Attorney client privilege in the EU

Presentation to the ACC

Thursday, January 20, 2011

Privileged and Confidential
Introduction

» A complex issue: illustration
  – Document from US external counsel concerning EU competition issues / EU Commission investigation / no privilege
  – Document from EU external counsel concerning EU competition issues / EU Commission investigation / privilege
  – Document from Belgian in-house counsel pertaining to legal position of company / EU Commission investigation / no privilege
  – Same document / Belgian jurisdiction / privilege
Introduction

» Latest development in this field: Judgment of the EU Court of Justice in the Akzo case of Sept. 14, 2010

- Negative decision
- Warrants practical measures
- But limited in scope, does not take away EU national legislation concerns
The Akzo decision

» Facts
  – EU Competition review
  – Company located in the Netherlands
  – Internal emails between in-house counsel and management
  – In-house counsel member of the Amsterdam Bar
  – Specific Agreement signed between in-house counsel and Akzo acknowledging his independence
  – Legal Professional Privilege denied
The Akzo decision

» Conditions of Legal Professional Privilege
  – Quality of documents: written communication for the purpose of exercising the rights of defense
  – Quality of Counsel:
    • Independent:
      – Positive component: ethical obligations
      – Negative component: No employment relationship
    • Member of the Bar in an EU jurisdiction
### Comparison US Attorney-Client and EU Legal Professional Privilege

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<thead>
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<th>US Attorney Client Privilege</th>
<th>EU Legal Professional Privilege</th>
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<tbody>
<tr>
<td><strong>Parties</strong></td>
<td>Communication between client and attorney (inside or outside)</td>
<td>Outside counsel admitted to a bar in a EU Member State</td>
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<tr>
<td><strong>Scope</strong></td>
<td>Oral or written communications made in confidence</td>
<td>Written communications concerning the right of defence, including documentation prepared <em>exclusively</em> for the purpose of seeking legal advice</td>
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<tr>
<td><strong>Circumstances</strong></td>
<td>Legal advice is sought or received</td>
<td>Legal advice is sought or received from outside counsel</td>
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<td><strong>Jurisdiction</strong></td>
<td>US jurisdictions</td>
<td>EU Commission Competition Investigation</td>
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</table>
The Akzo case: main conclusions

» No privilege for in-house counsel communications

» Only privilege for communication with outside counsel member of a EU bar

» May constitute waiver of US privilege

» Limited in scope to EU level competition investigations

» EU national legislation remains relevant for all other matters
LPP and Member State legislation

» Introduction: structure of EU legislation
» No EU level privilege legislation
» Some member states have organizations/associations of corporate counsel with ethical standards
» Inside counsel privilege recognized in: Belgium, Cyprus, Denmark, Germany, Greece, Netherlands, Portugal, Spain and the UK
» Significant jurisdictions have no such privilege: France, Italy, Sweden, Luxemburg, Switzerland
LPP and Member State legislation

» Varies significantly from one country to another: e.g. Belgium _all_ communications between inside counsel and management relating to legal advice are privileged. In France there is no privilege at all; in both jurisdictions communications with outside counsel are entirely privileged;

» Varies in time: an increasing number of Member States have draft legislation in this respect
LPP and discovery

» Significance of privilege rules is depending to a large extent on the discovery obligations

» The vast majority of Member state legislations do not provide for discovery obligations – most notable exception is the UK

» Still risk of US style discovery measures in EU – also area for best practices
Conclusion

» The extent to which LPP is recognized in the EU depends on the following variables:

– Quality of the parties;
– Area of the law;
– Type of communication;
– Jurisdiction in which the privilege issue arises.

» Based on these variables best practices can be designed.
LPP – best practices

1. Location
   1. Location of your legal department in the EU
      Identify jurisdictions of concern regarding
      - national privilege regulations
      - discovery legislation
      - judicial cooperation treaties

2. Location of your IT servers
   Use dedicated servers for confidential information in
   locations which do not recognize discovery, outside the
   reach of enforcement agencies and with strong
   privilege legislation
LPP – best practices

2. HR policies

   1. Recruit local in-house counsel

   2. Impose registration/qualification with In-house Counsel Organization when available
LPP – Best practices

3. EU competition matters
   1. Hire external EU counsel
   2. Streamline communication on such matters as to include EU outside counsel on all confidential written documentation
   3. Make appropriate objection as to preserve US privilege
   4. Request sealing of documents if cursory look unacceptable
   5. Consider sending home in-house counsel during investigation
LPP – Best practices

4. Communication

1. Clearly identify as registered In-house counsel
2. Clearly identify documents from outside counsel
3. Clearly identify information as Confidential and Privileged
4. Avoid editing/commenting or inserting remarks in outside counsel documents
5. Transmit documents of outside counsel as is: don’t add summary
LPP – Best practices

4. Communication (C’ued)

6. Consider setting up privilege « help-desk » for EU-wide communication
7. Monitor developments in US Legal Privilege law
8. Segregate business documents of privileged legal documents / consider segregating documents based upon geographic provenance
9. Route sensitive US generated documents through external counsel rather than directly transmitting to in-house counsel in Europe
LPP – Best practices

5. External audits

1. Have external audits performed under supervision of outside counsel

2. Have external auditors signing a retention letter making it clear that they work under supervision of external counsel

3. Have final report of audit formatted as external counsel advice