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Lista M. Cannon

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COMPARATIVE APPROACHES TO THE ATTORNEY-CLIENT PRIVILEGE IN THE US, CANADA, UK & EU

Lista M. Cannon
Fulbright & Jaworski International LLP
London, England

This article summarizes the general principles of legal privilege in Europe both in the context of the civil code approach to legal privilege across the European Union ("EU") member states and as applied by the European Commission ("EC"). The main areas of discussion are as follows:

I. Legal Privilege - The General Principles

II. A Sample of the EU Member States
France, Germany, Italy, The Netherlands, Spain, Belgium and Sweden

III. The European Commission: Is there a Harmonized Rule Within the EU?
The Decision of the ECJ in AM&S
The Decision Pending in Akzo Nobel and Akcros Chemicals
The Modernisation Regulation

IV. Practical Implications: Managing the Risks and Cross-Border Disputes
EC Investigations: What is Privileged
Best Practice: Disclosure
Best Practice: Privilege and Confidentiality

I. LEGAL PRIVILEGE - THE GENERAL PRINCIPLES

At present, Europe is striving towards making a progression to common political and economic unity throughout the primary sovereign state cultures. This is reflected in the EU legal and enforcement structure of the EC, and the in-balance between Common Law and Civil Code procedures.

Legal professional privilege at the EU level, is a judicial creation. It has been established and developed by the Court of First Instance ("CFI") and the European Court of Justice ("ECJ"). However, the rules of privilege of the individual member states within the EU itself are governed by their respective codes of civil procedure.

It should be noted from the outset that most civil law jurisdictions do not impose a general obligation to disclose documents that adversely affect their cases, although narrow rules are available for specific applications in relation to specifically identified documents. While applications for specific disclosure are available in most jurisdictions, it is only in defined circumstances by way of describing a document precisely and justifying the application by indicating the facts a party believes each document will prove.

Generally, the approach of the civil law jurisdictions to lawyer privilege is one of professional secrecy and confidentiality. Such rights do not attach to documents but to a professional

status and obligation. Further, there are important distinctions with regard to in-house lawyers and communications with third parties which are discussed in more detail below. Unlike the common law jurisdictions, the communication itself is not privileged, but rather, the lawyer is under a duty not to disclose the information found within that communication.

The difficulties in asserting privilege often arise when a company circulates communications across jurisdictions, either voluntarily or as required by law. In relation to cross-border disputes and at the EC level, a litigant or company involved in a regulatory investigation may be obliged to disclose communications in one jurisdiction while benefiting from privilege in relation to the same communications in another jurisdiction. In these circumstances, communications or documents and advice on sensitive matters should be circulated with care, recognising the different rules and interpretations on privilege and confidentiality.

II. A SAMPLE OF THE EU MEMBER STATES

The following is an overview of the civil code approach to privilege across some of the EU member states. The scope of privilege in each jurisdiction is identified under their respective codes together with disclosure obligations. All information in this section is sourced from the Practical Law Company, online cross border service (www.practicallaw.com).[1]

1. France

(i) Privilege

The relationship between a lawyer (*advocat*, admitted to the local bar) and a client is protected by professional confidentiality obligations (*articles 226-13, New Criminal Code*), which prohibit a professional who is subject to a confidentiality obligation from divulging information obtained from their client (a criminal offence unlimited in time): the lawyer/client privilege.

All correspondence (oral or written) by a lawyer in relation to a matter handled on behalf of a client, between a lawyer and a client, and between a lawyer and opposing lawyers in relation to a matter, is protected by professional confidentiality.[2] Correspondence protected by professional secrecy cannot be disclosed to the Court nor transmitted to clients unless marked "*official*". Importantly, lawyer to foreign lawyer correspondence across countries is not privileged, unless subject to a separate confidentiality undertaking with the foreign lawyer. Internal communications by an in-house lawyer are not privileged.

A client cannot release their lawyer from the lawyer's obligation to keep documents confidential, but are not themselves bound by the confidentiality obligation.

(ii) Disclosure

There is no process in French civil procedure that is equivalent to documentary discovery or disclosure. Parties to civil proceedings in France generally only produce the documents that they consider to support their respective cases.

2. Germany

(i) Privilege

The relationship between a lawyer and a client is protected by a number of professional confidentiality regulations. Without the consent of the client, a lawyer is prohibited from divulging any confidential information or documents obtained in the course of their professional activities (*section 203(1), Criminal Code*). This obligation to preserve confidentiality is mirrored by provisions

1 See "*A World Tour of the Rules of Privilege*", 1 November 2006 (and updated) Resource ID: 9-205-5802.
2 Exceptions: unless there is express indication to the contrary (*articles 66-5, Law of 31 December 1971*).

which give the lawyer a right to refuse to divulge such information (*sections 383 and 142(2), Civil Procedure Code, and section 53 of the Criminal Procedure Code*).

(ii) Disclosure

There is no duty to disclose documents to the other side, other than those upon which a party intends to rely. As discussed above, only very limited means of obtaining disclosure from the court exist.

Civil Courts do not investigate facts in litigation; the production of facts is the responsibility of the parties to establish the burden of proof. The issue of privilege and obligation of confidentiality therefore does not generally arise in the minds of lawyers in German based matters.

Generally, documents entrusted to a lawyer in their professional capacity, and which remain in their possession, are protected from disclosure (*section 97, Criminal Procedure Code*).

3. Italy

(i) Privilege

There is no recognised doctrine of privilege in Italy. However, a lawyer cannot be obliged to give evidence of any information acquired by reason of their profession, including conversations and communications with their clients (*article 200, Italian Code of Criminal Procedure*). The same applies to any document in a lawyer's possession as a result of their professional activities, if they declare in writing that the document is covered by professional confidentiality (*article 256, Italian Code of Criminal Procedure*). Lawyer-client communications held at the client's premises are also generally protected from disclosure.

(ii) Disclosure

There is no formal process of disclosure. The parties are merely obliged to produce their own bundle of exhibits on which they rely, to be served on both the other side and the Court.

4. The Netherlands

(i) Privilege

Those entrusted with a duty of confidence by status or by profession (such as priests, doctors, lawyers and notaries) cannot be forced to reveal confidential information (*article 843a sub 3, Dutch Act on Procedure in Civil Matters RV and article 165 sub 2b, RV*). This right to legal privilege only relates to information revealed to lawyers in their professional capacity. The Professional Conduct Rules of the Bar forbid a lawyer from testifying to facts that were revealed to them by a client in the course of the exercise of their profession, although a client can give their lawyer permission to use specific confidential information in Court.

Correspondence between Dutch lawyers is confidential in nature and cannot be used in Court, except where the client's interests require this. However, even in such a case, the prior consent of the other part or the president of the local bar is required. Lawyer-client communications held at the client's office are protected from seizure by regulatory and other investigative bodies.

(ii) Disclosure

Dutch law does not provide for a general duty to disclose comparable to the UK or US discovery rules. However, the Dutch law of procedure does contain a limited number of specific regulations which allow the Court to order the disclosure of specific documents.

5. Spain

(i) Privilege

Lawyers (*abogados*, for whom membership of the bar is obligatory) must keep confidential all facts and matters that they come to know through the conduct of their professional obligations (*article 542, Law of Judicial Authority*). This is reinforced by the imposition on lawyers of a duty not to disclose facts and documents that have come into their possession as a result of their professional activities (*Spanish Professional Conduct Code, (June 2000) and General Statute for Spanish Lawyers*).

Clients may not release their solicitors from this duty, although they are not bound by it themselves. However, relevant documents in the client's possession continue to benefit from confidentiality and do not have to be disclosed to investigative bodies.

(ii) Disclosure

Disclosure must be made of the documents that a party intends to use to support its own case only.

6. Belgium

(i) Privilege

As is the case in The Netherlands, those entrusted with a duty of confidence by status or by profession such as lawyers, and doctors, cannot reveal confidential information except where they are called to give evidence in legal proceedings or where the law requires them to disclose the information in question (*article 458, Belgian Criminal Code, 1867*). This concept is referred to as "professional confidentiality".

Correspondence between a lawyer and client is confidential by nature. Even the client may not produce correspondence from their lawyer marked as confidential unless the lawyer consents. However, correspondence previously marked by the lawyer as non-confidential may be used in Court.

Correspondence between Belgian lawyers is also confidential in principle and cannot be used in evidence (*article 444, Judicial Code*). Some correspondence between lawyers will be classified as "*official*" and can be produced in Court. The relevant Professional Conduct Rules determine how the distinction should be made.

(ii) Disclosure

There is no formal process of disclosure. The parties are merely obliged to produce their own bundle of exhibits on which they rely, to be served on both the other side and the Court.

7. Sweden

(i) Privilege

The concept of legal professional privilege is recognised, although it is limited and depends on the identity of the lawyer.

Legal privilege is primarily an exception to the general obligation to give testimony provided by the Swedish Procedural Code (SPC). Swedish *advokats* (members of the Swedish Bar Association) and their assistants have a right to legal privilege, which protects all confidential information gained by them in the provision of legal services generally (*chapter 36, section 5, SPC*). However, legal privilege available to non-advocate trial lawyers is limited to protecting only confidential client communications entrusted to the lawyer for the purposes of the litigation.

Investigative authorities are not entitled to seize lawyer-client communications held at the client's premises. This right may be overridden where the examination is authorised by law or the client consents to the disclosure.

(ii) Disclosure

There is no concept of disclosure of documents in Swedish law, although during the preparation for trial each party must submit all documents it wishes to present as evidence. A party must also indicate what additional items of written evidence it is holding if asked by the opposing party.

III. THE EUROPEAN COMMISSION: IS THERE A HARMONIZED RULE WITHIN THE EU?

The EC is the executive arm of the EU which was created to ensure compliance with EU law. The EC rules on legal privilege (known as attorney-client privilege in the US), are in considerable contrast with those of the EU member states, resulting in an inconsistent application of legal privilege within the EU.

The EC undertakes investigations into anti-competitive practices: cartels, monopolies and intellectual property rights. Inquiries and investigations are also often in conjunction with the US Securities and Exchange Commission, US Department of Justice and other EU Agencies.

1. The Decision of the ECJ in AM&S

Neither *Articles 81 and 82 of the EC Treaty*,[3] nor any of the regulations implementing them, contain any provisions in relation to legal privilege. The principles governing legal privilege have largely been developed through the case law of the ECJ. The *AM&S*[4] case established the principle that former *Regulation 17 of the EC Treaty*,[5] which sets out the rules implementing *Articles 81 and 82*, must be interpreted as protecting the confidentiality of written communications between lawyer and client.[6]

The *AM&S* principle is subject to the following two conditions:

(i) The communications must be made for the purpose and in the interests of the client's right of defence in connection with the EC's investigation.

(ii) The communications must emanate from independent lawyers qualified to practise in a member state within the European Economic Area ("EEA"). Meaning, the privilege of in-house and non-EEA qualified lawyers is not respected.

The second condition as held in *AM&S* was broadened in the *Hilti*[7] case, where it was held that an in-house lawyer within the EU who reports an external lawyers advice can in fact claim privilege on that advice, provided they do not alter the advice (i.e. provide a summary of the advice). The ECJ's narrow interpretation of legal professional privilege in *AM&S* excludes the advice of in-house lawyers because they are not considered to be independent. Further, while some in-house lawyers are subject to professional conduct rules, the majority are not.

The position taken by the ECJ is in contrast with that of some of the EU member states, where correspondence with an in-house lawyer tends to be protected if that lawyer is a member of a professional association.[8]

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3 In the EU, competition law is regulated by Articles 81 and 82 of the EC Treaty.
4 *AM&S v Commission* [1982] ECR 1575.
5 Replaced by *Regulation 1/2003.*
6 *Regulation 17* has since been replaced by Regulation 1/2003, the Modernisation Regulation, but the position remains the same.
7 *Hilti v Commission* Case T-30/89 [1990] ECR 163.
8 Note exceptions include Member States where in-house lawyers cannot be members of the bar (e.g. France, Italy and Sweden).

EU competition law applies only where there is an effect on trade between member states and exists alongside national EU member state competition laws. However, when a competition investigation involves multiple member states, the EC will prevail. The practical effect of this is that it is possible for an in-house lawyer to be afforded privilege in a UK competition authority investigation but not to be afforded privilege if the same investigation were being carried out by the EC.

2. The Decision Pending in Akzo Nobel and Akcros Chemicals

The status of communications from in-house lawyers is currently pending before the EU's Court of First Instance ("CFI"),[9] a decision which many hope will further broaden the rule set out by the ECJ in *AM&S*.

The *Akzo Nobel* case followed a dawn raid by the Commission on Akzo Nobel, during which the company argued that certain communications, including some from in-house lawyer, should be regarded as privileged. Privilege was claimed over two sets of documents. The first envelope contained documents prepared for a competition law compliance programme and the second envelope contained drafts of the first set of documents together with correspondence between the General Manager of Akcros Chemicals and the competition law co-ordinator of Akzo Nobel.[10] The EC could not reach a definitive conclusion during the raid in relation to the privilege claimed over the first set of documents, which were subsequently placed in a sealed envelope. The EC official responsible for the investigation took the view that the second set of documents were not protected by privilege and had already taken copies and added them to the file, without placing them in a separate sealed envelope.

The question was referred to the CFI who in October 2003, prevented the EC (in an interim order) from reading the first set of documents pending the full proceedings in order to prevent serious and irreparable harm to the company. The CFI held the protection of professional privilege may also extend to written communications with a lawyer employed by an undertaking on a permanent basis. Interim relief was only granted for the first set of documents as the second set of documents were not in a sealed envelope and had already been placed on the EC's file, thus not satisfying the condition relating to urgency.

In September 2004, the ECJ overturned the decision of the CFI on the grounds the condition of "urgency" of such measures had not been satisfied. As the EC had already provisionally reviewed some of the documentation during the investigation, any harm which may result from a more detailed review of the documents was not sufficient to establish serious and irreparable harm to the company's interest.[11]

The EC considered that the President of the CFI applied a concept of professional privilege which has not been recognised and is not consistent with existing case law, in particular with *AM&S*. The EC also gave an undertaking that it would not allow third parties to have access to the first set of documents until judgment is given on the main application.

The decision by the ECJ in *Akzo Nobel* is a concern for companies involved in EC investigations. Although the EC might be prevented from explicitly relying on a document ultimately held to be privileged, its ability to review such a document during the course of its investigation has the potential to damage a party's interests.

In a positive move for companies involved in EC investigations, on 26 February 2007, the International Bar Association ("IBA") was granted leave by the CFI to intervene in the *Akzo Nobel* proceedings (Joined cases T-125/03R and T-253/03R). The CFI accepted the IBA's submissions that the case raised fundamental issues regarding the principle of legal professional privilege and held the judgment to be given in the full proceedings may significantly affect both the functioning of the

9 *Akzo Nobel and Akcros Chemicals (Akzo):* Joined cases T-125/03R and T-253/03R.
10 Akzo Nobel's competition law co-ordinator was a registered attorney in the Netherlands, a member of the Legal Department and employed by that undertaking on a permanent basis.
11 *Akzo Nobel Chemicals & Akcros Chemicals v Commission (C7/04).*

sector concerned and the interests of the IBA's members. However, as its application for leave to intervene was submitted after the expiry of the six-week period prescribed in Article 115(1) of the Rules of Procedure of the CFI, the IBA's intervention is limited to the submission of observations during the oral procedure.

The full proceedings in this case are still pending, where the issue of privilege will be raised again. Until such time, the position taken by the ECJ in AM&S remains.

3. The Modernisation Regulation

Regulation 17 of the EC Treaty as considered in *AM&S* has since been replaced by *Regulation 1/2003*, or the "Modernisation Regulation". The Modernisation Regulation has changed the implementation of *Article 81 of the EC Treaty*. While it does not affect the position of legal privilege under EC law, it does place a greater responsibility on individual national competition agencies and provides for the sharing of information between EU member states.

The Modernisation Regulation in fact permits the EC to access information from National Competition Authorities ("NCA"), through the European Competition Network ("ECN").[12] The ECN has the ability to exchange information among authorities across borders which can result in them exchanging legally privileged documents that were retrieved in a jurisdiction that does not provide privilege for an in-house lawyer, and pass that documentation to other jurisdictions that would normally not be able to view such communications.

It is important to note the distinction between the law applicable to the collection of information and the law applicable to the use of information in this context. In relation to the collection of information, under *Article 22* of the Modernisation Regulation, when an NCA conducts an investigation on its own territory on another NCA's behalf or at the EC's request, it does so under its national law.

In relation to the use of information, under *Article 12(1)* of the Modernisation Regulation, it is possible that the information collected can be received and used by the EC and the NCA even if it has been collected under rules that offer less protection to the client-lawyer communication than those of the EC or the receiving NCA. That is, the information may be used by the EC and the receiving NCA even though it could not have collected the information itself.

Notwithstanding the provisions of the Modernisation Regulation, the EC (and other regulatory authorities particularly in Financial Services) will in many cases propose a waiver of privilege and confidentiality in relation to documents and legal advice during the course of an investigation. There is no equivalent document in the EU to the US "Thompson Memorandum" and the subsequent "McNulty Memorandum".

It's therefore advisable that companies dealing within the EU must consider carefully that any communications may be subject to a wide variety of national laws and interpretations on privilege which were not contemplated when the communications came into existence.

IV. PRACTICAL IMPLICATIONS: MANAGING THE RISKS AND CROSS-BORDER DISPUTES

1. EC Investigations: What is Privileged

(a) Generally, the following communications are privileged in the context of an EC investigation:

12 Together, the National Competition Authorities ("NCA") and the EC form a network of public authorities that act in the public interest and cooperate closely in order to protect competition. The network is called the European Competition Network ("ECN"). The ECN seeks to facilitate close cooperation between national competition authorities and the EC to ensure consistent application of Article 81 and 82 of the EC Treaty.

- Between the company and an external lawyer (subject to conditions in *AM&S*).
- Preparation of internal reports by an in-house lawyer or other employee of advice received by an external lawyer (subject to conditions in *Hilti*).

(b) Generally, the following communications are not privileged in the context of an EC investigation:

- Between the company and an in-house lawyer.
- File notes prepared by in-house lawyers or other employees.
- Requests from the company or an in-house lawyer to professional advisors for information or advice, other than an external lawyer qualified to practise in the EEA.
- Preparation of internal reports by the company or an in-house lawyer of advice received by professional advisors, other than an external lawyer qualified to practise in the EEA.

2. Best Practice: Disclosure

- Understand local rules and disclosure requirements.
- Understand the consequences of transferring documents from a Civil Code country to a Common Law country - even on the basis of evaluation and review.
- Transferring documents from a Civil Code subsidiary to a Common Law subsidiary has a potential impact of disclosure.
- The reverse considerations apply: Common Law to Civil Code jurisdictions: disclosure may assist in making specific applications.

3. Best Practice: Privilege and Confidentiality

- Recognise the local/national law rules when corresponding across countries.
- Do not rely on informality: establish confidentiality wherever possible, particularly in dispute scenarios.