Multinational anti-trust proceedings: protecting privileged communications

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Practical and candid legal advice has long been critical to achieving a company's business objectives and to dealing with any legal challenges that may arise. The application of lawyer-client privilege is essential to effective legal advice. As a result, well-managed businesses properly focus considerable attention on protecting privileged communications against discovery.

Many businesses fail to realise, however, that the scope of privilege is much narrower in some countries than in others and that failure to account for those differences in advance may threaten a company's ability to protect a privileged communication from discovery throughout the world. The consequences of such failure have never been greater, as discovery in multinational litigation continues to grow and the anti-trust and competition enforcement agencies in numerous jurisdictions expand their formal co-operation and information exchange.

Against this backdrop, this chapter:

- Briefly discusses the key differences in the scope of lawyer-client privilege (and the work product doctrine) in the context of anti-trust proceedings, using the US and the EU as examples.
- Provides guidance on how to protect privileged communications in a multinational context.

DIFFERENCES IN THE SCOPE OF PRIVILEGE: US AND EUROPE

US anti-trust proceedings

In the US, lawyer-client privilege generally protects confidential communications with a lawyer or his agent for the purpose of securing legal advice and services against discovery. Confidential lawyer mental impressions and other work product in anticipation of litigation are also generally protected against discovery. Where otherwise available, these protections apply with respect to both in-house and outside counsel and to communications by counsel who are not authorised to practise in the US.

Disclosure of privileged communications to parties outside the lawyer-client relationship frequently results in the loss of privilege (note, however, that it may not be lost if the common interest or joint defence privileges apply).

EU anti-trust proceedings

Within the EU, the rules on privilege differ under EC and national law.

EC law. Unlike the position in the US, under EC law:

- Communications from in-house counsel are not recognised as privileged in the context of EC anti-trust proceedings. In effect, this means that the European Commission can seize in-house counsel advice in investigations of suspected anti-trust infringements and can rely on that advice to prove an infringement.
- Advice provided by external counsel is not considered privileged for the purposes of EC anti-trust proceedings, unless the external counsel is admitted to practicse in a member state of the EU.

The interpretation of the scope of legal professional privilege in EC anti-trust proceedings was provided by the European Court of Justice (ECJ) in the *AM&S* judgment (*AM&S v Commission, Case 155/79, [1982] ECR 1575*). The case involved an EC anti-trust investigation of an alleged cartel, where one of the companies concerned refused to hand over to the Commission certain documents that the company claimed were protected by legal professional privilege. The ECJ ruled that, based on the common criteria of the laws of the member states, communications for the purposes of EC anti-trust proceedings are privileged if:

- They are made for the purposes and in the interests of defence (this extends to written communications before the start of proceedings if they relate to the subject matter of the proceedings).
- They originate from independent lawyers, that is, lawyers who are not bound to the client by a relationship of employment.
- The lawyer is entitled to practise his profession in one of the member states of the EU and is subject to ethical and disciplinary rules.

A subsequent decision by the European Court of First Instance (CFI) added a further nuance to this interpretation by recognising that legal professional privilege extends to a company's internal memoranda which report the content of advice received from external legal advisers (*Hilti v Commission [1990] ECR II 163*).

The *AM&S* decision has been the subject of much debate and controversy over the years and is now under challenge in a case brought to the CFI by Akzo Nobel against the Commission (*Akzo Nobel Chemicals and Akcros Chemicals Ltd v Commission, Case T-253/03*). The case relates to documents taken by the Commission in a dawn raid of Akzo's premises in the UK in February 2003. The documents seized include advice given to the company by its in-house lawyer, who is registered at the Dutch bar. Akzo has applied for the annulment of the Commission's

decision to seize and not to return these documents. In October 2003, the CFI granted interim measures in favour of Akzo, preventing the Commission from using in its investigation certain documents from Akzo's in-house counsel pending final judgment in the case. In granting the interim measures, the Court stated that the protection of professional privilege may also extend to "written communications with a lawyer employed by an undertaking on a permanent basis".

This interim measures decision fuelled speculation that the final judgment in this case may finally open the way for recognition of in-house counsel privilege in EC anti-trust proceedings. However, on 27 September 2004, the ECJ annulled the interim measures Order (*Commission v Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd, Case C-7/04*). In this most recent decision in the Akzo saga, the ECJ does not comment on the arguments for and against recognition of privilege between in-house lawyers and their companies, but overturns the lower Court's order on the basis that the "urgency" of such interim measures was not demonstrated. Nonetheless, in overturning the order for interim measures and permitting the Commission to use the in-house counsel's documents pending the final judgment in the case, the ruling is seen as a blow to hopes that a change in the rules on privilege may be imminent. The case will now proceed to a hearing and judgment on the substantive question of whether and in what circumstances the Commission can use in-house counsel advice in its investigations of anti-trust infringements (the date for this hearing is not yet fixed). Pending final judgment in that case, the law remains as set out by the ECJ in *AM&S*, and companies obtaining advice on compliance with EC competition rules should proceed on the basis that the Commission will not recognise as privileged communications from in-house lawyers, or indeed from external counsel not admitted to practice in the EU.

This latter point has received less attention in the debate, in part because it seems that the Commission has not relied on the advice of an external non-EU lawyer to prove an infringement, or at least has not acknowledged doing so in any of its published decisions. As a practical matter, it would also be difficult to seize such advice, without first giving the parties the opportunity to verify that the lawyer concerned is admitted to practice in one of the 25 member states and politically, it would also be a controversial move. By contrast, the Commission has seized in-house legal advice in its investigations and has occasionally relied on that advice as a basis for finding an infringement (*see box, Commission reliance on in-house advice: some examples*).

National law. The position in Europe is further complicated by the fact that privilege rules at the level of member state competition authorities and courts vary widely (*see In-house counsel privilege: QuickGuide at www.practicallaw.com/A34495*). While certain member states recognise in-house counsel privilege to varying degrees in anti-trust proceedings (for example, the UK, Spain and Norway), others (such as France) do not.

As a result, parallel proceedings by the Commission and a national competition authority that recognises in-house privilege, or by various national competition authorities with different privilege rules, can have widely differing results. In investigating the same or similar infringements, one authority can seize and rely on in-house counsel advice, while another cannot. However, if at least one authority does so, there is a danger that the privileged status of the advice may be lost in other jurisdictions.

For example, the little protection in-house counsel advice may enjoy at national level is jeopardised by the new EU "Modernisation Regulation" (*Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L1, 4 January 2003*). This Regulation entered into force on 1 May 2004. In addition to giving the Commission increased powers of enforcement and investigation, it also provides for sharing of enforcement tasks between the Commission and the member state national authorities. In that context, it sets out the rules on information exchange between the Commission and the national authorities, and between national authorities themselves. The rules, as set out in Article 12 of the Regulation, would permit, for example, the Commission, or a national authority which does not recognise in-house privilege, to transmit advice of in-house lawyers to a national authority, such as the UK, which does recognise in-house privilege. The receiving authority would be allowed to use that advice for the purposes of applying the EC competition rules (Articles 81 and 82 of the EC Treaty) in the investigation of the same matter as the transmitting authority and it could even use the advice in applying its own national competition law in parallel to EC law in the same case (some limited "protection" is foreseen only where the information might be used to impose sanctions on "individuals", as opposed to companies).

AVOIDING LOSS OF PRIVILEGE

The increasing scope of discovery in multinational litigation and enhanced international co-operation and information exchange among anti-trust and competition enforcement agencies heightens the need for effective advance preparations to protect privileged communications. The consequences in the past of failure to identify and protect privileged communications were mainly confined to the particular jurisdiction initiating the investigation. Now, however, there is an increasing likelihood that such information could also be passed on to enforcement agencies elsewhere and, potentially, to private litigants against the company.

Under the US position, US law is generally applied to determine the privileged status of communications that have a connection to the US, even if they involve communications or communicants outside the US. In addition, some co-operation agreements and information agreements among governments (for example, the US/Australia bilateral) provide that they are not intended to be used to compel production of information in violation of a valid legal privilege.

Similarly, draft OECD guidelines on intergovernmental information exchange suggest that a country:

- Requested to provide information should not produce information that is privileged or otherwise not subject to discovery under its own law.
- Requesting information should not accept or use communications that would be privileged under its law, even if they are not privileged in the country requested to make them available.

As a practical matter, however, it is uncertain in some cases whether these rules will be adopted and, even if they are, whether they will be effectively implemented. As a result, the best protection against the loss of privilege in one or more jurisdictions is to structure and identify privileged communications in a manner

COMMISSION RELIANCE ON IN-HOUSE ADVICE: SOME EXAMPLES

The European Commission has relied directly on in-house counsel advice in published decisions such as:

- *John Deere* (*OJ L35/58, 7 February 1985*), where the Commission fined the company EUR2 million (about US$2.44 million) for an export ban which was fine-tuned with the words "as far as no contrary legal regulation prevents". The Commission noted that "Deere's own in-house counsel expressed doubts as to the legitimacy of such a device". The Commission also noted that "Deere and Company knew that such conduct and, in particular, the contractual export ban, was contrary to EEC and national competition law. It was advised on this by its in-house counsel. Senior management of Deere and Company in Moline, including a member of the main board, was fully informed."

- In *London European/Sabena* (*OJ L317/47, 24 November 1988*), where the Commission fined Sabena EUR100,000 (about US$121,790) for abuse of dominance. The Commission noted that "The infringement was committed deliberately and Sabena could not have been unaware that it was infringing the rules of competition: on 9 April 1987, a member of its legal department stated that, in his opinion, its behaviour could give rise to penalties imposed by the Commission pursuant to Article 86."

- In *Volkswagen/Audi (OJ L124/60, 25 April 1998)* the Commission fined Volkswagen EUR102 million (about US$124.23 million) for restriction of parallel imports (subsequently reduced to EUR90 million (about US$109.61 million) following an appeal to the Court). In investigating this case, the Commission seized advice from in-house counsel. In its decision, the Commission rejects Audi's claim that such advice should not be used by the Commission, referring to the ECJ's *AM&S* ruling. The Commission states that "Audi can not invoke attorney's privilege", since the communications were not "made for the purposes and in the interests of the client's rights of defence" and they did not "emanate from independent lawyers".

While instances such as the above are rare, it is worth remembering that in-house counsel advice is vulnerable to seizure, as demonstrated by the Commission raid on Akzo last year (*see main text, EU anti-trust proceedings, EC law*).

designed to prevent their disclosure to any private or governmental third party in the first instance. The following measures may help to achieve this:

- Whenever feasible, provide advice orally rather than in writing. This will obviously not be possible in many instances, but is the best protection against inadvertent or compelled disclosure of written communications.

- Ensure that communications are headed appropriately. For example, in the EU, communications from in-house counsel to the company that repeat or summarise advice from external counsel should be headed "privileged report on advice received from external counsel", or similar wording. Similarly, advice from outside counsel should always be headed with appropriate language (for example, "lawyer-client privileged communication from external counsel"), to show that both its substance and source entitle it to privileged status.

- Where feasible, external and in-house counsel should avoid providing anti-trust advice in the body of an e-mail. It is preferable to include such advice in an attachment clearly marked "privileged and confidential". At a minimum, advice sent by e-mail should always include a header indicating that the content of the e-mail is "privileged and confidential".

- On issues requiring advice on compliance with EC competition rules, on compliance with national competition rules of EU member states, or on other particularly sensitive matters, it is advisable to work closely with external counsel in a manner that will help establish the privileged nature of the communication. This does not mean that a company needs an opinion from external counsel on all issues on which it needs legal advice but, where potentially serious restrictions are involved, it may be advisable to have external counsel provide the opinion.

- Since in-house counsel communications to his company are considered privileged under the national rules of some EU member states and under US law, and given the pending *Akzo* case (*see EU anti-trust proceedings: EC law*), companies should continue to label advice from in-house counsel as privileged with the indication, in the EU, that the advice is from in-house counsel (in the event of a Commission dawn raid, the Commission will likely review that advice but, for example, the UK competition authority would not seize it). While one could question whether it is advisable to highlight that advice emanates from in-house counsel, not doing so risks that the Commission, in a dawn raid, would review both in-house and external advice in order to verify which is entitled to protection, in particular, where the company had failed to segregate the advice of in-house and external counsel.

- With regard to a company's paper files kept in Europe, hard copies of advice from external counsel should be kept in a separate file and clearly labelled as such. Given the pending *Akzo* case and the fact that some EU member states recognise the privileged nature of in-house counsel's advice, hard copies of in-house counsel advice held at European premises should also be kept separately and labelled as "in-house counsel advice" and "privileged and confidential".

- In highly sensitive cases involving communications from an external counsel who is not admitted to practice in an EU member state to a client based in Europe, consider involving EU-admitted counsel in a manner that is most likely to result in recognition of the communications' privileged status. For example, in some situations, it may be appropriate to have the communications come from both counsel.