

Communication That Is No Longer Privileged

Construction companies should take note of a recent European Court of Justice judgement

By Melanie Willems



The ECJ's Akzo Nobel decision (14 September 2010) confirms that all communications with in-house lawyers (even advice they give) are not 'privileged' in European competition law investigations by the Commission - although internal legal advice remains

protected under English law and in national competition law enforcement.

Privilege means documents are confidential and safe from disclosure in legal proceedings or regulatory investigations (short of crime). The ECJ has now held that advice given by a company's internal lawyers is not protected in this way (in the European competition law arena), since in-house counsel is not independent. They are bound by a contract of employment, and, in the opinion of the ECJ, their interests are too closely intertwined with those of their employer, for privilege to apply.

Competition law

Construction firms seeking advice from internal solicitors on thorny issues of competition law (such as competitive tendering, exchanging information with competitors, and procurement) must assume that if there were a dawn raid by the EC commission (as happened at Akzo's offices in Eccles, near Manchester, in February 2003), then any advice given could be seized by the Brussels officials.

Our industry and competition law have had an uneasy relationship. The Office of Fair Trading shone the spotlight on bid-rigging last year. Following the OFT's investigation, fines have been hanging over a number of UK construction firms like the sword of Damocles. In September 2009, the OFT levied a (sobering) total of £129.2 million on 103 construction firms in England. They had colluded

with competitors on bidding for construction contracts; 199 tenders from 2000 to 2006 showed infringements, mostly through cover pricing (artificially inflated bids).

The industry has since adopted a competition code of conduct, and a June 2010 OFT follow-up report painted a better picture. There was improved understanding of anti-competitive practices, and two in three procurers had introduced controls to prevent such behaviour. Nonetheless, the Commission in Brussels could still step in to investigate repeat offenders. Construction firms should know that unless they consult external lawyers on competition law matters, any legal advice they receive could find its way into the Commission's file.

Melanie Willems is a partner at Chadbourne & Parke