Delphi

October 2011

Anti-trust dawn raids: Sweden gets more extensive protection for legal professional privilege than EU

When competition authorities carry out dawn raids in search for evidence of a possible violation of the competition rules, there is only one kind of document they are not allowed to read, this being a document covered by legal professional privilege. Thus, legal professional privilege is a safe area where companies are given the opportunity, , to correspond with their lawyer to obtain competition law advice,without the authorities' being able to access this information. In a decision recently issued by the Stockholm District Court, the court gave the Swedish legal professional privilege a wider interpretation than the ECJ has done on a European level. Elisabeth Eklund outlines in the following the consequences hereof for companies.

The istrict court case (Konkurrensverket v Posten AB, Posten Meddelande AB and Posten Norden AB, case no. Ä 6673-11, decision of 22 June 2011) (below referred to as the Posten-Case) was tried following a dawn raid which the Swedish Competition Authority carried out at the premises of Posten and its subsidiaries (jointly referred to as the Posten Companies) on 3 May 2011. Before the district court's decision and its consequences are commented on, a brief description of how a dawn raid is executed and the extent of legal professional privilege according to EU law is provided.

When and how is a dawn raid conducted?

In their hunt for evidence of suspected competition law violations, the competition authorities are entitled to carry out unannounced visits at company premises, and in special situations even home visits to representatives of the company. The Swedish Competition Authority (or the Commission, if the alleged competition violation has cross-border implications) is entitled to gain access to premises, land, means of transport and other facilities held by the company. If there is a particular suspicion present that evidence may be stored in an employee's home, a dawn raid can take place there as well. Regardless of where the investigation takes place, the company is always entitled to request that its lawyer shall be present. However, the competition authorities do not need to await the lawyerIn order for the company to safeguard its rights before the lawyer arrives, the company should train its personnel about these rights. To facilitate to call the lawyer as soon as an investigation is initiated on the premises, it may be worth letting the lawyer prepare specific dawn raid instructions. The competition

October 2011

Anti-trust dawn raids: Sweden gets more extensive protection for legal professional privilege than EU.

authorities may take copies of basically all documentation, both in physical and electronic form. This means that the authorities are entitled to review and take copies of accounting material, agreements, letters, emails, calendars, lists of conversations, electronic documents etc. The competition authorities are entitled to ask employees to explain facts but they are not entitled to hold interrogations, which may, however, take place later in the process. The competition authorities are entitled to seal off the company's premises for the period, and to the extent, necessary for the investigation. The Swedish Competition Authority has employed, for the past two years, the practice of mirroring some of the company's hard drives (i.e. everything on the hard drive is copied, both saved and deleted documents) and the authority then reviews the material electronically at the authority's premises, where electronic searches of the material are carried out by using certain search words, after which the documents are read. Material which falls within the scope of the investigation is saved and printed. The lawyer is also now entitled to be present to safeguard the company's interests. A dawn raid is clearly a very intrusive measure for the company subject to it. In order for a dawn raid to be permitted there must exist a concrete suspicion of a violation of the competition rules.. Thus the authorities may not embark on a fishing expedition for possible evidence, but it may be asserted that the level of suspicion does not have to be particularly high.

What is protected by legal professional privilege under EU law?

In the AM & S Europe case (case 155/79), the ECJ held that legal professional privilege applies to communications between a lawyer and his/her client on the condition that the communication has been made with the purpose of safeguarding the client's right to defence and that the lawyer has an independent position. In the Akzo case (case C-550/07 P) (on which we commented in Newsletter no.4, December 2010) the ECJ held that communications with in-house lawyers were not covered by legal professional privilege even if the in-house lawyer was a member of a bar or law society within the EU/EEA. The ECJ stated that in-house lawyers cannot claim to have such an independent position as was laid down in AM & S Europe. The companies concerned argued that in-house lawyers who are enrolled with a bar or law society should meet the requirement of independence, which was later established in AM & S Europe, since they are bound by ethical and disciplinary rules. The ECJ did not accept this argument but instead considered the position of an in-house lawyer as economically dependent and closely tied to his/her employer and that his/her position cannot, therefore, be compared to that of an external lawyer.

In conclusion, the following documentation from or to the company is covered by confidentiality towards the Commission in accordance with the EU anti-trust rules:

- External communications with lawyers who are enrolled with a bar or law society within the EU/EEA, if the communication pertains to the company's right to defence. The company's internal documents are also covered if these have been prepared solely for the purpose of engaging external legal advice, provided that the advice itself falls under the confidentiality.
- Documents in which the company describes the (confidential) advice he or she has been given by an external lawyer, provided that it remains unchanged.

The following documentation is,however, not covered:

- Communications between the company and its in-house lawyer, including anti-trust advice.
- Legal advice and internal documents concerning legal advice to the company from

October 2011

Anti-trust dawn raids: Sweden gets more extensive protection for legal professional privilege than EU.

external lawyers who are not enrolled with a bar or law society within the EU/EEA, e.g. the US.

- Documents which have not been prepared solely for the purpose of seeking legal advice, e.g. a document in which a part of the document has been prepared with the purpose of informing the company's management.
- Documents in which a representative of the company writes his/her own comments or makes changes in the original (confidential) external advice also fall outside of the legal professional privilege and the document must be surrendered to the competition authority.

The Posten Case decision

The Posten companies were exposed to a dawn raid on 3 May 2011 after suspicion that the companies were abusing their dominant position. During the investigation, the Swedish Competition Authority found a memorandum prepared by one of Posten's in-house lawyers, who was an anti-trust specialist. The document existed in two copies, one was a pure print-out of the memorandum and the other contained certain notes. The Posten companies claimed that the document could not be seized by the Competition Authority because it was covered by legal professional privilege, since it had been prepared after contacts with the companies' external lawyer with the direct purpose of obtaining legal advice from that lawyer. The document concerned exactly the same issue as the Competition Authority was seeking information about. It was not clear from the document who had prepared it, from which company it originated from or if it had been communicated to a lawyer. Since the parties had conflicting views as to whether the document could be seized in the investigation, it was submitted, in a sealed envelope, to the District Court of Stockholm for the matter to be tried.

The district court concluded initially in its decision that the rules on legal professional privilege (Chapter 5, Section 11 of the Competition Act) are based on what a lawyer or its counsel cannot be heard about as a witness under Chapter 36, Section 5 in the Code of Judicial Procedure. From the preparatory works to the Competition Act, it is evident that the provision is to be applied in accordance with EU law, a so-called EU compatible interpretation., There is also a reference to AM & S Europe in the preparatory works. However, the district court held that since the AM & S Europe case tried to establish a lowest common denominator for legal professional privilege among the member states, the protection level established by the ECJ could not be the maximum level. Neither does the minimum level stemming from EU law apply if Swedish law provides a more extensive protection. A higher level of national protection may therefore apply.

The Swedish rules protect against seizure of material which has been given to a lawyer in confidence and this includes, in principle, all written documents which have been given to a lawyer in confidence within the scope of the lawyer's professional duties. In order not to erode this protection, the district court held, with reference to two judgements from the Supreme Court (NJA 1990 p527 and NJA 2010 p122) that only a "modest level of evidence" is required in order for the document to be covered by legal professional privilege. The Posten companies' external lawyer had presented a copy of an email in which the disputed document had been delivered to him - the evidentiary requirement was therefore deemed to have been fulfilled. Since the counsel never could be questioned as a witness, the document could not be subject to seizure by the Competition Authority.

October 2011

Anti-trust dawn raids: Sweden gets more extensive protection for legal professional privilege than EU.

Consequences of the Posten Case

The conclusion of the decision is that the Swedish protection is more extensive than under EU law and covers all documents which have been given to a lawyer in confidence within the scope of his/her professional duties. It should be noted that the Competition Authority chose not to appeal against the decision by the district court.

In order tosafeguard their interests in the best possible way in the event of a dawn raid, it is important that companies are aware of the fact that correspondence with lawyers who are members of a bar association or a law society (but not with in-house lawyers), including documentation set to prepare such correspondence and documentation prepared to obtain advice may not be read by the Competition Authority, and much less be copied for the investigation. In order to maintain the legal professional privilege, all written communication with a lawyer should be restricted to a limited circle; the documentation consistently marked "legal professional privilege" and, if possible, be kept in a separate place. When the company sets up documentation with the purpose of obtaining advice from a lawyer, it must be carefully documented. The same applies to documents which are set up by a representative of the company on the basis of the original external advice.

In the event of a dawn raid, it is important that the company itself, or with the assistance of a lawyer, carefully safeguards its interests by ensuring that it opposes to the Competition Authority examining documents covered by legal professional privilege, and, if a discussion arises regarding the issue, delivers the document in a sealed envelope to the district court for review.

Elisabeth Eklund

Elisabet Eklund, Senior Associate