

A RECENT EU COURT OF JUSTICE JUDGMENT POTENTIALLY EXPANDS THE SCOPE OF LEGAL PRIVILEGE IN ANTITRUST PROCEEDINGS

Companies seeking to resist disclosure of information related to legal advice in the context of EU antitrust proceedings could find support in the *Orde van Vlaamse Balies* judgment of the Court of Justice of the European Union (CJEU). The judgment clarifies that the legal professional privilege extends not only to information exchanged for purposes of legal defence in the ongoing proceedings, but also to legal advice more broadly. The judgment suggests that the European Commission (EC) can no longer automatically reject the invoking of legal professional privilege on the basis that these communications did not relate to the exercise of the rights of defence in those proceedings. The judgment could prove particularly relevant to companies facing proceedings where the theory of harm revolves around the allegedly anticompetitive exercise of IP rights, such as standard essential patent injunctions, patent litigation, or patent settlements.

THE CURRENT NARROW INTERPRETATION OF LEGAL PROFESSIONAL PRIVILEGE IN ANTITRUST PROCEEDINGS

One of the few limits to the EC and national competition authorities' far-reaching information gathering powers in antitrust proceedings is the right for companies to resist disclosing information that is covered by legal professional privilege. Based on established EU case law, legal professional privilege applies, in competition proceedings, to communications between lawyers and clients that (i) were made for the purposes and in the interest of client's rights of defence and (ii) were addressed to or emanated from independent lawyers (Case 155/79, *AM & S* and Case C-550/07, *Akzo*). This protection aimed at ensuring that the undertaking under investigation can exercise its rights of defence in full. It was thus generally recognized that legal privilege in antitrust proceedings covered written communications exchanged between external counsel and a client after the initiation of antitrust proceedings as well as earlier communications which have a relationship to the subject matter of the procedure (e.g., prior antitrust advice regarding a practice that would

Key points

- The *Orde van Vlaamse Balies* judgment provides that confidentiality of communications between external lawyers and their clients covers both the activity of legal defence and legal advice.
- Although the judgment concerns tax proceedings rather than antitrust proceedings, its holding should also apply to privilege in the context of antitrust proceedings. It provides a basis for companies facing antitrust proceedings to claim confidentiality over legal advice even if it was not provided for purposes of ensuring rights of defence in those proceedings (i.e., not given after the initiation of antitrust proceedings or in relation to the subject of the investigation).
- The judgment could prove to be particularly relevant for companies claiming privilege over advice received in other areas of law, such as IP law.
- The judgment does not change the fact that only genuine legal advice can benefit from protection and that unfounded privilege claims might qualify as an obstruction of the investigation or an aggravating circumstance.

subsequently be the subject of the investigation). The protection also covered internal notes confined to reporting the content of privileged communications as well as working documents or summaries that were drawn up for the purpose of seeking legal advice from a lawyer in connection with these antitrust proceedings (Order in Case T-30/89, *Hilti* and Case C-550/07, *Akzo*).

At the same time, it remained unclear to what extent other communications could also benefit from legal professional privilege. In practice, the EC has been adopting a narrow interpretation of the scope of the protection. In particular, according to the EC, the legal professional privilege would not apply to communications that are not related to a company exercising its rights of defence in competition cases, including communications with lawyers advising on other areas of law (e.g., advice from patent attorneys on IP law). In practice, the EC's stated position that unfounded claims of legal professional privilege protection could be sanctioned as an obstruction to the investigation or be considered an aggravating circumstance leading to increased fines dissuades companies from making privilege claims that extend beyond the EC's interpretation, as the risk of a sanction generally outweighs the potential benefits of withholding some information.

POTENTIAL EXPANSION OF THE SCOPE OF PROTECTION

The *Orde van Vlaamse Balies* judgment (judgment of 8 December 2022, Case C-694/20, *Orde van Vlaamse Balies*) appears at least implicitly to undermine the EC's approach. The CJEU found that Article 7 (respect for private and family life) of the Charter of Fundamental Rights of the European Union (**the Charter**) guarantees the confidentiality of exchanges between a lawyer and their client, with such confidentiality covering "*not only the activity of legal defence but also legal advice.*"

While the judgment concerns disclosure obligations that were imposed on lawyers advising on cross-border tax arrangements, the CJEU's interpretation of the scope of privilege could provide support for the exercise of the rights of parties subjected to antitrust investigations, for example during a dawn raid or when responding to an information request. In particular, a company invoking legal professional privilege could argue on the basis of the judgment that it is not required to demonstrate that a piece of advice is related to the exercise of rights of defence in competition proceedings, as *any* legal advice given by an external EU qualified lawyer should be protected by legal professional privilege. The judgment appears most relevant to cases where advice unrelated to antitrust rules is particularly relevant to establishing an infringement. For example, the EC might be interested in IP lawyers' advice on the scope or strength of a patent when investigating an alleged abusive injunction for a standard essential patent against an infringer or allegedly vexatious patent litigation. The judgment should strengthen the companies' arguments when seeking to resist the production of such advice. Of course, nothing would prevent a company from disclosing such advice if doing so is in its interest.

The CJEU also states that Article 7 of the Charter guarantees the secrecy of a legal consultation "*both with regard to its content and to its existence*". However, it is unlikely that companies would be able to rely on that part of the judgment to avoid disclosing the existence of legal advice in case of a dawn

Background to the judgment:

- In transposing the EU Directive on cross-border tax arrangements (**DAC6 Directive**) into its national law, the Belgian legislator required lawyers advising clients on cross-border tax arrangements to disclose the fact that they are advising on such matters.
- The Order of Dutch-language legal professional associations in Belgium challenged the Belgian law before national courts.
- In the course of proceedings, the Belgian Constitutional Court asked the CJEU whether the disclosure obligations imposed on lawyers advising on cross-border tax arrangements breached the Charter of Fundamental Rights of the European Union.
- The CJEU found that Article 7 of the Charter protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. It therefore necessarily guarantees the secrecy of a legal consultation, both with regard to its content and to its existence.
- The CJEU also confirmed that any limitations to the exercise of rights enshrined in Article 7 of the Charter must be provided for by law and respect the principle of proportionality.

raid. As recognised in well-established case law, the EC has a legitimate interest in checking if a document is legally privileged, as the main aim of the unannounced inspection is to gather all information the EC deems necessary to its investigation. Thus, EC officials are entitled to take a " cursory look " at the " superficial features " of the document, such as the general layout, heading, or title during a dawn raid, to enable them to confirm the accuracy of the confidentiality claims made by the company (Case C-550/07, *Akzo*). It is unlikely that the *Orde van Vlaamse Balies* judgment will fundamentally change that approach. However, the judgment can be helpful in resisting any examination by the officials of the content of the document.

The principles set out by the CJEU could also be helpful before national competition authorities in disputes related to the applicability of legal professional privilege to external counsel's advice unrelated to competition proceedings. Where the national law provides that legal professional privilege applies also to in-house counsel advice, the judgment could be relied upon to argue that such advice should be covered irrespective of its subject matter.

Practically, while not a legal requirement, the judgment further highlights the value of properly marking documents containing legal advice as " privileged & confidential " and ensuring and identifying that this advice comes from an external EU qualified lawyer, as these elements should assist in demonstrating that a communication is privileged, whether for purposes of exercising the rights of defence or providing legal advice. The EC still has a right cursorily to review the communication to ensure that it indeed meets the criteria of privilege, but its review should be limited to checking that the communication concerns legal advice that originates from an EU qualified lawyer. If all advice is appropriately marked, the EC might be dissuaded from reviewing each piece of genuine legal advice on a case-by-case basis.

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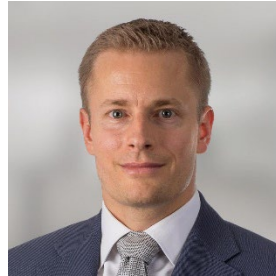
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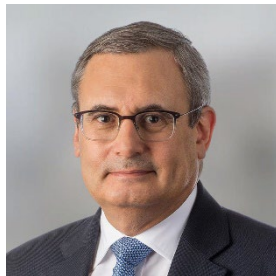
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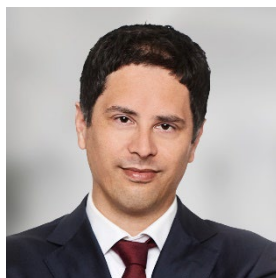
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