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Court Of First Instance Reaffirms Narrow Application Of Attorney Client Privilege in EU Competition Proceedings

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The September 17, 2007 decision of the Court of First Instance ("CFI") in *Akzo v. Commission* provided an opportunity to revisit and comment on the position enunciated by the European Court of Justice ("ECJ") in its 1982 judgment in *AM&S v. Commission*[1] case concerning the treatment of legal privilege in the context of EU competition law investigations.

AM&S recognized the right of companies under investigation to withhold communications between the company and "an independent lawyer entitled to practice his profession in a Member State," where those communications were exchanged after the initiation of the proceedings or occurred before and had a relationship to the subject-matter of the proceedings. This principle was derived from the right to defense explicitly recognized in Regulation 17, the basic competition law procedural regulation (now replaced by Regulation 1). The formula used by the ECJ made it clear the privilege did not apply to in-house counsel, or to outside lawyers who are members of a third-country bar but not an EU Member State bar. The *AM&S* judgment sketched out a proceeding for the handling of privilege claims arising in the course of investigations: where a company asserts privilege during an investigation, it must provide "relevant material" demonstrating the eligibility of the document in question but is not required to "reveal the contents" of the document; if the European Commission ("Commission") is not satisfied, it may make a decision ordering disclosure of the document, which the company can appeal to the CFI. Under the practice developed by the Commission, the contested document is placed in a sealed envelope, and, if the matter cannot be resolved without an appeal, is examined by the CFI.

The *AM&S* judgment left many questions open, in particular regarding the scope of the privilege. For example, how did the privilege apply to internal materials prepared with a view to seeking legal advice? More narrowly, did it cover internal notes recording the content of advice received? The latter question was answered affirmatively in 1990 in *Hilti v. Commission*.[2] The fact that it had to be asked at all was an indication of the narrow view of privilege taken by the Commission.

The CFI's Holding

Companies, their lawyers, and the Commission have operated under the *AM&S* guidelines for 15 years. The *Akzo* judgment provided an opportunity to reconsider some of the most controversial aspects of *AM&S*, as well as to fine-tune the details as to its application.

1. The denial of privilege to in-house lawyers has been heavily criticized. Since 1982, some additional Member States have moved to allow in-house counsel to be bar members. Their status has arguably become more important following the move to competition law self-evaluation and the abolition of the notification system by Regulation 17. This is a point on which EU divergence fromother jurisdictions, especially the US, is particularly apparent. In response to these arguments, the CFI resolutely confirmed existing law. It did so using language that contrasts the position of in-house counsel with that of outside lawyers in terms which are at odds with much corporate practice and likely to provoke justifiable criticism.[3]

2. The status of third-country lawyers was not raised in *Akzo*, but the attitude of the CFI suggests that they might not, in a new case presenting the issue, fare better than in-house counsel, except, perhaps, to the extent that they can claim that the terms under which they are permitted to practice in an EU Member State amount to EU bar membership for the purposes of *AM&S*.

3. As regards the procedures to be followed in handling claims of privilege arising in the course of investigations, the CFI provides detailed guidance, in the process rapping the Commission on the knuckles for having taken some shortcuts in the investigation concerned.

   When claiming privilege, it is for the company investigated to provide some "relevant material" showing that the document concerned is covered. "The undertaking concerned may, in particular, inform the Commission of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each, and refer to the objective and the context in which the document was drawn up. Similarly, it may also mention the context in which the document was found, the way in which it was filed and any related documents." (*See* paragraph 80.)

   While the company may allow the Commission a "mere cursory look" at the document to help demonstrate its privileged character, the CFI recognizes that there will be cases where even doing this would give the Commission access to information covered by the privilege; in such cases the company is entitled to refuse the Commission even a cursory look. If the matter cannot be resolved on the spot, the Commission is entitled to take a copy of the contested item in a sealed envelope. If it wishes to read the document, it must first make a decision rejecting the privilege claim, which the company can appeal to the CFI, allowing the latter to resolve the question. The Commission cannot read it until the time limit for appealing the decision has elapsed without an appeal being made. The CFI specifically found that the Commission had infringed this procedural requirement by forcing Akzo to allow it to take a cursory look at certain documents, and by reading certain documents before allowing Akzo to appeal to the CFI.

   The Commission had expressed a concern that companies could abuse this procedure by raising unjustified or frivolous claims of privilege. The CFI replied that in such a case, the Commission could use its powers under Regulation 1 to sanction the furnishing of misleading information.

4. As to the scope of the privilege, the CFI accepted a limited and disappointing clarification.

Two of the contested documents consisted of copies of a memo prepared by an executive in the context of a competition law compliance program and addressed to his superior. The memo reflected information-gathering conversations with other employees, conducted with a view to seeking outside legal advice in connection with the compliance program. One of the copies of the memo included handwritten notes referring to contacts with a named outside lawyer. A third document was the handwritten notes of the author of the memo reflecting his discussions with employees, used for preparing the memo.[4]

The question then was whether these materials could qualify for privilege on the basis that they were prepared for the purpose of seeking legal advice. Akzo argued that if exactly the same memos had been addressed to outside counsel rather than another executive in the company, there would have been no doubt that they and the underlying notes were privileged. The Council of the Bars and Law Societies of the European Union, following US practice, argued that the test should be whether the "dominant purpose" of the materials was to seek outside legal advice. The Commission argued that, under the *AM&S* and *Hilti* case law, the privilege should be strictly limited to written communications between the company and its outside counsel seeking or giving advice relating to the company's rights of defence, and notes "which do no more than report the text or the content of those communications," i.e. not including preparatory notes.

The CFI accepted that preparatory documents, "even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer," may be privileged "provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in the exercise of the rights of defence." It emphasized that the scope of the privilege, as an exception to the Commission's investigatory powers concerning competition law, must be construed restrictively. The company claiming privilege has the burden of showing that it is "unambiguously clear" that the document concerned was prepared with the sole aim of seeking advice from outside counsel in the exercise of the rights of defence.

Applying this test to the documents at issue, the CFI held that none of them qualified for privilege.

Comments

1. EU Member State privilege rules are not harmonized in the EU and do not apply to Commission investigations of potential EU competition law infringements. The European courts have therefore developed a specific set of privilege rules for such investigations. These specific rules do not apply outside the scope of EU competition law.

2. What should companies do to maximize their chance of success in claiming privilege in the event of a request for information or an on-the-spot investigation in an EU competition law investigation? The CFI's judgment itself contains a number of implicit suggestions:

   > Clearly label all internal notes and memoranda for which there is a reasonable basis to argue that they are preparatory to seeking outside legal advice. Use of a stamp containing the legend "prepared for the purpose of seeking the advice of competition law counsel" could be one way of doing this.

   > Involve outside counsel in any analysis of possible infringement of EU competition law, and ensure that the file contains a writing recording the seeking of the advice and/or the advice given.

   > If possible, keep all materials for which privilege may be claimed in separate files.

   > When an investigation occurs, insist on the CFI's procedure being applied to the letter. The facts recited in the judgment are a good example of a tendency by investigators to seek short-cuts which may not respect the investigated company's rights.

3. Where the outside lawyer concerned is not a member of an EU bar, it is recommendable that the advice should be co-signed by a lawyer who is a member of an EU bar.

4. Note that even after the CFI's judgment there are still a number of points which remain doubtful. For example, what if the claim of privilege relates to a possible competition law infringement other than the one that is the subject of the investigation? This would be the case, for example, if a document requested in the course of an investigation under the Merger Regulation concerned a possible competition law infringement. It seems unlikely that the Commission would contest the privilege in such a case or that, if it did, it would be upheld by the CFI. By contrast, if the advice relates to an area of law other than antitrust or competition law, the claim of privilege is unlikely to be accepted.

Footnotes:

[1] Case 155/79 [1982] ECR 1575.

[2] Case T-30/89 [1990] ECR II-163.

[3] "Furthermore, even if the adoption of Regulation No 1/2003 and of the Commission Notice on Immunity from fines and reduction of fines in cartel cases may have increased the need for undertakings to examine their conduct and to define legal strategies in respect of competition law with the help of a lawyer who has in-depth knowledge of the particular undertaking and of the market in question, the fact remains that such exercises of self-assessment and strategy definition may be conducted by an outside lawyer in full cooperation with the relevant departments of the undertaking, including its internal legal department. In that context, communications between in-house lawyers and outside lawyers are in principle protected under [the privilege], provided that they are made for the purpose of the undertakings rights of defence. It is therefore clear that the personal scope of that protection, as laid down in *AM&S*, is not a real obstacle preventing undertakings from seeking the legal advice they need and does not prevent their in-house lawyers from taking part in self-assessment exercises or strategy definition." (*See* paragraph 173.)

[4] The last two documents consisted of an exchange of emails between the executive and an employee of the company's legal department holding the title "coordinator for competition law." As permitted by Dutch law, he was a member of the Dutch bar. Akzo's claim that the documents were

privileged apparently rested solely on the fact that he was a member of the Dutch bar.