally do not have regular access to those communication channels. Thus, even in countries with diminished privilege protections, hostile third parties would not have ongoing rights to inspect joint defense information.

However, the same adversaries *could* obtain "access" to joint defense communications by invoking their investigative or subpoena powers. Would the existence of that hypothetical right of access make sharing joint defense information vulnerable to a claim of waiver? At least some cases in the employment context suggest that waiver requires more than theoretical vulnerability to disclosure; if the right of access is not actually exercised in practice, then some courts have been more willing to find that the employee enjoyed a reasonable expectation of privacy when using company systems, and thus that no waiver occurred.[20] In the context of joint defense communications, there would rarely be any ongoing monitoring or real-time access by adversaries, and obtaining access generally would require taking significant affirmative steps (e.g., through a subpoena or other compulsory process) to uncover the confidential information. Thus it seems incorrect to assume that merely sharing joint defense information with participants in countries that do not uphold privileges would necessarily destroy any reasonable expectation of privacy.

Moreover, a party might further protect against a claim of waiver by avoiding any voluntary production of the joint defense communications. In general, a party waives the attorney client privilege by voluntarily disclosing confidential communications to a third party that is not within the privilege.[21] This includes voluntary disclosures made to foreign regulators.[22] Compelled disclosures, on the other hand, do not constitute voluntary waivers to third parties, and therefore do not waive the attorney-client privilege.[23]

Mitigating the Risk

In the absence of clear law, there are a number of steps parties can take to reduce the likelihood that a U.S. court would find a waiver when joint defense information has been shared with participants in countries that do not recognize the same privileges and protections provided under U.S. law.

1. Limit the information that you share with people in vulnerable jurisdictions, especially those in in-house counsel roles. If a member of a joint defense group resides in a country that limits protections for in-house counsel, consider limiting any privileged communications or work product to the outside attorneys.

2. Clearly label privileged information. Marking information as privileged provides two benefits. First, clear privilege designations allow electronic systems to identify the documents and may help prevent inadvertent disclosure of the information. Second, because U.S. courts will consider whether the parties had a reasonable

expectation of privacy, marking the joint defense information as privileged can help to establish that the parties took steps to maintain confidentiality of the documents.

3. Specify in the joint defense agreement that sharing information pursuant to its terms is not intended to waive any protections. Because U.S. courts will consider a party's reasonable expectations, a court may credit a contractual provision stating that the parties intend privileged information or work product to remain protected.

4. Require notice and opportunity to intervene if joint defense information is requested by any outsider. If a participant voluntarily discloses confidential joint defense information to a hostile third party (e.g., a foreign enforcer), a U.S. court is more likely to find a waiver. By contracting for the opportunity to object to any disclosure, joint defense group participants can limit their exposure to such a finding.

Conclusion

Members of cross-border JDA's should carefully evaluate the risks posed by sharing joint defense information with participants subject to less protective foreign privilege laws. Although the law is unsettled, parties should take steps to minimize these risks and avoid a waiver.

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[1] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000); *see also United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D. Mass 1950).

[2] *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).

[3] *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991).

[4] *Id.* at 1428*; see also Kraus Industries v. Moore*, 2008 WL 4206059, at *4 (W.D. Pa. Feb. 11, 2008).

[5] *See United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

[6] *See United States v. Hsia*, 81 F. Supp. 2d 7, 16 (D.D.C. 2000). As noted in Elizabeth Castillo's companion article in this newsletter, the doctrine does not confer an independent privilege; it merely prevents a waiver that would otherwise occur when privileged or work product-protected information is disclosed to third parties. Castillo, Elizabeth T., "Misconceptions About Privilege Relating to Everyday Agreements", at 4; *see also In re Grand Jury Subpoenas, 89-3 and 89-4*, 902 F.2d 244, 249 (4th Cir. 1990) ("[A]s an exception to waiver, the joint defense or common interest rule presupposes the existence of an otherwise valid privilege").

[7] *Western Fuels Ass'n v. Burlington Northern Railroad Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984).

[8] For more thorough discussion of these variations, we recommend the companion articles in this newsletter by Deba Das and Jessica Steele (England and Wales), Simon Priddis and Thomas Wilson (EU), Sabrina Protocic (Germany), Gian Luca Zampa and Mario Cistaro (Italy), and Winfred Knibbeler and Nima Lorjé (Netherlands).

[9] *See Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479, 491 (S.D.N.Y. 2013), *aff'd in part rev'd in part on other grounds*, 2013 WL 6098484 (S.D.N.Y. Nov. 20, 2013).

[10] *See In re Vitamin Antitrust Litig.*, 2002 WL 35021999, at *4, *26 (D.D.C. Jan. 23, 2002).

[11] *See, e.g., Garrity v. John Hancock Mut. Life Ins. Co.*, 2002 WL 974676 at *2 (D. Mass. May 7, 2002); *In re The Reserve Fund Sec. & Derivative Litigation*, 275 F.R.D. 154, 159-165 (S.D.N.Y. 2011); *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996); *United States v. Simons*, 206 F.3d 392, 398-399 (4th Cir. 2000); *Bohach v. Reno*, 932 F. Supp. 1232, 1236 (D. Nev. 1996).

[12] *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257-258 (Bankr. S.D.N.Y. 2005).

[13] *Id.* at 261.

[14] *See, e.g.*, *In re Reserve Fund Securities & Derivative Litigation*, 275 F.R.D. 154, 163-64 (S.D.N.Y. 2011); *Kaufman v. Sungard Investment Systems*, 2006 WL 1307882 at *4 (D.N.J. May 10, 2006); *In re Royce Homes, LP*, 449 B.R. 709, 737-741 (Bankr. S.D. Tex. 2011); *Alamar Ranch, LLC v. County of Boise*, 2009 U.S. Dist. LEXIS 101866, at *8-11 (D. Idaho Nov. 2, 2009).

[15] 449 B.R. at 743.

[16] *Id.* at 714, 741.

[17] We ignore the first *Asia Global* factor, which is whether the company has a policy banning personal or inappropriate communications using company devices.

[18] *See, e.g., Long v. Marubeni America Corp.*, 2006 WL 2998671, at *3 (S.D.N.Y. Oct. 19, 2006) (finding that plaintiff's professed "ignoran[ce]" of the company's electronic communications policy, which allowed for company monitoring of data existing on company computers, was immaterial (and not credible), as the plaintiff "knew or should have known" about the company monitoring policy).

[19] *See e.g., Simons*, 206 F.3d at 396 ("[U]sers shall . . . [u]nderstand FBIS will periodically audit, inspect, and/or monitor the user's Internet access as deemed appropriate."); *Asia Global*, 322 B.R. at 260 ("The Corporation . . . reserves the right . . . to [e]ngage in random or scheduled monitoring of business communications.").

[20] *See, e.g., In re High-Tech Employee Antitrust Litig.*, 2013 WL 772668, at *7 (N.D. Cal. Feb. 28, 2013).

[21] *See, e.g., Westinghouse*, 951 F.2d at 1424-1427. It could also be argued that sharing "privileged" information with such a party might cause the privilege not to attach in the first instance. A party's expectation that a communication would be kept confidential must be "reasonable" in order for the privilege to attach. *Bingham v. Baycare Health System*, 2016 WL 3917513 at *1 (M.D. Fla. July 20, 2016).

[22] *See In re Vitamin Antitrust Litig.*, 2002 WL 35021999, at *26.

[23] *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1373 (D.C. Cir. 1984) ("The distinction between voluntary disclosure and disclosure by subpoena is that the latter, being involuntary, lacks the self-interest which motivates the former."); *In re Vitamin Antitrust Litig.*, 2002 WL 35021999, at *28, 30-31 (finding that submissions to the Mexican Federal Competition Commission were compelled, and thus that the privilege still attached).

Europe – A Privileged Position?

In this series of articles, edited by Simon Priddis and Deba Das,[1] we consider developments in legal privilege across Europe. While well-established at common law in England and Wales, the concept of privilege has manifested itself in novel ways across European civil law jurisdictions, in particular through the law of professional secrecy. Privilege in those jurisdictions is likely to develop (and potentially be litigated) further as a result of the implementation of the EU Antitrust Damages Directive. As we discuss in this series, the scope of any such development remains uncertain, but interestingly occurs at exactly the same as the ambit of privilege has arguably come under (qualified) attack in England & Wales – the jurisdiction that may be regarded as its home.

LEGAL PRIVILEGE IN THE EU

Simon Priddis, Partner, and Thomas Wilson, Counsel, Freshfields Bruckhaus Deringer LLP

Introduction

Within the EU, cartel damages actions are pursued at national level under the substantive and procedural law of EU Member States. Traditionally, therefore, legal professional privilege (***LPP***) has only been relevant at EU level in cases where European Commission has sought to use investigative powers, either in antitrust or merger investigations. There is surprisingly little case law – a total of three cases that the EU courts[2] (and one Commission decision[3]), all relating to cartels. At the same time, LPP has become significantly more relevant in particular in EU merger investigations as it is no longer uncommon for the Commission to request several hundred thousand internal documents in complex cases.[4] The use of LPP in these contexts is nevertheless relevant to private litigation, given the scope of an eventual Commission decision may of course bear on the content of any claimant action, particularly in the cartel follow-on damages sphere. Moreover, a step change in the relevance of privilege is now heralded by the EU Antitrust Damages Directive, which was to be implemented across all EU Member States last year, now, *inter alia*, establishes certain minimum standards in relation to disclosure and privilege in the context of private enforcement actions in EU Member States. This introduces novel concepts in certain civil law jurisdictions in the EU (as we discuss in the following articles in this edition), although the implementation of these changes is a matter for the EU Member States and will likely evolve over time.

Current Law

The concept of LPP is recognised at the EU-wide level only in an antitrust context. It has been developed by the EU courts, and its scope covers the following:

- written communications with an external, EU-qualified lawyer made for the purpose and in the interest of exercising the client's rights of defence in the proceedings;[5]
- internal notes circulated within the company reporting the text or the content of communications with an external, EU-qualified lawyer containing legal advice;[6] and
- working documents and summaries prepared by the client, provided that they were drawn up exclusively for the purpose of seeking legal advice from an external, EU-qualified lawyer in exercise of the client's rights of defence.[7]

In-house legal advice is not within scope of LPP under EU law.

The Commission published a summary of the EU case law and best practices in respect of LPP in the conduct of proceedings concerning Articles 101 and 102 TFEU.[8]

Practical Considerations

The Commission is taking an increasingly strict approach to LPP claims. Areas of dispute between the parties and the case teams commonly include: legal advice given by a non-EU-qualified lawyer (under I.), the passing

on of external legal advice within the company (under II.) and legal advice unrelated to the competition proceedings (under III.). There are also procedural issues relating to LPP (under IV.). The Commission's approach is relevant in the private litigation context given disclosed documentation may inform the scope of any eventual Commission Decision that may underpin private follow-on litigation, and may impact on an undertaking's ability to sustain or challenge claims to LPP in subsequent litigation. Concerns around the privileged status of documents in a Commission investigation (particularly in the immunity context) mean that sensitive documents (e.g. opining on the existence of any infringement) should only be produced by external lawyers, and their clients must be alive to the risk that internally produced advice, e.g. to the Board, may become disclosable in subsequent private litigation.

I. Legal advice from non-EU qualified lawyers

The "default position" of Commission case teams normally is that LPP only exists for external "EU-qualified lawyers". By contrast, US courts recognise the existence of a foreign attorney-client-privilege when the legal advice is given by a foreign lawyer or one acting in the capacity of giving legal advice on foreign law issues.[9] And the US agencies – beyond the black letter of the law – normally do not challenge the withholding of EU communications even if the European lawyer is an in-house lawyer. The lack of coherence between the EU and the US can have implications, in particular in multi-jurisdictional investigations or merger cases. One of them is that, as a result of disclosure obligations in the EU, privilege may be lost in the US.

If, for instance, the Commission issues – as part of an antitrust or merger investigation – an information request that covers legal advice given by a US lawyer, such advice is not protected by LPP and therefore has to be disclosed to the Commission. This disclosure may mean that the US privilege is voluntarily waived. As a result, the materials may have to be disclosed in US litigation as part of the civil discovery process. This is not an entirely new debate but the issue is a topical one as there is increasing cooperation between competition authorities in global antitrust investigations and merger reviews.

Competition authorities have tried to tackle this issue in their model confidentiality waivers.[10] But the US courts are not bound by these waiver documents. Also, there may be disagreement between the authority and the disclosing party as to whether the document is in fact privileged or not – in that case, the confidentiality waivers do not help.

The practical approach taken by DG COMP case teams – i.e. outside the legal question of whether EU LPP applies – varies in this respect. In a recent complex merger investigation, the case team did not request the disclosure of legal advice given by US lawyers belonging to the same internationally active law firm. In other cases, the Commission requested US privilege logs (in which the parties had to justify their privilege claim in relation to US legal advice in detail – see further details under IV.3.). In earlier cases, however, case teams applied the EU case law strictly, allowing only the non-disclosure of legal advice prepared by lawyers qualified in an EU Member State.

II. In-house summaries of external legal advice

EU LPP is not restricted to communications between the client and his external lawyer. In-house notes that report the text or the content of communications with an external lawyer containing legal advice are also covered by LPP, as decided by the General Court in the *Hilti* case.[11]

DG COMP case teams occasionally interpret the *Hilti* decision as meaning that documents are only protected by LPP if they exclusively contain external legal advice. Under this interpretation, if the documents do not exclusively contain external legal advice they are *not protected by LPP at all*, including the parts containing external legal advice. This would mean that external legal advice contained in a project memorandum to the

board is not covered by EU LPP. The same would apply for board minutes containing legal recommendations by external lawyers. In our view such an approach goes beyond the General Court's judgment in *Hilti*. In fact, the key message of the General Court's decision is that the content of external legal advice is protected irrespective of the form of communication. Nevertheless, as a practical matter, parties to a Commission investigation should be aware that the Commission will – in view of the limitations on LPP in EU law – often focus on securing documents prepared by in-house counsel, which are not protected against disclosure.

Assuming that the responsible case team can be convinced that in-house documents containing external legal advice do not have to be disclosed, the Commission normally only accepts a partial withholding of the privileged parts of the documents in question. This means that redacted versions have to be produced by the parties which can be burdensome given the large volumes of documents that are nowadays commonly requested.

III. Legal advice unrelated to the proceedings

The Commission has occasionally taken the view that only communications related to the client's rights of defence in "competition proceedings" and those related to the subject-matter of those proceedings are protected by LPP. This is derived from the *AM&S* judgment of the European Court of Justice in which the court found that the LPP applies to all written communications between an external lawyer and client after the initiation of competition proceedings and that it must be possible to extend the protection to earlier communications which have a "relationship to the subject-matter of that procedure".[12]

Based on this Commission interpretation a legal memo prepared by external counsel regarding the assessment of possible cartel infringements for which proceedings have not yet commenced would not be covered by LPP at EU level.

In our view, such an approach is incorrect, and it is preferable that legal advice not directly related to competition proceedings should also be covered by legal privilege, including preliminary advice given by external lawyers before the initiation of any proceedings. Anything else contradicts the EU jurisprudence establishing that everyone needs to be able to consult a lawyer "without constraint".[13] If the legal advice is irrelevant for the Commission's investigation (e.g. it relates to tax or labour law advice), its disclosure should not even be requested in the first place.

IV. Procedural issues relating to LPP

Procedural LPP issues relate to the role of the Commission's Hearing Officer (under 1.), the absence of a formal "claw back" mechanism (under 2.) and the necessity for parties to provide (extensive) privilege logs in the EU (under 3.).

1. Role of the Hearing Officer

In case of a dispute as to whether documents are privileged or not the companies cannot – at least in merger cases – turn to the Commission's Hearing Officer, a post that was established in order enhance impartiality in competition proceedings. Under the current mandate, the Hearing Officer is only competent for disputes over LPP in cartel cases, but not in merger matters.[14]

2. No "claw back" mechanism

Another procedural issue concerns "claw back", which relates to privileged documents that are inadvertently produced by the parties. Unlike the US position, there is no official "claw back" procedure in place and the

Commission's Hearing Officer usually declares himself not competent. Currently it is for the parties to agree "claw back" with the case teams.

3. Privilege logs

The Commission has recently established a practice (albeit in merger cases) that requires companies to justify privilege claims in more detail. The exact requirements can vary but increasingly case teams ask for so-called privilege logs. This means that companies need to justify in detail why the document that is not disclosed is in fact privileged. The information that needs to be provided includes the author, the recipients of the email or document, the type of privilege claimed and other information. The most work-intensive aspect is that a summary of each email or document needs to be provided in the privilege log. This is highly burdensome for the parties and advisers in complex cases as several thousand documents may be privileged.

The EU Antitrust Damages Directive

In addition to requiring courts to give effect to the applicable LPP rules, the EU Antitrust Damages Directive introduces extensive rights for national courts to order disclosure of evidence under Articles 5 and 6. For civil law jurisdictions within the EU that traditionally do not recognise the concept of legal privilege, the Directive means that LPP protection must now be provided for in domestic law and given effect by courts that have hitherto had relatively limited engagement with disclosure and privilege concerns.

The EU Antitrust Damages Directive has been implemented in 26 of the 28 EU Member States. This series of articles discusses the implementation of the EU Antitrust Damages Directive in Germany, Italy and the Netherlands (and comments on developments in the UK), which are important venues for antirust damages litigation in the EU.

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[1] Partner and Senior Associate, Freshfields Bruckhaus Deringer LLP. We would like to thank Tom Rhodes for his assistance with finalising this series of articles. The views expressed in what is a developing area of law are ours, and those of the individual authors, and not Freshfields Bruckhaus Deringer LLP.

[2] Case C-155/79, *AM&S,* ECLI:EU:C:1982:157, judgment of 18 May 1982; Case T-30/89, *Hilti*, ECLI:EU:T:1991:70, order of 4 April 1990; Case C-550/07P, *Akzo Nobel Chemicals and Akcros Chemicals*, ECLI:EU:C:2010:512, judgment of 14 September 2010.

[3] Commission decision of 23 July 2010, C(2010)5044 final, COMP/E.1/39.612 – *Perindopril (Servier)*. As part of an antitrust investigation into Servier and competitor pharmaceutical companies, the Commission found at Servier's premises a communication between Servier's legal counsel and legal counsel to Teva, a competitor company. The communication alleged anticompetitive practice by Servier, and Servier's counsel had therefore shared the communication with their client. The Commission rejected Servier's claim of LPP. It expressed the view that LPP is normally not applicable in the case of communications between lawyers acting for opposing parties, and that the fact the communication was attached to an email from Servier's counsel did not change this position.

[4] One recent example where disputes over LPP played a prominent role is the *Dow/DuPont* case, Commission decision of 27 March 2017, Case M.7932, see para. 119.

[5] Based on Case C-155/79, *AM&S,* judgment of 18 May 1982, paras. 23-25.

[6] Case T-30/89, *Hilti,* order of 4 April 1990, paras. 13, 16-18.

[7] Joined Cases T-125/03R and T-253/03R, *Akzo Nobel Chemicals and Akcros Chemicals*, ECLI:EU:T:2007:287, judgment of 17 September 2007, paras. 120-123.

[8] OJ C 308/6, paras. 51 et seq.

[9] See *Epstein*, The Attorney-Client Privilege and the Work-Product Doctrine, Fifth Edition, p. 764.

[10] See for instance Appendix D – European Commission Confidentiality Waiver, § 5 (5). Available at: http://ec.europa.eu/competition/mergers/legislation/npwaivers.pdf.

[11] Case T-30/89, *Hilti,* order of 4 April 1990, paras. 13, 16-18.

[12] Case C-155/79, *AM&S*, judgment of 18 May 1982, para. 23.

[13] Case C-155/79, *AM&S,* judgment of 18 May 1982, para. 18.

[14] See Decision of the President of the EU Commission of 13 October on the function and terms of the hearing officer in certain competition proceedings, OJ L 275/29, Article 4(2)(a).

PRIVILEGE IN GERMANY

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Introduction

The concepts of "privilege" and discovery, as conventionally understood in common law jurisdictions, do not exist under German law. The attorney-client relationship is instead protected by certain professional secrecy rights and obligations ("secrecy protection").[1] Based on this secrecy protection, attorneys may refuse to testify about information that was entrusted to them in their professional capacity and certain communications and items of attorney work product are exempt from seizure and other investigative measures.

Discussions on "privilege" under German law focus on dawn raids and information requests in criminal or regulatory proceedings. This is due to the fact that few disclosure obligations exist in civil proceedings and that such obligations have to date been rarely implemented in practice.[2] While the position may change as a result of the EU Antitrust Damages Directive, it is not yet clear how the German courts will give effect to the new substantive disclosure rights created under that regime.

Current Law

German law on the production of documents and secrecy protection is part of German procedural law. It therefore applies in proceedings before German authorities and courts. A general distinction is to be made between criminal and regulatory proceedings on the one hand (see below **1.**) and civil proceedings on the other (see below **2.**).

1. Criminal and regulatory proceedings

a. Scope of protection

In criminal proceedings, there is no general obligation to produce documents. However, the public prosecutor may request relevant information and documents from the suspect, secondary participants to the proceedings (such as corporations) and/or third parties, as well as search premises and inspect and seize documents.[3] Other authorities, such as the Federal Cartel Office (*Bundeskartellamt*), have similar rights.

Although there exists a general right to refuse to testify benefitting all external attorneys with regard to information entrusted to them in their capacity as legal counsel,[4] in the past, the prevailing view was that only communications with, and documents drafted by, attorneys who have previously been retained for the defence against criminal accusations (defence counsel, *Verteidiger*) were exempt from seizure.[5] Following a change in the law in 2011, several courts have held that documents created in the context of the attorney-client-relationship in the possession of any attorney may not be seized.[6] However, a decision of the higher German courts is still outstanding and German public prosecutors can and do conduct dawn raids on law firms.[7]

Documents covered by the secrecy protection are correspondence with the attorney, documents created by the attorney in the capacity as legal counsel and other items in the attorney's possession. However, the protection does not apply if there are indications that the attorney participated in the potential wrongdoing, the documents result from a violation of the law, or it appears that the documents have been improperly relocated to the attorney's office. The extent to which documents created in the course of internal investigations are protected has not yet been fully determined.

Importantly, according to the strict letter of the law, the protection only applies for documents in an attorney's possession (for the definition of "attorneys" in this sense, see below) and does not cover work product and correspondence in the client's possession. There are good arguments that when a company is already subject to proceedings imposing a fine or when it is a secondary participant in criminal proceedings, correspondence with the attorneys retained as defence counsel and documents prepared for the defence in such proceedings should be exempt from seizure even when they are in the client's custody. This is, however, still disputed.[8] Similarly, it has not yet been decided whether documents prepared in an internal investigation may be considered to be defence documents. In practice, of course, in the context of a dawn raid, clients may be unaware of the proceedings before the raid itself occurs and as such will not have instructed lawyers to defend them in such proceedings.

b. Definition of attorneys

Under German law, an attorney is someone who is established (*niedergelassen*) in Germany and admitted to or registered with a German bar. Foreign lawyers, therefore, will be unable to benefit from the secrecy protection, although the prevailing view is that attorneys admitted to a bar in the European Economic Area, who are providing legal advice temporarily in Germany without being established there, are considered equivalent for secrecy protection purposes.[9]

In-house counsel (*Syndikusrechtsanwälte*) do not have a right to refuse to testify under the rules of the German Code of Criminal Procedure with regard to information that was entrusted to them or became known to them in their capacity as in-house counsel.[10] Consequently, exemptions from seizure do not apply for them and they are not treated differently from other employees. The position for in-house counsel in Germany is, then, analogous to the position at EU level.

c. Waiver

The secrecy protections for the attorney-client relationship exist in order to protect the client and its trust in the confidentiality of this relationship. Therefore, any secrecy right is at the client's disposal. A client may choose to release the attorney from its obligation to keep information or documents confidential. In such circumstances, the secrecy protection no longer applies, and the attorney must testify and produce relevant information or documents if so requested by the authorities. In the case of legal entities, the legal entity is deemed to be the client and its management or appointed representatives may take the relevant decisions.

The mere fact of sharing information with third parties does not "waive" the secrecy protection under German law, i.e. documents may still be protected from seizure if stored at the attorney's premises. However, documents or information shared with third parties will be accessible at their premises if those third parties do not benefit from secrecy protections of their own.

2. Civil proceedings

a. Scope of protection

German civil proceedings are based on the principle that each party has to produce the evidence it wishes to rely on (*Beibringungsgrundsatz*). Disclosure of documents is, therefore, very exceptional. Only if (i) the substantive law gives a person a right to information or to the possession of a document,[11] or (ii) under procedural law, when a party refers to specific documents in the course of the proceedings, will a court make a disclosure order.[12] In such circumstances, the law does not provide for any particular secrecy protection derived from the attorney-client relationship. However, when deciding on a request for documents, the court may take into account its reasonableness and the parties' secrecy rights, including the confidentiality of the attorney-client relationship. Moreover, disclosure orders by the court based on procedural law have to date been rare. And even when a court decides to make such an order, it does not have the means to enforce it.

A court may also order third parties to produce documents based on procedural law. However, third parties – and in particular certain professionals – may withhold documents if they would be unreasonably burdened by the production thereof or if they are entitled to refuse to testify pursuant to the German Code of Civil Procedure.[13] Such a right to refuse to testify is granted in particular to persons to whom facts are entrusted by virtue of their profession and who are obligated to keep these facts confidential.[14] This concerns, *inter alia*, documents in the possession of attorneys that contain confidential information which the attorney has obtained in the course of professional activities.

Recent changes of the German law as a result of the EU Antitrust Damages Directive[15] might increase the importance of attorney-client relationship secrecy protection in civil antitrust damage litigation. The new law grants a substantive right to claimants and defendants to demand disclosure of internal information or documents relevant to substantiate actions for damages or for the defence against such claims.[16] The law exempts leniency applications and settlement documents from disclosure and also states that third parties who may refuse to testify under the relevant rules of the German Code of Civil Procedure may withhold documents in their possession.[17] As to documents in the client's possession, the new law is rather unclear. While it is, therefore, open to a defendant to argue that disclosure of attorney work-product or correspondence is unreasonable,[18] the application of the new rules is still untested and will largely depend on the courts' approach in practice.

b. Definition of attorneys

As the secrecy protection in civil proceedings is not directly linked to the definition of attorneys but rather refers to professionals who are under a secrecy obligation, compared to the criminal and regulatory context, it is broader and may also apply to foreign lawyers and in-house counsel who do not fulfil the requirements described above.[19]

c. Waiver

Again, it is open to the client to waive the secrecy protection regarding documents in the attorney's possession. However, even if he does not do so, once a private civil litigant has lawfully gained access to

information, he or she is free to use such information in the litigation and is not bound by rights to refuse to testify that others may assert.

Practical Considerations and Conclusion

Compared to common law jurisdictions, the secrecy protection of documents in the attorney-client relationship under German law is less robust, in particular, regarding documents which are in the clients' possession. As in-house counsel do not qualify as attorneys for the purpose of secrecy protection in criminal and regulatory proceedings, the chances of asserting secrecy protection for any documents at the client's premises, even if stored with in-house counsel, are low.

Therefore, as matter of standard practice, where attorneys create documents during the course of an investigation or litigation which summarise the information gathered and the attorney's legal assessments, distribution of such information should be very restricted. In particular, if an official investigation has not yet been initiated by the authorities, it is advisable not to send such documents to the client at all but rather to only provide copies on the premises of the attorneys which should not be handed over to the client. If documents are shared, any document created for the purpose of litigation should be marked "privileged and confidential" and include a brief introduction clarifying its purpose. Documents created with respect to an investigation should be clearly labelled as attorney work-product and/or defence documents relating to a specific (criminal) investigation which is already ongoing.

When authorities request the disclosure of documents that counsel has determined to be protected by professional secrecy rights, the documents should only be handed over to the authorities under protest.

While risks of disclosure obligations in civil proceedings have been limited in the past, they might gain more importance at least with regard to antitrust damage claims in the future. However, it remains to be seen how the courts will in practice handle requests for documents in the client's possession that qualify as attorney work-product or attorney-client correspondence.

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[1] See: Section 43a of the German Federal Lawyers Act, *Bundesrechtsanwaltsordnung*, *BRAO*.

[2] In addition, there exist certain possibilities for third parties to ask for the inspection of regulatory records which are separate from claims for disclosure vis-à-vis the concerned parties dealt with in this article.

[3] Criminal investigations in Germany are conducted by public prosecutors. Unlike individuals, legal entities such as corporations cannot commit crimes. Yet, a company may be fined for an administrative offence (*Ordnungswidrigkeit*) if a director, officer, or any other person responsible for the management of the company has committed a criminal offence by which duties of the company have been violated or the company way enriched or was intended to be enriched.

[4] Section 53 para. 1 no. 3 of the German Code of Criminal Procedure, *Strafgesetzbuch, StPO*.

[5] The relevant law being section 97 para. 1 no. 3 StPO. See e.g. *LG Hamburg* NJW 2011, 942.

[6] Regarding the new section 160a StPO see *LG Mannheim* CCZ 2013, 78; *LG Braunschweig* NStZ 2016, 308.

[7] A case is currently pending before the German Federal Constitutional Court (*Bundesverfassungsgericht*). So far, the court has issued a preliminary injunction ordering the public prosecutor to seal the documents until the court reaches a final decision. See *BVerfG* decision of 25 July 2017, 2 BvR 1287/17, 2 BvR 1583/17. The order has been extended for six months on 9 January 2018, see *BVerfG* decision of 9 January 2018, 2 BvR 1287/17, 2 BvR 1583/17.

[8] *LG Braunschweig* NStZ 2016, 308 held that it was sufficient that proceedings against a company were foreseeable for the secrecy protection to apply to documents in the client's possession; *LG Bonn* NZKart 2013, 204 held that proceedings actually have to be initiated; for more detail see also e.g., *de Lind van Wijngaarden/Egler* NJW 2013, 3549 (3552 et seq.); *Schneider* NStZ 2016, 309 et seq.

[9] See section 25 of the Law on the Activity of European Lawyers in Germany (*Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland*, *EuRAG*). For other foreign attorneys see sections 206, 207 BRAO. For their right to refuse to testify see *Percic* in Münchener Kommentar StPO, 1st ed. 2014, § 53 para. 2. A court decision on the issue has not yet been taken.

[10] A recent change of section 53 para. 1 no. 3 StPO explicitly clarifies this now. Even if in-house counsel continue to be additionally admitted as lawyers (*Rechtsanwalt*) to a German bar, they may generally not assert privilege with regard to their work for the employing company. Regarding such cases prior to the amendment of the law see, e.g. *Percic* in Münchener Kommentar StPO, 1st ed. 2014, § 53 para. 19.

[11] E.g. under sections 242 or 666 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*).

[12] Sections 142, 421 et seq. German Code on Civil Procedure (*Zivilprozessordnung, ZPO*). It is important to note that the reference must be to specific individual documents relevant to the case, not to categories of documents.

[13] Sections 383, 384 ZPO.

[14] Sections 383 Nr. 6, 384 Nr. 3 ZPO.

[15] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[16] Sections 33g, 89b of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*).

[17] Section 33g para. 4, 6 GWB.

[18] Section 33g para. 3 GWB.

[19] See e.g., *Greger* in Zöller, ZPO, 32nd ed. 2018, § 383 para. 19.

LEGAL PRIVILEGE IN ITALY

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The law of professional secrecy in Italy (*segreto professionale*), concerns members of certain professions, such as lawyers, notaries, consultants and accountants, upon whom a duty of secrecy is imposed which requires such professionals to keep confidential all information and documents learnt or received in the context of their professional activities and, in certain circumstances, affords those professionals the right to oppose a disclosure request from a court or authority. The related concept of legal privilege, as it is generally understood, that is the entitlement of a party to refrain from producing evidence, be it either oral or written, requested by a third party or a court, was until recently not expressly recognized under Italian law[1]. It is only with the entry into force of Legislative Decree n. 3/2017, implementing the EU Antitrust Damages Directive, that concept of legal privilege as a limit to any discovery obligation, has been explicitly set out in Italian

domestic law, pursuant to article 3, para. 6 ("…*Resta ferma la riservatezza delle comunicazioni tra avvocati incaricati di assistere la parte e il cliente stesso*….").

Current Law

Under the law of *segreto professionale* applicable to lawyers, any information or document handled by lawyers acting in the course of their profession is covered by confidentiality and must not be disclosed. Its underlying rationale is to allow free and unfettered access to a lawyer's professional service, i.e. to encourage communication between lawyers and their clients and thereby promote public interest in the administration of justice. Thus, the *segreto professionale* reflects both a duty imposed on lawyers not to disclose any confidential communications between themselves and the client as well as the right not to disclose it. The concept has been applied most particularly in the context of criminal proceedings (see below), whilst in civil trials it has been less relevant in the absence of any form of discovery-like mechanisms. Traditionally in Italian civil litigation, under the general rules of procedure, the court may order the plaintiffs, the defendants or even third-parties, to make specific disclosure of certain documents, based either on an application of the parties or on its own motion. However, under the rules of procedure non-compliance with such a court order is not in fact sanctionable and generates very limited consequences as a refusal to provide the requested disclosure can only be taken into consideration by the judge while evaluating the evidence, on a discretionary basis.

Importantly, the position has recently been modified in relation to damages actions based on antitrust grounds, as Legislative Decree n. 3/2017, in implementing the EU Damages Directive, now provides direct material sanctions in case of non-compliance with court disclosure orders, the corollary of which is that for the first time the right to withhold direct communications between lawyers and clients has been explicitly established.

Failure to observe the duty of secrecy constitutes a criminal offence under Article 622 of the Italian Criminal Code (***ICC***). The client remains free to disclose the information if they so wish or to discharge the lawyer from this duty.

The legal framework of the law of *segreto professionale* is built upon Articles 24 and 2 of the Italian Constitution: the former states that the right to a legal defence is inviolable at every stage and instance of legal proceedings, while the latter recognizes and guarantees the inviolable rights of the person that include, according to established case law of the Italian Constitutional Court, the right enshrined under Article 24. Specific provisions further develop the aforementioned constitutional framework. In the context of criminal investigations, under Article 103, paragraph 2, of the Italian Code of Criminal Procedure (***ICCP***) the public prosecutor cannot seize any document at the lawyer's premises concerning the defence strategy and defence investigations, unless the document itself is the *corpus delicti* (i.e. the body of crime). In case of an assertion of professional secrecy by a lawyer, the judge has the authority to ascertain the grounds of this claim before authorizing the seizure of the allegedly privileged documents. Another example included in primary legislation is Article 200 of the ICCP that bestows on lawyers the right to be exempted from the duty to testify on matters they have gained knowledge of through their professional activities. The right in question is also granted to legal trainees as recognized by the decision of the Italian Constitutional Court n. 87, April 8, 1997. In the context of civil litigation, the same right for lawyers and trainees is provided for by Article 249 of the Italian Code of Civil Procedure. Finally, as seen, in the context of antitrust damages actions, Article 3, paragraph 6, of Legislative Decree n. 3/2017 expressly guarantees the confidentiality of communications between lawyers and clients even in the event of a court order to disclose documents.

The law of *segreto professionale* applies to lawyers who are members of the Italian Bar and/or qualified in any of the European Union Member States. Only members of the Bar are subject to the legally binding Professional Code of Conduct that requires lawyers to maintain absolute secrecy regarding their services and

information either provided by the client or gained in the course of the lawyer's activity. In-house lawyers who cannot be members of the Bar are not subject to, and not protected by, *segreto professionale*.

Specific regard should be had to the interplay between the law of *segreto professionale* and investigatory powers by public authorities, such as the Italian Antitrust Authority (***IAA***) and the European Commission, in the course of their investigations to enforce national and European competition law. The relevant legal principles applied are aligned with those applied a EU level discussed separately in this newsletter. The decision n. 7467, September 9, 2012, of the Italian Administrative Court of First Instance (TAR Lazio) has confirmed in full the principle established by the Court of Justice of the European Union (***CJEU***) in the *Akzo* line of cases and stated that legal privilege in the context of competition investigations is limited to the communications with external lawyers. The Italian Supreme Administrative Court (***CdS***) has also confirmed the EU approach that has been established in competition investigations prevails in respect of privilege over documentation containing legal advice. As such, while internal notes reporting the text or content of communications with independent, external lawyers that contain legal opinions are privileged, internal company notes that do not contain references to external legal advice do not attract privilege (see decision n. 4016, June 24, 2010).

Practical Considerations

In practice, however, there have been occasions in which the IAA has not fully considered or complied with privilege claims. In the past, during dawn raids the IAA has often seized privileged documents irrespective of their nature, and in other cases, while not seizing a privileged document, has nonetheless read its content. For these reasons it is common practice to have lawyers closely shadowing the inspectors during all phases of an investigation trying to prevent this from happening without a proper discussion on legal privilege. In one notable case, *Rai Mediaset, R.T.I., Mediatrade*, I283B 1998, the IAA not only gathered during its investigation a legal opinion drafted by one of the parties' counsel but also used its content in the final decision, evidently without clear opposition of the parties until that point.

Conclusion

The Antitrust Damages Directive will, potentially, have a transformative effect on the application of privilege in Italy. As is evident from the foregoing, the concept has – in common with other civil law jurisdictions in the EU – until now only been given indirect effect through the law of professional secrecy. Given the lack of respect that – in practice – has been afforded to the concept to date, we anticipate a need for further procedural reform and, potentially, satellite litigation on the ambit of the protection to be afforded in contentious matters.

[1] In Italy, as in other civil law systems, the term "*legal privilege*" refers to something completely different than the above illustrated concept of privilege. In particular, a legal privilege is a payment preference established by legislation.

LEGAL PROFESSIONAL PRIVILEGE IN THE NETHERLANDS

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Introduction

Lawyers that are subject to the Dutch Counsel Act are bound to keep client-attorney communications secret. The obligation to protect legal professional privilege (***LPP***) includes all information that is entrusted to lawyers in their professional capacity and extends also to staff members of the lawyer's firm. LPP finds its legal basis in the Counsel Act and is further defined in the Rules of Professional Conduct that are adopted by the Dutch Bar Association. Unlawful disclosure of privileged information by lawyers can lead to disciplinary sanctions or even criminal liability.

Furthermore, lawyers have their own responsibility for keeping clients' confidential information secret. This may require a lawyer to decide, if he deems it to be in the client's interest, not to disclose privileged information even if the client has waived his or her right to LPP.

Current Law

Legal privilege in competition law investigations

LPP under Dutch competition law is based on the rights of defence. LPP can be invoked as a defence if the submission of documents is required by companies, private persons that qualify as de facto managers of the company (as they bear a personal responsibility to comply with competition law) and external advisors that are retained by lawyers for a specific case. LPP can cover both documents (or other data containers) as well as verbal declarations.

Documents are covered by LPP insofar as they contain legal advice concerning competition law proceedings or legal advice on competition law matters. The Dutch Competition Authority (***ACM***), in this regard follows EU law to a great extent, except that LPP under Dutch law also extends to communications with in-house counsels that are admitted to the bar (which is not the case under EU law).

The ACM has set up a special procedure for documents that may be covered by LPP. The ACM appoints an LPP official who is granted an independent status and is allowed to review LPP claims on their merits. The LPP official can review LPP documents to verify whether they are indeed covered by LPP. If the LPP claim is upheld by the LPP official, the information will not be included in the ACM files. If the claim is denied, the ACM will generally add the document to its files, although it is open to the document holder to apply for an injunctive relief judgment from the civil courts to prevent disclosure to the ACM.

Legal privilege in civil law proceedings

LPP in civil law proceedings applies to a number of professionals, including lawyers that are admitted to the bar, in-house lawyers that are admitted to the bar, medical doctors, notaries and parole officers.

The boundaries of LPP in the Netherlands are set out in statute and civil procedure rules. Statutory law (Article 165(2) Dutch Code of Civil Procedure) provides that witnesses do not have to testify about communications that fall within the scope of LPP. Also, documents that are covered by LPP do not need to be disclosed in court (Article 843a(3) Dutch Code of Civil Procedure).

Regarding the scope of LPP, the Dutch Supreme Court judgment of 2012 (Supreme Court 27 April 2012, ECLI:NL:HR:2012:BV3426) is relevant. Although the facts of the case related to a dispute with the internal revenue service over LPP, the case is also relevant in a broader context. The case concerned an individual who consulted a tax lawyer and claimed in court that communications with his lawyer should remain confidential. The Supreme Court ruled that such communications are covered by LPP because every person should have the possibility to freely consult with a lawyer, without having to fear that the communications may become public. Another interesting aspect of the judgment is that it confirms that third parties may have derived LPP if a lawyer retained such a third party and insofar as the information provided by the lawyer to such a third party is covered by LPP.

In-house counsel and legal privilege

Although the ECJ in the *Akzo* case ruled that communications with in-house counsel are not covered by LPP, regardless of whether they are admitted to a bar (see, ECJ case C-550/07 of 14 September 2010), the Dutch Supreme Court confirmed that such communications are covered by LPP under Dutch law provided that the in-house counsel is admitted to the bar (Supreme Court 15 March 2013, ECLI:NL:HR:2013:BY6101). The Supreme Court acknowledged the lack of LPP for in-house counsel under European competition law. It also noted that EU law does not preclude national law from providing more extensive safeguards for LPP. Whereas the European Court of Justice ruled – in short – that in-house counsel is not covered by LPP due to his or her lack of independence, the Supreme Court ruled that specific rules that apply to in-house counsels that are admitted to the Dutch bar are sufficient to maintain their independence. On that basis, the Supreme Court confirmed that LPP is available in relation to communications with in-house counsels that are admitted to the bar.

Practical Considerations

The Dutch civil law system does not allow for disclosure (or discovery, to use the US term) that is comparable to that seen in the US or the UK. The possibilities in the Netherlands to compel a party to disclose documents are rather limited and applied by courts in a restrictive way. LPP therefore plays a more limited role. As set out above, documents that are covered by LPP are exempt from disclosure. Similarly, witnesses that are covered by LPP are exempt from making statements.

Thus LPP in the Netherlands usually plays a role in specific contexts, such as, for example, settlement and joint defence agreements.

Maintaining LPP for joint defence groups in which several defendants cooperate is often solved somewhat differently in Dutch litigation proceedings compared to other jurisdictions. The legal position in the Netherlands on sharing such privileged information within joint defence groups (i.e. between parties that have a mutual interest in the proceedings) is not entirely clear and has not been tested in court. A solution to this legal uncertainty is usually that counsels provide bilateral legal advice to clients regarding joint defence arrangements without actually providing the arrangement (the agreement) itself to clients. Subsequently, the counsel would negotiate the joint defence agreement with its counterparts only (i.e. on a counsel to counsel basis), making use of a specific deontological rule that prevents the disclosure of counsel-to-counsel correspondence (which is in principle respected by courts).

This solution may not hold up for settlement agreements which are usually reviewed by clients and often require a client's signature. Such documents would therefore be disclosable in court if compelled. Although Dutch courts tend to respect confidentiality of settlement agreements, it cannot be excluded that a party may be compelled to disclose such an agreement, as follows from a judgment of the District Court of the Hague (District Court of the Hague 21 September 2016, ECLI:NL:RBDHA:2016:11305). In that case, the claimant had

settled with one of the defendants, after which the remaining defendants requested the court to order the disclosure of the settlement agreement. Although the request was denied, the court considered that the claimant may need to disclose the settlement amount if that becomes relevant for the proceedings.

Lastly, the Damages Directive (Directive 2014/104/EU) requires that Member States shall ensure that national courts give full effect to applicable LPP under EU or national law when ordering the disclosure of evidence. The Dutch legislator considered, however, that legislative changes in this regard were not required as current law already adequately safeguards LPP.

PRIVILEGE IN ENGLAND AND WALES

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Introduction

The potential information asymmetry that may exist in cartel damages cases between defendants (that participated in a secret cartel) and the claimants (who may be unsuspecting customers) is recognised in English law,[1] and English law has well-developed and wide-ranging rules of disclosure compared to many European jurisdictions,[2] which is one of its main attractions for the claimant bar. However, alongside wide-ranging rules of disclosure, English law has traditionally admitted the existence of wide-ranging rights of privilege. But a number of recent English judgments have refined the application of privilege to the circumstances in which cartel damages claimants often find themselves: that is, seeking disclosure of documents produced during an internal or regulatory investigation into the conduct that is now the subject of their claim.

In an EU antitrust context, the rules of privilege and disclosure have changed in several Member States with the advent of the recent EU Antitrust Damages Directive, as discussed in detail in this series of articles. The long-established principles of legal privilege under English law have not changed. However, the Directive circumscribes English law rights of disclosure in antitrust investigations, for example by providing for blanket protection of immunity material. This is contrary to the previous position, established under EU case law, and illustrates the Commission's concern for safeguarding the immunity process.

Current Law

Legal advice privilege protects communications between a lawyer and the client for the purposes of seeking or giving legal advice. English law recognises in-house counsel as "lawyers" for the purpose of legal advice privilege and their communications with non-lawyers in the same company may be protected. Contrast this to the position under EU law, where only communications with external legal counsel are privileged. "Legal advice" extends to advice on what should sensibly be done in the relevant legal context.[3] The English courts also recognise that communications between a client and their lawyer can form part of a "continuum". The entirety of a chain of communications between lawyer and client may be privileged, despite some links in that chain containing factual information relevant to the advice, rather than a request for or the provision of the advice itself.[4] Legal advice privilege also extends to any materials the lawyer creates while preparing to give legal advice – what US lawyers might call "attorney work product" – despite the fact that those materials are not themselves a communication of legal advice.[5] English case law has on occasion defined the "client"

narrowly, leading to issues where external lawyers communicate with a number of individuals within the company instructing them.

Litigation privilege protects communications between a lawyer and the client, or between either the lawyer or the client and a third party, for the purpose of litigation. "Adversarial" litigation must be pending, reasonably contemplated or existing at the time of the communication and the communication must be for the "dominant purpose" of litigation. As litigation privilege protects communications to third parties, there is also no need to consider the definition of "client". A key issue for antitrust litigators, where court proceedings often follow an internal and/or regulatory investigation into the same conduct, is what constitutes "adversarial" litigation and when litigation can be said to be reasonably contemplated.

Common interest privilege is not a separate head of privilege, but prevents privileged documents from losing that protection when they are shared with third parties. It arises where the third party with whom the document is shared has a common interest in the subject matter of the privileged document: for example, a common interest in the litigation relevant to a document protected by litigation privilege. An interesting question in English law is the extent to which a party can share a document under a ***limited waiver***, without the need to assert common interest privilege.

Practical Considerations

In light of recent case law, the following three aspects of the law of privilege give rise to potential issues, particularly in the context of cartel damages claims.

Can the claimant inspect interview notes?

a. Legal advice privilege

Re RBS Rights Issue[6] was a claim by RBS shareholders who sustained substantial losses after having been allegedly misled into participating in a rights issue months before the bank was bailed out by the government at the peak of the financial crisis. The bank had conducted a number of internal investigations into its role in the financial crisis, notably its sub-prime exposures and use of collateral debt obligations. The shareholders sought inspection of notes of interviews conducted by RBS's external lawyers with RBS employees during the investigations. The High Court found that the interview notes were not covered by legal advice privilege. The interviewees were not authorised to seek and receive legal advice from those lawyers. The interviewees were therefore not the "client". Properly characterised, the interviews were an information-gathering exercise prior to the investigated company seeking legal advice through an authorised person. Further, the interview notes, although not verbatim, were simply records of the lawyers' conversations with employees and did not "give a clue" as to the legal advice the lawyers would eventually give. They were therefore not covered by legal advice privilege as "lawyers' working papers".

What can antitrust litigants take from this? In short, an external lawyer's contemporaneous note of an interview with an employee who is not the "client" may not be covered by legal advice privilege. However, a summary of that same interview written by that same external counsel in order to report back to the client and advise, in view of that interview, what the client should do next, might well be privileged.

b. Litigation privilege

A well-informed defendant in a cartel damages claim reading *Re RBS* might think, not unreasonably, that if a claimant ever sought notes of interviews conducted during an internal or regulatory investigation into cartel

conduct, those notes would in any event be covered by litigation privilege. For that to be true, adversarial litigation must be reasonably contemplated at the time of the interview and the note must be prepared for the "dominant purpose" of conducting that litigation.

i. Adversarial litigation reasonably contemplated

Whether competition investigations in England constitute "adversarial litigation" was considered in *Tesco v OFT*. In that case, the UK Competition Appeal Tribunal found that an investigation by the UK competition regulator, the OFT (now the Competition and Markets Authority) was, at least following the publication of a Statement of Objections, sufficiently adversarial for interview notes prepared in connection with it to be protected by litigation privilege.

Recent judgments of the English High Court have, however, reinvigorated debate as to whether litigation privilege might be available in the case of purely internal investigations, even when conducted against the backdrop of regulatory action. In *ENRC*[7] a defendant company instructed external lawyers to carry out an internal investigation into allegations of bribery and corruption in its activities. The UK Serious Fraud Office (***SFO***) became involved and commenced a criminal investigation into the defendant. It compelled the production of documents created during the internal investigation, including interview notes produced by external lawyers. The defendant resisted production on the basis that the documents were protected by litigation privilege.

The High Court found that the SFO's own investigation, although reasonably in contemplation at the time of the interviews, was not "adversarial litigation". It was nothing more than a preliminary step taken before there is any decision to initiate criminal litigation. Further, at the time the interview notes were created, ENRC had uncovered no information which would result in criminal proceedings. A prosecutor needs a sufficient evidential basis before it initiates criminal proceedings, and if none exists then litigation (in the form of a criminal prosecution) was not a "real likelihood", only a "mere possibility".

However, in *Bilta (UK) Ltd*,[8] the High Court considered there was "*something of a tension*" between *ENRC* and earlier authorities. In *Bilta*, the claimant sought disclosure of a report prepared by external lawyers for their client (RBS) investigating the factual circumstances surrounding particular trades, which had been triggered by a letter from the UK tax authority stating that certain tax reliefs may be denied on the basis that RBS knew or ought to have known that the trades were connected to tax fraud. The claimant argued that the investigation report was not created for the sole or dominant purpose of conducting litigation, and as such litigation privilege did not apply. The High Court rejected the application, and found that litigation privilege did exist, on the basis that the defendant's subsidiary purpose in avoiding litigation could be "subsumed into" the dominant purpose of preparing for litigation which was, on the facts, highly likely to follow the letter from the UK tax authority.

While these decisions seem at odds, it is possible to reconcile them. *ENRC* concerned a fact-finding investigation by the SFO, as a potential precursor to litigation in the form of a criminal prosecution by the same authority. In *Bilta*, the Court considered that a tax assessment (for these purposes a form of adversarial litigation) was overwhelmingly likely to follow. A cartel damages defendant arguably falls at the *Bilta* end of this spectrum: civil litigation might be a "real likelihood" at a much earlier stage than criminal prosecution. If a regulator has investigated *and* issued a Statement of Objections, as in *Tesco*, that is clearly reasonable basis for expecting cartel damages claimants to emerge. However, a defendant might also reasonably contemplate litigation as soon as a competition authority publicises its investigation. As the High Court held in *Bilta*, it is ultimately necessary to take a "*realistic, indeed commercial, view of the facts*". However, in the recent criminal case of *Jukes*,[9] the Court of Appeal (Criminal Division) followed the *ENRC* line of reasoning, in considering that an investigation into matters potentially giving rise to criminal liability (in that case regarding

a fatal accident in the workplace) did not equate to criminal prosecution, and that as such a witness statement produced by lawyers investigating the accident did not attract litigation privilege. It will, therefore, be a contextual enquiry in a given case as to whether the facts are sufficiently adversarial for litigation privilege to apply.

ii. Prepared for the dominant purpose of litigation

The court in *ENRC* found that, even if adversarial litigation were reasonably in prospect, the interviews were part of a "fact-finding" mission by external counsel to uncover whether ENRC had a problem. They were not for the dominant purpose of gathering materials to defend a criminal prosecution. Further, even if they were for the dominant purpose of the criminal prosecution, they were aimed at *preventing* a prosecution and not at *defending* one.

The first part of this finding is not as problematic for defendants as it appears. If a defendant has no reasonable basis for expecting litigation – because the litigation it expects is criminal, and it has no evidence of wrongdoing – then logically it cannot be creating or requesting the creation of documents for the dominant purpose of litigation. The second part – that documents intended to head off litigation cannot be for the dominant purpose of litigation – is harder to understand and will hopefully be clarified on appeal. The High Court in *Bilta* made it clear that it was not possible to draw a general legal principle from the reasoning in *ENRC* in this regard.

Can I share legal advice with my co-defendants?

Co-defendants in cartel litigation may often wish to share privileged documents with one another. They may wish to compare the legal advice they have received, or the analysis of the strength of their case. English courts have held that where two or more persons share a common interest in the outcome of litigation, that common interest enables them to share privileged documents with each other without waiving that privilege. The test for common interest privilege is fairly complex and given inconsistent treatment in the courts.[10]

A key issue for co-defendants in a cartel damages claim will be whether they can be said to have a common interest when their interests may also conceivably conflict (for example, in any contribution claims). It should not, of course, be the case that, in order to have a common interest in the outcome of litigation, parties must be aligned in all conceivable respects. If that were true, common interest would very rarely, if ever apply. However, co-defendants should be clear about the exact nature of their common interest. Co-defendants might, for example, execute a joint defence agreement stating that, while their interests may diverge in other respects, they have a common interest in the successful defence of a claim. We would add that, although there is no clear authority under English law on the position of co-defendants sharing documents under common interest privilege as recorded in a joint defence agreement, claimants have not sought to test the point.

Alternatively, it may be simpler to conceive of the sharing of documents between co-defendants as limited waiver. Unlike in the US, in the UK it is possible to share privileged documents with third parties under express terms that privilege is not waived. This was applied recently in another privilege challenge in the *PAG* litigation discussed above.[11] In the course of various regulatory investigations into its alleged manipulation of Libor, RBS showed a number of privileged documents to regulators on a confidential, "non-waiver" basis. The court agreed that the doctrine of limited waiver protected those documents from disclosure to the claimants. The fact that the documents were disclosed under limited waiver with a number of "carve-outs" relating to the regulators' statutory duties did not affect the limited nature of the waiver.

Similarly to common interest privilege, a party considering sharing a document with a third party under a limited waiver should make clear, in writing, the terms of the waiver. If possible, the sharing party should retain a contractual undertaking from the receiving party the reasons for sharing the document; that the document is privileged, and that privilege belongs to the sharing party; that privilege is waived only in respect of the third party to whom the document is provided and only for the stated purpose; that the third party will maintain the confidentiality of the document; and that the third party will not share the document with any other party without the sharing party's consent.

Can I share legal advice with my litigation funder or ATE insurer?

On the claimant side, claimants may wish to share privileged documents with a third-party funder. Again, this could be achieved either by demonstrating a common interest between the claimants and their funder, or by providing the documents under a limited waiver agreement. Claimant solicitors, should, however, be aware that the English courts have in some cases accepted that common interest privilege can work both ways. In the *TAG* litigation,[12] an ATE insurer sued a panel of solicitors charged with vetting and conducting claims taken on under a failed ATE insurance scheme. The solicitors claimed that the insurer could not inspect their case files because those files were privileged, and the privilege belonged to the individual claimant in each case. The court held that the common interest between the insurer and insured prevented the solicitors from withholding the case files on the grounds of privilege.

Conclusion

Cases like *RBS* and *ENRC* have led some commentators to conclude that the English courts are rolling back the boundaries of privilege, or that its protections are somehow diminishing. In our view, these fears are overstated. In *RBS*, all the court did was to confine the application of privilege to those communications it is actually intended to protect: that is, those communications between a lawyer and a client for the purposes of seeking legal advice. Companies should not be able to hide behind privilege simply by routing communications through lawyers. Likewise, *ENRC* is not the death-knell of privilege in investigations it is sometimes seen to be – a point it seems that the Court was keen to make in *Bilta*. *ENRC* is predicated on a very specific set of facts. There is no easy read-across of the judge's conclusions on the likelihood of a criminal prosecution during an investigation to the likelihood of civil proceedings. The problems, from a defendant's perspective, with this judgment lie in its statements of general application: such as its conclusion on the "dominant purpose" of actions taken to avoid litigation. The Court in *Bilta* rightly cautioned against drawing a general legal principle from this. However, in light of *Jukes*, the position is not clear cut, and companies must be alive to the risk that documents produced during internal investigations at the pre-SO stage, or where there is no live regulatory or criminal investigation, may not attract litigation privilege, and legal advice privilege may not attach (e.g. because the documents in question contain only factual reporting, e.g. verbatim interview notes). This issue, in particular, is one to watch on appeal.

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[1] As the English courts have recognised: see *Property Alliance Group v Royal Bank of Scotland (Ch D),* [2016] 1 WLR 361, [11].

[2] Certainly before the implementation of the Damages Directive, which we discuss above [ref to EU section].

[3] *Three Rivers* [2004] UKHL 48.

[4] *Balabel v Air India* [1988] 2 All ER 246; *Property Alliance v Royal Bank of Scotland* [2015] EWHC 3187 (Ch).

[5] On the basis that legal advice privilege may apply even where advice is not in fact communicated to the client: see *Three Rivers No 5* [2003] EWCA Civ 474; restated in *USP Strategies v London General Holdings* [2004] EWHC 373 (Ch).

[6] *Re the RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

[7] *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB). ENRC has been granted permission to appeal this decision.

[8] *Bilta (UK) Ltd (in liquidation) & ors v Royal Bank of Scotland Plc & anor* [2017] EWHC 3535 (Ch).

[9] *R v Jukes (Paul*) [2018] EWCA Crim 176

[10] In *Buttes Gas v Hammer* [1981] Q.B. 223, the Court of Appeal held that for common interest privilege to arise the two persons must share a common interest and a common solicitor. In *USP Strategies v London General Holdings* 2004 EWHC 373 (Ch), the court held that for common interest privilege to apply it was necessary that the two persons must be "capable" of acting through the same solicitor. The judge therefore found that a communication of privileged legal advice to a third party (not a co-defendant) under a confidentiality agreement was protected by the doctrine of limited waiver rather than common interest privilege. However, other cases, including *Winterhur v AG (Manchester) Limited* [2006] EWHC 839 (Comm), have taken a broader view of common interests, which may arise wherever two persons have a "*common interest in the confidentiality of the communication*".

[11] *Property Alliance Group v Royal Bank of Scotland* [2015] EWHC 1557 (Ch).

[12] *Winterhur v AG (Manchester) Limited* [2006] EWHC 839 (Comm).