

The Curious Case of the 7 Cs – Competition, Commission, Communication, Corporate Counsel and Confidentiality in Client-Attorney Privilege in India*

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This article addresses the complex issue of attorney-client privilege and confidentiality affecting the ambiguous status of in-house counsel under the current Indian law and how all corporate communications in global companies could now come under the investigative eyes of the new Competition Commission of India.

Issue in perspective

Are protected confidential corporate communications privileged from the purview of the Competition Commission of India? This is precisely a question that generates an indistinct response when considering the existing legal framework of a nation that has one of the fastest growing economies in the world and has been attracting enormous amounts of foreign direct investment in the last decade. There have been apprehensions on the issue of assertion of attorney-client privilege, specifically relating to the practical limitations on the extent to which an in-house counsel (also known as corporate counsel) may seek and claim privilege on non-disclosure of certain documented communications in a situation where the Competition Commission of India conducts an investigation (like a ‘**dawn raid**’) on a corporation, within the investigative powers conferred to it by the new enactment.

New Competition law - Competition Act, 2002

The Competition Commission of India (CCI) started functioning in May 2009. The statutory framework of this new regulatory body consisting of duties, power and functions is broadly spelt out in Chapter III¹ and Chapter IV² of the Competition Act, 2002. In addition to being a regulator, the Act also empowers the CCI with an investigative authority. Transactions of mergers, amalgamations and acquisitions that are above certain prescribed threshold limits in terms of assets or turnover as laid down in the enactment are subject to combination review. The CCI can enquire into commercial agreements (including any anti-competitive behaviour such as predatory pricing, rigging of bids and cartelisation), dominant position and combinations, that have an appreciable adverse effect on competition in the relevant market in India irrespective of the fact that the agreement has been entered outside India or any party to the agreement is outside India or any enterprise abusing dominant position is outside India or a combination has taken place outside India or any party to the combination is outside India or any other matter or practice or action arising out of such agreement or dominant position or combination is outside India. Therefore the CCI also has **extraterritorial jurisdiction** and can investigate acts taking place outside India, but having an effect on competition in India.

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¹ Sections 7 – 17, The Competition Act, 2002 (No. 12 of 2003) as amended by The Competition (Amendment) Act, 2007.

² Sections 18 – 40, *Ibid.*

The new competition law has sought inspiration from the US and EU competition laws. It is important to note that the CCI can order the production of documents, summon witnesses, and record statements on oath. It can also undertake search and seizure operations (so-called 'dawn raids') at the premises of firms, and individuals.

It is interesting to note that any such inquiry or investigation can be initiated if needed '**suo moto**' by the Commission to see whether a particular combination has caused or is likely to cause an appreciable adverse effect on competition in India.

The CCI³ has granted itself the power to regulate its own procedure and is vested with the same powers as those in a civil court under the Code of Civil Procedure, 1908. The Director General also has same powers as under Section 240 of Indian Companies Act relating to production of documents and evidence and Section 240A relating to seizure of documents by inspector in relation to conducting investigations.

Compliance with the enactment is very important. Consequences of any non-compliance can be detrimental for any business in terms of significant financial penalties - agreements being declared invalid or void and combinations not taking effect. There can be an adverse impact on M&A deals and significant loss of reputation and goodwill for the business of an enterprise.

It is worthwhile to note that the legal department of a corporation acts as a primary and essential gatekeeper for the corporation that includes managing issues relating to legal risk and compliance by in-house counsel with a healthy approach towards corporate governance. So, when there is birth of a new regulator that directly seeks to protect the process of competition and related behavioural issues (overt or covert) in the business market, then the essence of attorney-client privilege affecting the department is bound to command a significant level of attention, thought and contention. The well-known Akzo Nobel case (discussed next) has addressed the scope of this issue in the European jurisdiction, but it may still have just enough strength to trigger a cross-border 'ripple effect' significantly affecting the Indian jurisdiction in due course.

The Akzo Nobel case⁴

Akzo Nobel, a multinational pharmaceutical corporation, chemicals and healthcare company was investigated in 2003 by the European Commission (EC) in relation to a price fixing enquiry. EC officials carried out an unannounced on the spot investigation ("dawn raid") at Akzo Nobel's Manchester premises and took copies of a number of documents. The officials were investigating possible anti-competitive practices at the premises of Akzo Nobel and its subsidiary Akcros Chemicals.

During the course of the search, Akzo Nobel informed the officials that some of the documents should not have been read or taken as they were likely to be covered by the protection of confidentiality of communications between lawyers and their clients ("legal professional privilege"). There were discussions between the companies and the officials on whether there was any legal privilege attached to certain documents and communications.

Akzo Nobel stated that EC had breached the principle of legal professional privilege in seizing the documents as it had not followed the correct procedural steps and had unjustifiably rejected the claim to protection of legal professional privilege for the documents.

³ Section 36, *Ibid.*

⁴ Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities, Joined Cases T-125/03 and T-253/03, CFI, 17 September 2007.

It further added that EC violated the fundamental rights, which formed the basis of legal professional privilege.

The European Union's Court of First Instance (CFI) confirmed that the protection of legal professional privilege in EC investigations applied only to written communications exchanged with external independent lawyers, and not to those with in-house counsel, but also extended the protection to documents drawn up for the purpose of seeking legal advice from an external lawyer in exercise of rights of defence. The court also set out the procedure to be followed where a document's privileged status was unclear.

The order clearly set out what was privileged and not privileged as follows:

Privileged Communications

- All communications between in-house counsel and outside/external counsel that are specifically written to seek legal advice.
- All communications between those limited group of personnel or employees in the company assigned specifically to work, instruct and interact with outside/external lawyers, and the external lawyers.
- All communications between in-house counsel and specifically identified employees who are assigned to report such communications between the in-house lawyer and an external lawyer.

Non-Privileged Communications

- All background working documents collated in process and set by in-house counsel in order to instruct outside/external counsel, but not actually communicated to them e.g. prepared as a means of evidence gathering.
- All communications between employees and in-house lawyers generally.

The Court further stated that **in-house lawyers were bound** to their clients by an **employment relationship** and therefore were not independent. Therefore communications exchanged within the legal department were **not protected** by legal professional privilege.

It is interesting to note that a word-by-word transmission of any legal advice given by an external counsel to an in-house counsel is purely privileged when transmitted by the in-house counsel. Documents and communications concerning documents drafted and conveyed for the purposes of obtaining legal advice from the external counsel may be privileged according to the Akzo Nobel ruling. But in-house counsel's own independent advice is not privileged. This situation is **controversial** and currently a much **debated** point as it has the potential of exposing communications, which would otherwise be privileged in other jurisdictions like the UK and USA.

Hypothetical situation

Let us take an example of a large multinational corporation that plans to trade and transact in India. The corporation has a significant business presence in different jurisdictions. It sets up a full service regional branch office in a metropolitan city in India. The branch office has a legal department with a dedicated team of in-house lawyers working on a complex transaction, like a cross-border combination deal involving some important compliance related issues. The department is involved in seeking advice and assistance from external lawyers. One fine day, officials from the competition commission arrive at the corporation's doorstep and undertake an unannounced on the spot investigation. The officials state suspicion on a particular combination transactional deal that qualifies as an anti-competitive agreement. They carry out

search and seizure operations of all documents and communications in the legal department relating to the deal.

What should be done? How should the in-house counsel, staff and employees of the department react to such a situation? Does the legal department have a duty of non-disclosure? Can all the confidential documents and communications of the department with the management be used as evidence by the investigator by waiving off the issue of confidentiality (whether deliberate or inadvertent)? Can the in-house counsel in the legal department claim attorney-client privilege on all the concerned documents and communications? A comprehensive guidance to answers on all these questions currently may be short of any distinct clarity due to the untested status of the enforcement of this new law. But what is clear is the answer to the last question which is closer to being in the negative rather than being purely positive. The reason for this primarily being that a corporate in-house counsel working in the legal department of a multinational corporation (national or multinational) in India is not considered as a 'lawyer' or an 'attorney' or a 'legal practitioner' under the Advocates Act, 1961.

Important note: It is very important to note at this stage that this potential situation poses a serious risk for any multinational corporation planning to do cross-border business. The last thing a company would want to see is that all communications (like share trading) between its own executives and its own legal department have no privilege protection and can be easily disclosed to the regulator because of the non-existent status of in-house lawyers under the Indian law, whereas the same exchange of communication for the same company could claim privilege protection and be free from any form of investigative disclosure in another jurisdiction.

An appraisal of the statutory laws in India that establishes and recognises the existence of lawyers and connects their communication with clients to privilege and confidentiality is necessary for greater clarity.

Existing legal framework in India

The Advocates Act, 1961

A lawyer is defined as an 'advocate' under the Advocates Act, 1961 which is the statutory enactment that provides for the necessary requirements to secure a right to seek admission and to practice in a court of law and being simultaneously administered and enforced by the Bar Council of India.

Section 2⁵ gives the definition of an advocate.

<i>Definitions</i>	<i>2 (1) In this Act, unless the context otherwise requires:-</i> <i>(a) "advocate" means an advocate entered in any roll under the provisions of this Act;</i> <i>(b) "appointed day", in relation to any provision of this Act, means the day on which that provision comes into force;</i> <i>(c) Omitted;</i> <i>(d) "Bar Council" means a Bar Council constituted under this Act;</i> <i>(e) "Bar Council of India" means the Bar Council constituted under section 4 for the territories to which this Act extends;</i> <i>(f) Omitted;</i> <i>(g) "High Court", except in sub-section (1) and subsection (1A) of section 34 and in sections 42 and 43, does not include a court of the Judicial Commissioner, and, in relation to a State Bar Council,</i>
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⁵ <http://www.barcouncilofindia.org/bar-council/chapter-1.php>

means;

(i) in the case of a Bar Council constituted for a State or for a State and one or more Union territories, the High Court for the State;

(ii) in the case of the Bar Council constituted for Delhi, the High Court of Delhi;

(h) "law graduate" means a person who has obtained a bachelor's degree in law from any University established by law in India;*1

(i) "legal practitioner" means an advocate or vakil of any High Court, a pleader, mukhtar or revenue agent;

(j) "prescribed" means prescribed by rules made under this Act;

(k) "roll" means a roll of advocates prepared and maintained under this Act;

(l) "State" does not include a Union territory;

(m) "State Bar Council" means a Bar Council constituted under section 3;

(n) "State roll" means a roll of advocates prepared and maintained by a State Bar Council under section 17.

(2) Any reference in this Act to a law which is not in force in the State of Jammu and Kashmir or in the Union territory of Goa, Daman and Diu, shall, in relation to that State or that territory, be construed as a reference to the corresponding law, if any, in force in that State or that territory, as the case may be.

*1 Section 2 (h) *The Bar Council of India, New Delhi. Vs. Sri Gundumeda Kasavaramayya and another* : Vol(1) 1972 Journal of the Bar Council of India (JBCI) 80 Held : Power given to Bar Council of India to recognize degree in law for purposes of Act, implies power to define a standard as a condition for admission.

Section 24⁶ provides for qualifications needed for a person to be admitted as an advocate on a State roll.

It is interesting to note that there is **no mention** (or recognition) **in the Advocates Act, 1961**, of an **in-house lawyer** or a legal adviser of a corporation. But in reality such lawyers **do exist and work** in the country.

The Bar Council of India is the supreme regulatory body to regulate the legal profession in India and also to ensure the compliance of the laws and maintenance of professional standards by the legal profession in the country. Part VI, Chapter II, Section VII, Rule 49⁷ of the Bar Council of India Rules states that **an advocate cannot be a full-salaried employee**.

The Indian Evidence Act, 1872

All professional communications exchanged between a lawyer and the client is governed by Section 126 of the Indian Evidence Act, 1872.

Section 126 - Professional communications - No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Provided that nothing in this section shall protect from disclosure –

1. Any communication made in furtherance of any illegal purpose,
2. Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such

⁶ <http://www.barcouncilofindia.org/bar-council/chapter-3.php>

⁷ <http://lawmin.nic.in/la/subord/bcipart6.htm#chapter2>

fact by or on behalf of his client.

Explanation - The obligation stated in this section continues after the employment has ceased.

Section 129 provides for confidential communications with legal advisers.

Section 129 - Confidential communication with Legal Advisers - *No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness in which case he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but not others.*

Section 126 protects communications between a lawyer and client made during the course of employment of the lawyer. On reading between the lines, it is reasonably clear to assume and realise that this privilege protection provision does not specifically include any mention of a lawyer who is working as an in-house counsel in a company. Similarly, the privilege protection under Section 129 applies to the client only and not to the legal professional adviser. The legal professional adviser does not include an in-house lawyer.

A communication can be confidential but not necessarily privileged. The nature of difference is clearly dependent and entirely subject to the gravity of a proportionate action initiated by a regulator that waives of the communicative exclusivity in the essence of privilege leading to gross loss of confidence in confidentiality where it is at a premium.

Indian case laws

The courts in India have made an attempt in the past to address and ascertain the status of a qualified legal professional working in the capacity of an employee. The most recent ruling is of the Supreme Court of India given in 2001. The Bombay High Court has come closest on addressing the issue of legal professional privilege but that was way back in 1982.

The rulings are as follows:

1. Satish Kumar Sharma v. Bar Council of Himachal Pradesh; AIR 2001 SC 509

Held:

'If a full-time employee is not pleading on behalf of his employer, or if terms of employment are such that he does not have to act or plead but is required to do other kinds of functions, then he ceases to be an advocate. The latter is then a mere employee of the government or the body corporate.'

The term 'advocate' is for one actually practising law before the courts. This term may include law officers appointed by the government or body corporate.

The judgment also quotes Chapter II, Section VII, Rule 49 of the Bar Council of India Rules, stating that 'an advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise and shall, on taking up any such employment intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment. An advocate cannot be a full-time salaried employee. The only exception is if the person is a Law Officer of the Central Government of a State or of any public corporation entitled to be enrolled in the Bar.'

2. *Municipal Corporation of Greater Bombay v. Vijay Metal Works; AIR 1982 Bombay 6*

Held:

‘That a salaried employee who advises his employer on legal matters would get the same protection as a barrister or attorney under Sections 126 and 129 of the Evidence Act 1872 provided that the communication between them should not be made in furtherance of any illegal purpose.’

A crucial question was raised by the court in this petition and that was regarding the status of a salaried legal adviser working as an employee of the corporation. Merely because such a person did not appear in the court, would this be a ground of ineligibility to get the protection of law? Or was it that only those persons who were professing and practicing law in the courts were entitled to claim protection of legal professional privilege under the law of evidence?

The Court highlighted that the nature of their duty was to advise their employers on all matters pertaining to law and litigation. The nature of duties was the same as that of a barrister, pleader, vakil or attorney except that they did not appear in courts.

The High Court ruling did provide some explanation between the complex relationship of an employed lawyer and the accompanying legal professional privilege, but the Supreme Court’s ruling in 2001 did not expressly build-up on this thought process even after due consideration of this issue in this case.

3. *Larsen & Toubro Ltd. Vs. Prime Displays Ltd, Abiz Business (P) Ltd. And Everest Media Ltd; 2002(5) BomCR158*

Held:

‘The privilege that attaches to a document coming into existence in anticipation of litigation is the legal professional privilege. Sections 126 and 129 protect the communications between a lawyer and client made during the employment of the lawyer.’

The Court further held that: *“It appears to be settled law that a person for whose benefit the document is treated as privileged is entitled to move the court seeking an order of injunction restraining the party who is intending to use the copy in evidence from doing so before the copy is actually used in evidence.”*

The question of whether the documents were privileged due to the legal professional adviser being legally qualified was not resolved by the judge in this case, because of the absence of proper pleadings on this point.

Multi-jurisdictional scenario – EU and US

EU in-house privilege

The current status of privilege for in-house lawyers in the EU is governed by the rule in the Akzo Nobel⁸ case which has been discussed earlier in this article. The privilege laws of the 27 EU member states are not harmonised. Some states have provisions and many do not.

⁸ Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission of the European Communities, Joined Cases T-125/03 and T-253/03, CFI, 17 September 2007.

Paul de Jonge, the current General Manager of the European Company Lawyers Association (ECLA) stated in a news article titled ‘the battle for legal privilege in Europe’⁹ that while the overall percentage of European countries that accepted legal privilege for corporate counsel had decreased, the number of countries that accepted it had also increased. Dutch in-house lawyers were only granted the right to join their local bar, and obtain the right to legal privilege under the domestic Dutch law, in 1996 – 14 years after the earlier test case, known as *AM&S v Commission*¹⁰.

The article further states that although ECLA accepted that many EU countries did not grant legal privilege for their corporate counsel, it did not accept that this state of affairs necessarily reflected the countries’ policy on the issue. Paul comments that there was lack of clarity on whether national governments had made a conscious decision to not to grant privilege to in-house lawyers or whether this was just a default position because they never thought to give it to them.

US in-house privilege

In the US, **in-house lawyers are at par** with other external attorneys for purposes of considering whether their communications are privileged. It is important to note that communications on business advice are not privileged even if they are mere consultations on business issues in a legal advice. So, there is a fine line of balance on any assertion of privilege on any communication that is for the purpose of receiving legal advice.

Extraterritoriality of laws

Extraterritorial application and assertion of privilege laws can be a contentious issue particularly if it is between two major jurisdictions. Nathaniel Zylstra and Christian Falk of Faegre & Benson LLP have written in their article titled ‘*Attorney-Client Privilege: A Critical Topic for In-House Counsel of Multinational Companies*’¹¹ that if a US company is involved in a European Commission investigation, the EU privilege rules may apply to the communications of US-based counsel with European business people. U.S. courts may in some situations consider applying European privilege law. The article further states that ‘*generally, US courts will apply a “centre of gravity” or “grouping of contacts” test to determine which law applies, with the goal of determining which country has the predominant interest in the matter. The country with the predominant interest is the place where the allegedly privileged relationship was entered into or the place in which that relationship was centred at the time the communication was made. If the court determines that a foreign country has the predominant interest in the matter, it may apply the foreign privilege law.*’

Conclusion

With the influx of foreign entities setting up and pursuing transactional trade in India, and with the improvised investigative role of the new Indian Competition Commission, the privilege issue is bound to further get drifted towards the territories of latent legal ambiguities in the existing complex Indian legal system. As already said before, the current position of the

⁹ ‘The battle for legal privilege in Europe’ by Richard Parnham, 01 Feb 2008, Martindale-Hubbell, Counsel to Counsel News available at <http://counselltocounselnews.com/p1/7/features.html>

¹⁰ *AM&S v Commission* [1982] ECR 1575

¹¹ ‘*Attorney-Client Privilege: A Critical Topic for In-House Counsel of Multinational Companies*’ by Nathaniel Zylstra and Christian Falk, Faegre & Benson LLP, dated 15 November 2008, available at <http://www.theworldlawgroup.com/docs/United%20States-Attorney-Client%20Privilege-A%20Critical%20Topic%20for%20In-house%20Counsel%20of%20Multinational%20Companies.pdf>

CFI in the Akzo Nobel decision (pending final decision in appeal at the European Court of Justice) raises high probability of generating cross-continental repercussions on the issue of attorney-client privilege and directly affecting the multinational corporations trading in India.

As the issue becomes more **uncertain** and **increasingly interconnected**, it leads to a growing concern that multinational businesses involving corporate communications with in-house counsel could be exposed in court actions in India due to international inconsistencies in the law of privilege.

As noted earlier, the Indian courts have in the past made an attempt to address the concern on privilege and in-house lawyers, but what needs to be seen is whether the Supreme Court is the appropriate forum that should be re-approached at this stage to seek a decisive and definitive stance on all the cumulative issues in contention.

Next steps

Following are a few proactive suggestions that I feel must be pursued:

Scoping report – It will be a significant step at this stage for the Law Commission of India to conduct an initial background study and prepare a scoping report to closely understand the nature and consequences of this issue in perspective. It should highlight the interconnectivity of the issue of privileged communications of in-house or corporate counsel working in multinational corporations and the effect of the new competition law. The report should be submitted to the Indian Ministry of Corporate Affairs and to the Indian Ministry of Law and Justice for their perusal and response. The report should also include a proposal regarding the need for an elaborate procedure, form and periodicity of disclosure for companies (national and multinational) that are subject to the investigative purview of the CCI.

Market research - The CCI should conduct a focused market research study to identify trends and emerging challenges in order to seek a complete practical viewpoint on this issue. Through its advocacy awareness compliance programme for the enterprises and the business community it can effectively highlight the existence of this issue.

Interactive sessions – The CCI can organise various interactions through interactive meetings or seminars with inclusion of different trade organisation, consumer associations and all stakeholders.

Public consultation – Alternatively, the CCI can also launch its own formal public consultation process wherein it can secure opinion on the public policy part on disclosure issues affecting cross-border deals, specifically from all interested and related national and international business entities. This can be a tailored approach and can also reflect current and prospective best practices examples that the Commission undertakes.

Recognise existence - It is also high time that the Ministry of Law and Justice take progressive steps towards expressly recognising the existence of in-house lawyers working in companies under Section 2 of the Advocates Act, 1961. The Parliament of India will need to amend the existing framework laws governing the legal profession.

Applicable rules - The Bar Council of India should re-visit the applicable rules under Chapter II, Section VII of the Rules for advocates under the Advocates Act, 1961 and provide due consideration to legal practitioners working in-house in companies. This is very important in order to know what ‘sanctum’ sanctorum’ will the legal advice of an in-house lawyer

command when advising his or her own client, that is, the company itself on diverse transactional deals like mergers and acquisitions.

Corporate consciousness – Representatives of multinational and local corporations trading in India should come together to discuss, identify, understand and be aware of how this ambiguous situation directly affects them. This would be useful for building up a unified response for recommending a persuasive action.

Bar Council / Associations - The Bar Council of India may also wish to consult other law societies, national bar associations or the International Bar Association in order to initiate a lead role in securing a meaningful dialogue and debate to spread awareness about the cross-border complexity of this issue and identify all available steps to resolve it.

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