



Competition - Portugal

Dawn Raids: Legal Professional Privilege Limits Regulator's Powers

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A dawn raid by the Competition Authority has raised questions about the scope of its investigative powers, particularly with regard to legal professional privilege.

Background

Legal professional privilege is guaranteed by Article 208 of the Constitution and Article 87 of the Lawyers Act, which protects the confidentiality of communications in which a lawyer provides legal advice to a client. This protection covers all facts, information or communications relating to professional matters and provided by officers, directors or employees of the company, whether or not they legally represent it.

However, such protection does not apply in circumstances of overriding necessity to ensure the defence of the personal dignity, rights or legal interests of the lawyer or client, subject to the previous binding authorization of the president of the association's district council and, ultimately, to appeal to the president of the association.

Portuguese law does not distinguish between independent lawyers and in-house counsel, extending legal professional privilege to both equally; thus, the existence of an employment contract with the company does not affect an in-house lawyer's status. Although EU case law has established a different approach,⁽¹⁾ the European Court of First Instance has acknowledged that certain EU member states extend legal professional privilege to in-house lawyers' communications.⁽²⁾

Facts

In March 2007 the authority, acting under Article 17 of the Competition Act (18/2003), carried out a dawn raid on a Portuguese company's premises. During the inspection the authority's agents collected a large number of documents from the office of the company's in-house counsel.

Article 71 of the Lawyers Act (15/2005) provides that information and communications exchanged by a lawyer and his or her client are subject to legal professional privilege, raising the question of whether the documents which the authority collected during the dawn raid were protected in this way. The in-house lawyer complained to the Portuguese Lawyers Association, raising several questions concerning the right of the authority's agents to access an in-house lawyer's privileged information and documentation.

Decision

On June 27 the association's general council issued Opinion E-07/07. It analyzed the merits of the complaint and specifically the extension of legal professional privilege to in-house counsel in the context of dawn raids under the provisions of the Competition Act.

The authority based its argument on EU case law, maintaining that in-house lawyers are not independent lawyers and that the raid on the in-house lawyer's office had not breached legal professional privilege. However, the general council ruled that the Lawyers Act does not differentiate legally or statutorily between independent and in-house lawyers or subordinate the duties, independence and autonomy of an in-house lawyer to those of an independent lawyer.

Furthermore, it referred to the statement in Article 22 of EU Regulation 1/2003 that:

"The officials of the competition authorities of the member states who are responsible for conducting these inspections, as well as those authorized or appointed by them, shall exercise their powers in accordance with their national law".

The association considered that this provision guarantees the applicability of legal professional privilege to in-house counsel under Portuguese law in accordance with the principle of subsidiarity on procedural and investigative matters. Therefore, the Portuguese rules must be respected, even if the authority's agents are performing an inspection on behalf of the European Commission.

The association concluded that the authority had acted illegally by entering the office of the company's in-house counsel in contravention of the Lawyers Act. In addition, the association believed that such action breached the Penal Code - Article 195 provides that the violation of legal privilege obligations is punishable by up to one year's imprisonment or a criminal fine. Therefore, the association considered that the in-house lawyer may bring criminal charges against the authority's case handlers.

Although the opinion is not binding on the authority and may yet be considered in court, it represents an unequivocal statement on the scope of legal professional privilege under the Lawyers Act and the restrictions which the act imposes on competition investigations in Portugal.

Comment

The EU courts - and some national competition authorities - have tried to differentiate between in-house lawyers and independent lawyers, arguing that the fact that the former are company employees may affect their collaboration with regulatory authorities and the administration of justice. However, in fighting against restrictive practices and abuse of a dominant position, does it make sense to punish a company that wishes to seek legal advice under its right to defence by weakening the legal professional privilege enjoyed by its in-house lawyers?

The authority has competence to apply national competition law and Articles 81 and 82 of the EC Treaty. Nevertheless, following EU Regulation 1/2003 and the *Akzo Case* (in which the court recognized the different trends at national level), it must respect the powers and procedures of national law. The opinion rightly states that legal professional privilege is a necessary condition of legal practice for independent lawyers and in-house lawyers alike.

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Endnotes

(1) See, in particular, the European Court of Justice decision in the leading case, *AM&S v Commission* (C-155/79, 1982).

(2) The *Akzo Case* (T-125/03 and T-253/03, 2007).

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