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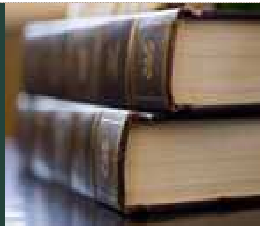


Public & Regulatory Law Update

May 2010

Legal professional privilege and in-house lawyers

European in-house counsel wishing to avail of legal professional privilege like their law firms counterparts have been set back by a recent influential opinion from the Advocate General of the European Court of Justice (ECJ).

Background. Legal professional privilege protects against compulsory disclosure of communications made between a client and their lawyer in which advice is sought or given within a relevant legal context.

This case developed out of an inquiry by the European Commission (the Commission) into suspected price-fixing. The Commission raided Akzo Nobel Chemicals Ltd's offices in 2003 and seized a number of papers – among them emails between a company executive and in-house counsel.

The Court of First Instance of the EU (CFI) upheld a Commission decision that privilege only attached to communications with EU-qualified and independent lawyers. This decision was appealed to the ECJ.

Opinion. On 29 April 2010 Advocate General Kokott recommended that the ECJ dismiss the appeal. She did not consider that the CFI erred in its application of existing case law and she confirmed the view that salaried, in-house lawyers are not sufficiently independent from their employers (as compared to external lawyers) to justify the extension of legal professional privilege to communication between them and their employers.

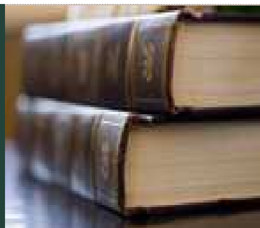
Comment. Although not binding on the ECJ, this opinion is likely to be persuasive as such opinions have a significant influence on the outcome of ECJ decisions. If followed, it will confirm that businesses should operate on the basis that the communications of their in-house lawyers are unprotected by legal professional privilege.

Case: Case C-550/07 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission

New money laundering legislation

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the Act) was signed by the President on 5 May 2010 and transposes the third EU money laundering Directive 2005/60/EC and the associated implementing Directive 2006/70/EC into Irish law. It repeals previous legislation and therefore consolidates all of Ireland's anti-money laundering legislation in a single statute. It will not come into force until a commencement order has been signed. It also gives effect to certain recommendations of the international anti-money laundering and anti-terrorist financing body, the Financial Action Task Force, which was established by the G7 countries.

The Act increases the obligations certain designated persons, including credit and financial institutions, lawyers, accountants, estate agents, trust and company service providers, tax advisers in relation to money laundering and terrorist financing. In particular it increases their obligations to carry out due diligence measures at the outset of a business relationship. Compliance with the Act will be enforced by competent authorities, for example, the Law Society in respect of lawyers and the Financial Regulator in respect of credit and financial institutions. It also requires designated bodies to identify customers, to report suspicious transactions to An Garda Sıochana and the Revenue Commissioners and to have specific anti-money laundering procedures.



Financial Services Ombudsman: need to follow fair procedures

Background. The Financial Services Ombudsman (Ombudsman) adjudicates complaints regarding the conduct of regulated financial services providers. If a complaint is upheld, the Ombudsman may direct the financial services provider to review, rectify and mitigate the conduct complained of and to change the practice relating to that conduct.

Facts. A complaint by a credit union that Davy's had mis-sold perpetual bank bonds to a credit union was upheld by the Ombudsman in January 2008. The Ombudsman ruled the bonds were unsuitable investments for credit unions and that Davy's did not advise the credit union adequately on the risks inherent in the bonds which later fell in value. As a result the Ombudsman directed that Davy's should buy back from the credit union, the three bonds at their original cost of €500,000. Davy's insisted it had provided full and proper advice about the nature of the bonds and the risks involved and took judicial review proceedings to have the Ombudsman's decision quashed. The High Court ruled that the Ombudsman failed to follow fair procedures in the way in which he upheld the complaint against Davy's. It held that the Ombudsman carried out his functions in good faith but quashed his decision and remitted the matter to him for it to be investigated again and set out the fair procedures to be followed. The court suggested that the Ombudsman in this case should hold an oral hearing. The court also stated that when investigating complaints against financial service providers both complainants and financial service providers must be treated equally. The Ombudsman appealed this decision arguing the intended informality of his decision making process was threatened, while Davy cross-appealed against some of the High Court findings.

Decision. On 12 May 2010 the Supreme Court directed the Ombudsman to conduct a new investigation into the complaint in accordance with the procedures necessary to ensure fairness. It upheld the High Court decision that the Ombudsman failed to adhere to fair procedures when investigating the complaint against Davy. The court also agreed with the High Court conclusion that it was appropriate to consider directing an oral hearing in the interests of fairness where there is a conflict of material fact as there was in the Davy inquiry. The court also upheld Davy's argument that the Central Bank Act 1942 (as amended) (under which the Ombudsman was appointed) imposes a mandatory requirement on the ombudsman to offer mediation to all parties involved in complaint made to him. The court did allow however the Ombudsman's appeal against the High Court finding that he was not entitled to adopt a two-stage procedure in dealing with the complaint.

Comment. The Ombudsman updated its procedures for dealing with complaints as a result of the High Court decision. This decision is a reminder to all public bodies that they must ensure that they follow proper procedures when investigating complaints otherwise they can face costly challenges.

Case: J & E Davy v Financial Services Ombudsman & anor [2010] IESC 30

Irish Stock Exchange: renamed markets

The Irish Stock Exchange (ISE) renamed two of its securities markets on 10 May 2010. The Main Market (also known as the Official List) is now the "Main Securities Market" (MSM) and the Irish Enterprise Exchange (IEX) is now the Enterprise Securities Market (ESM). The Global Exchange Market remains unchanged. The ISE have said that the renaming initiative is part of a wider project of corporate rebranding to enhance the ISE's brand in Irish and international markets and to position the ISE for future business development. The Main Market of the Irish Stock Exchange is Ireland's only "regulated market" for the purposes of the Markets in Financial Instruments Directive (MiFID).

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Safeguarding the euro

As the financial position of Greece deteriorated in recent months, the Government of the euro area reaffirmed their willingness to take action to safeguard financial stability in the euro area as a whole. On foot of these commitments the euro area Finance Ministers agreed on 11 April 2010 the terms of financial support to be given to Greece to be implemented through bilateral loans centrally pooled by the European Commission as part of an agreed euro area package, with co-financing from the International Monetary Fund.

On 14 April 2010 the Government approved Ireland's participation in the Greek financial support programme and drafted the Euro Area Loan Facility Act 2010 to permit the provision of assistance which was signed by the President on 20 May 2010. The main proposals in the Act provide for:

- Ireland's participation in the euro area loan facility to Greece subject to the terms of the loan documentation;
- Payments to be made from the Central Fund in respect of Ireland's share of the euro area funding and that such payments be based on our European Central Bank paid capital key of 1.64% and subject to an overall limit of €1.5bn;
- The receipt into the Exchequer of interest payments and repayment of principal amounts of the loan funding and any related receipts; and
- Annual reports on expenditure and receipts to Ireland under the loan facility to be laid before Dáil Éireann.

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