

Competition - Hungary

Legal privilege: where does the Competition Office draw the line?

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Legal privilege is considered a fundamental procedural right throughout the developed world. However, its interpretation tends to vary between European jurisdictions. The introduction of legal privilege into Hungary's Competition Act in 2005 was a major achievement; however, it soon transpired that the Competition Office set much narrower limits than the market players - which were supposed to be protected by the new right - had expected.

The basis for the Competition Office's narrower interpretation was that the new text of the act led to conflicting interpretations of the range of documents to which legal privilege protection applied. In particular, the wording limited the legally privileged status of documents exchanged between outside counsel and client to those produced for the specific purpose of defending the client. The Competition Office construed this provision as covering only those documents that are produced after an investigation has been initiated. This interpretation left no protection for an item of attorney-client communication on the potential regulatory evaluation and likely consequences of market conduct or an agreement that might become the target of an investigation after the date of the communication. This narrow interpretation was reflected in a 2005 German court ruling.

This interpretation was not questioned in court for more than two years, probably because in that time the Competition Office did not seize any documents to which legal privilege might have applied. However, in 2007 the Pharmaceutical Chamber, following a dawn raid by the Competition Office on its headquarters, claimed legal privilege in respect of a set of documents previously exchanged with its outside counsel on the subject matter of the investigation. The correspondence in question set out legal advice from the outside counsel regarding the potential competition law risks triggered by the agreement under investigation, which relate to the recommended resale prices of medicines outside of the state subsidy system. The Competition Office refused the reference to legal privilege and submitted the entire documentation for the court to decide.

The court of first instance accepted the Competition Office's position and ordered the disclosure of the documents to the Competition Office; however, the documents were not forwarded to the Competition Office. The Pharmaceutical Chamber appealed against the order.

In 2008 the appellate court overturned the first instance court's order and ruled that the documentation qualified for legal privilege in its entirety. It reasoned that legal privilege applied to all attorney-client correspondence, regardless of date, if it was produced for the purpose of facilitating the client's defence against claims of potential competition law infringement.

The Competition Office filed an extraordinary supervision request with the Supreme Court, asking it to set aside the second instance ruling. The Competition Office claimed that the second instance ruling was erroneous in fact since, in the Competition Office's view, it construed legal privilege to include the right to ask for external legal advice in support of the commission of competition law infringements. The Competition Office reiterated its interpretation that legal privilege is essentially a point of procedural defence that is available only to undertakings against which a competition investigation has been initiated. On this analysis, its scope should be limited to communications exchanged after the start of an investigation.

The Supreme Court issued a final decision in December 2009.⁽²⁾ It agreed with the appellate court's ruling and rejected the Competition Office's request. It held that legal privilege may not be limited in the way that the Competition Office had claimed. However, the Supreme Court referred to the principles described in two European

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Commission cases, *Akzo Nobel Chemicals* and *Akcros Chemicals Ltd.*⁽¹⁾ in holding that legal privilege is intended to ensure that all parties can freely consult a lawyer, whose profession entails the provision of independent legal advice to all those in need of it. This principle is closely linked to the concept of the lawyer's role as one of collaborating in the administration of justice by the courts. Therefore, the Supreme Court held that all of the documentation in dispute constituted legal assistance for the purpose of the effective exercise of the rights of the defence, to which legal privilege protection must apply.

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Endnotes

(1) Joined cases T-125/03 and T-253/03.

(2) BH 2009/364.

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