

LEGAL PRIVILEGE FOR IN-HOUSE LAWYERS

BRIEFING PAPER :

LEGAL PRIVILEGE BEFORE NATIONAL COMPETITION AUTHORITIES

This briefing paper discusses the question whether legal advice given to a client will benefit from legal privilege before national competition authorities, or on the contrary can be used by such authorities against the company/client concerned.

1. Belgium

External lawyers (Avocats, Advokaten) can rely on professional secrecy, and therefore refuse to testify, before the competition authority (Raad voor de Mededinging, Conseil de la Concurrence) in the same way as before the civil and criminal courts, and the competition service (Dienst voor de Mededinging, Service de la Concurrence) cannot seize documents emanating from an external lawyer, even in the office of his/her client. This is an application of the general rules of 'secret professionnel/ beroepsgeheim' and there is no case law on the subject yet. The writer is also not aware of any cases where this question arose.

In-House lawyers do not benefit from 'secret professionnel' but according to the new Law of March 1, 2000, the advice of an in-house counsel is confidential. In a conversation with the Head of the Competition Service she confirmed that the Service would thus not seize opinions from in-house counsel when investigating an antitrust infringement.

2. Denmark

The competition authority in Denmark is the Competition Council (Konkurrenceradet).

Decisions taken by the Competition Council can only be appealed to the Competition Appeals Tribunal. The decisions of the Tribunal can be brought before the Courts of Law.

According to the Competition Act the Council is empowered to demand any information, which is considered necessary for its activities or for deciding whether the provisions of the act shall apply to a specific matter.

Requests for information can be addressed to enterprises, organizations and public authorities as well as to lawyers, accountants and other advisers. Lawyers' responsibility in that respect can, however, be limited by their obligation to observe professional secrecy.

Representatives of the Competition Council are also empowered - on due proof of identity and subject to prior procuring of a court order to institute control investigations at the premises of enterprises or associations.

However, the Competition Council will hardly be entitled during such control investigations to obtain an insight into internal correspondence between the enterprise and its In-House lawyers or lawyers in private practice, as such insight might be at variance with the lawyer's secrecy obligation to his clients. But there is no practice to support this assumption, as the Competition Council has never made use of its powers to institute control investigations.

The Danish Competition Council on October 18, 1999 issued guidelines concerning dawn raids which set forth that legal privilege does not apply to in-house counsel. The legal status of the guidelines is uncertain. Also, the legal validity of the guidelines is doubtful.

3. England and Wales

The competition authorities in the United Kingdom with general responsibility for enforcing the competition laws are the Office of Fair Trading ("OFT"), the Monopolies and Mergers Commission ("MMC") and the Restrictive Trade Practices Court ("RTPC")

Production of documents covered by legal privilege under the Rules of the Supreme Court cannot be demanded.

In the leading case on privilege for In-House Lawyers (*Alfred Cromptons Amusement Machines v. Customs & Excise Commissioners* 1972, 2, QS, 102 (C.A.)), it was held, on appeal, that salaried legal advisors, whether barristers or solicitors, employed by a government department or commercial concern had precisely the same duties and privileges as lawyers in independent practice and therefore legal professional privilege attached to all the communications between the officials and their legal department both in the ordinary course of their work and when litigation was anticipated.

Accordingly, the clients of solicitors and barristers in employment will have the same protection for the legal advice on UK competition issues received from In-House counsel as from outside counsel.

This is reaffirmed in s 30 of the Competition Act of 1998, which came into force on March 1, 2000, where it is expressly noted that legal privilege extends to in-house lawyers.

4. France

A French "avocat" can invoke confidentiality for his/her advice to clients also before the Competition and Consumer Directorate. However, the decision of the Highest Court (Cour de Cassation) criminal chamber of September 30, 1991 introduced a distinction between advice by the "avocat" in his capacity as defender of the client and in his capacity as advisor. Only opinions given in the first capacity now appear to be protected by professional secrecy in criminal matters. It is not clear what the effect is of this decision for advice given in competition law cases.

In any event there are no particular provisions governing competition law cases.

The In-House lawyer does not benefit from professional secrecy in general, so also would not be able to invoke it before the anti-trust authorities.

5. Finland

The Finnish competition authorities are the Office of Free Competition, the Competition Council and the county governments. There is no competition court in Finland.

The question of legal privilege appears to be somewhat unclear. There are no provisions in the Competition Act nor any case law that would allow for a conclusion that the competition authorities would not be allowed to review legally privileged documents.

6. Germany

The Federal Cartel Authority recognises legal privilege for those In-House lawyers who are admitted to the Bar, according to the same principles as before the ordinary National Courts. Only documents which are in the sole possession ("actual custody") of the In-House counsel are privileged and not such material in the possession of the management of the company. With respect to the In-House lawyer the question of "actual custody" is debated because he has his office on his client's premises; an argument is made that the lawyer and client have joint custody which is not sufficient to grant legal privilege.

As the Federal Cartel Authority ("FCA") does not allow the In-House lawyer to act as defense counsel (because a Syndicus Anwalt cannot represent his employer in those cases where a Rechtsanwalt is required), his/her communications do not carry legal privilege, although there is no case law on this. In practice the Authorities respect the In-House lawyer's advice as privileged. In a case in 1991/92 the Federal Cartel Authority tried to make an In-House lawyer give evidence on matters governed by professional secrecy; he refused and the FCA did not bring the matter to Court.

7. Ireland

There is no difference between outside counsel opinion and In-House lawyer opinion where lawyer/client communications are concerned.

In order to carry out an inspection the Competition Authority requires a warrant from a district judge. It is to be assumed that the Judge will respect lawyer/client privilege; the matter has not been judicially determined. It is to be expected that the Courts will not distinguish between In-House lawyers and those in private practice where a lawyer/client relationship can be shown to exist.

8. The Netherlands

The competition authority in the Netherlands is the Nederlandse Mededingingsautoriteit, NMa. Members of the Bar (advocaat) have the right of legal privilege before the competition authority in the same way as before the courts.

Since 1997 it is possible for in-house lawyers to enter the Bar. In-house lawyers admitted to the Bar also have legal privilege as "advocaat". A limited number of members of NGB (Netherlands Association of Company Lawyers) has entered the Bar. The NGB keeps pressing the legal privilege issue in its dealings with the national authorities.

9. Norway

In-House Lawyers who are admitted to the Bar, employed by a government department or commercial company can claim legal privilege before the Competition Control Office (Konkuransetilsynet) in the same way as lawyers in private practice.

10. Scotland

As the competition authority is the same for Scotland as for England and Wales, the same applies as set out in 3.

11. Spain

Spanish company lawyers are member of the Bar, and as such can invoke legal privilege in the same way as outside lawyers. This is also true before the competition authorities.