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Competition Law Amendment Clarifies Legal Professional Privilege in Competition Council Investigations

A recent amendment to the Romanian Competition Law, effective from 6 August 2010, clarifies the content and protection of the legal professional privilege (LPP). In doing so, it recognizes the importance of the confidentiality of communications between clients and their lawyers, so the former would have unrestricted access to legal advice.

The LPP Concept and Its Clarification

The LPP is a rule of law according to which certain lawyer-client communications cannot be subject to compelled disclosure in legal proceedings. This means that in case disclosure is made against the will of the client, such communication is inadmissible as evidence in these legal proceedings. The concept was recognized and defined rather restrictively by the European Court of First Instance and Court of Justice, which do not recognize its applicability to in-house lawyers. Various national bar associations argued that its scope needed to be widened, so that the LPP protection would also cover communications with in-house lawyers.

The amendment to the Competition Law transposes into domestic legislation the LPP concept, most recently revisited in *Akzo Nobel* by the European Court of First Instance in September 2007. It codifies the concept and outlines a procedure to be followed in case of dispute between an undertaking and Competition Council inspectors as regards the LPP-protected nature of a client-attorney communication.

Scope of the LPP Protection

The LPP applies in case the following conditions are fulfilled:

- First, the communication is between the investigated undertaking and its attorney.

- Second, the communication must be made for the exclusive purpose of exercising the rights of defense in the context of a Competition Council investigation. This includes not only communications made after the opening of an investigation but also prior communications, to the extent they are exclusively related to the subject matter of the investigation.

The LPP also covers an undertaking's preparatory documents drafted exclusively for exercising the rights of defense, even if such documents were not yet sent to the attorney or were not actually prepared so as to be physically sent to the undertaking's attorney. Neither the communications, nor the preparatory documents may be copied or used as evidence by Competition Council inspectors, and the investigated undertakings may invoke the LPP protection whenever Competition Council inspectors attempt to copy or even review such communications and documents.

Dawn Raids and How to Deal with LPP Disputes

Disputes may arise between Competition Council inspectors and dawn-raided undertaking on the LPP nature of certain communications or preparatory documents. To this end, the undertaking has the burden to prove that the LPP is applicable.

The recent amendment to the Competition Law does not detail the actions required of an undertaking to prove the protected nature. Thus, in line with the Community Courts guidance on the procedure to be followed in the event of a LPP dispute, the undertaking may (but cannot be forced to) allow the inspectors to have a cursory look at the heading, title or other features of a document so as to allow the undertaking to prove the LPP nature of the document.

Should the undertaking fail to persuade the inspectors of the privileged nature of the communications or documents, the inspectors have the right to place them in a sealed envelope and remove them from the dawn-raided undertaking, in two counterparts. Thereafter, the Chairman of the Competition Council is obliged to promptly decide as to whether or not the attorney communication or preparatory documents in question are LPP-protected, based on the evidence and arguments submitted by the undertaking.

If the Chairman declines the LPP nature of the documents or communications in question, an undertaking may challenge this decision with the Bucharest Court of Appeals within 15 days from the communication of the Chairman's decision rejecting the LPP protection. The Bucharest Court of Appeals decision may, in turn, be appealed to the Supreme Court of Justice. During this time, Competition Council inspectors may not open the sealed envelope until the Chairman's decision would be upheld and become final and irrevocable. Thus, a court challenge of the Chairman's decision has the effect of suspending inspectors' access to these documents.

Practical Implications

Chairman Review Raises Concerns

The initial review by the Chairman of the Competition Council obviously raises a number of concerns. There are no explicit safeguards guaranteeing that the evidence supporting the LPP nature of the documents may not be disclosed to the inspectors (and which could cause irreparable harm to the undertaking and its legal defense). The implementing regulation will hopefully provide clarifications.

LPP Covers Preparatory Documents

The recent amendment to the Competition Law expanded the scope of LPP protection by including its application to an undertaking's preparatory documents, in line with the European Court of First Instance's *Akzo Nobel* case (Joined Cases T-125/03 and T-253/03). An early draft of the amendment, proposed by the Competition Council, did not recognize the extension of the LPP protection to preparatory

documents; thus, it is likely that the Competition Council will routinely challenge internal documents as not being preparatory in nature and thus not LPP-protected. To prevent this, undertakings should clearly establish that such documents are prepared exclusively for the purpose of seeking legal advice by marking these types of documents (as a header on the top of the page) with wording such as "*Privileged and confidential. Prepared for the purpose of obtaining legal advice*", be it hardcopy documents or emails.

Invoking the LPP

The mere fact that an undertaking claims that a document is LPP-protected is not enough to prevent the Competition Council from reading the document, unless the undertaking produces evidence as to the LPP nature of such document. Thus, the undertaking must inform the Competition Council of the author of the document, for whom it was intended, explain the respective duties and responsibilities of each of the author and recipient, and refer to the objective and context on which the document was prepared. Caution must be used when invoking the LPP, as unfounded claims of LPP protection may be sanctioned by the Competition Council.

Applicability to In-House Counsel

Further, the amendment refers to the general category of attorneys, registered with the national bar, and does not restrict the scope of the LPP only to attorneys that are outside counsel to the relevant undertaking. Thus, the LPP should also apply to in-house counsels, to the extent they are attorneys registered with the bar. Such protection would not exist, though, in case of an investigation under Articles 101 or 102 of the Treaty for the Functioning of the European Union.

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