

Legal Privilege

A practical guide post *Akzo*

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Case study: Scenario 1

You are an in-house lawyer and suspect that members of the sales team may be having inappropriate contact with competitors coordinating price increases for a product.

You launch an internal investigation, which suggests that the company is involved in a cartel. The following documents are created:

- Interview notes with key sales staff members;*
- A report to the board of directors setting out the preliminary findings from the investigation.*

(1) Dawn raid by the European Commission

Before your company can take action on the findings, the European Commission conducts a “dawn raid”.

Would you disclose to the European Commission:

The interview notes?

Yes / No

The board report?

Yes / No

(2) Dawn raid by the OFT

If the OFT carried out the dawn raid (to investigate a potential breach of Chapter 1, Competition Act 1998 rather than to support the European Commission)...

Would you disclose to the OFT:

The interview notes?

Yes / No

The board report?

Yes / No

(3) Investigation by external lawyers

If you instructed external lawyers to carry out the investigation rather than doing it yourself...

Would you disclose to the European Commission:

The interview notes?

Yes / No

The board report?

Yes / No

Scenario 2: Investigation, decision and follow-on litigation

Following the dawn raid, the European Commission begins a formal investigation into the alleged cartel.

You instruct an expert economist to assess whether there are other good reasons why prices may have increased in the market.

After the European Commission has reached an infringement decision, a follow-on claim is launched in the High Court by the alleged victims of the cartel.

(1) The economist's report

A party to High Court proceedings must disclose all documents which are or have been in its possession, control or power and which support or adversely affect that party's case - although privilege would provide a bar to disclosure

Are you obliged to disclose the economist's report?

Yes / No

(2) If external lawyers instructed the economist

If external lawyers had instructed the economists rather than you, would the report fall to be disclosed?

Yes / No

(3) The interview notes and preliminary legal advice

Do your interview notes and your report to the board fall to be disclosed in the English High Court case?

Yes / No

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