

Competition - Switzerland

Supreme Court Extends In-House Solicitor Privileges

February 12 2009

On October 28 2008 the Supreme Court handed down a ruling in which it extended the scope of legal professional privilege to communications between parties and their in-house solicitors in the context of competition law. The court confirmed the view, already expressed by some commentators, that the privilege extends to protect internal communications involving in-house solicitors from disclosure during competition investigations by the Federal Competition Commission, provided that such communications (i) have not been made available by the company's corporate bodies to other persons within the company, and (ii) have been subject to steps by the solicitor concerned to keep the information under his or her control. This protection applies only to communications with in-house solicitors, thus excluding lawyers who have not completed a bar exam.

In contrast, the Supreme Court refused to extend the scope of privilege to correspondence and advice from of-counsel, in the event that such correspondence is kept in the company's premises.

The power to order house searches and seizures is one of the substantial amendments of the Competition Act 2004. Under this investigative power, the secretariat of the commission conducted its first dawn raids in 2006 and 2007. However, one issue that remained to be clarified was the protection of documents subject to professional privilege during house searches. Based on precedents in criminal proceedings, the secretariat considered that privileged documents are excluded from seizure, provided that they relate to the current investigation. The secretariat was also of the opinion that in-house lawyers were not subject to lawyers' professional secrecy.

Of-counsel and their clients will no doubt be disappointed at the Supreme Court's refusal to extend the scope of legal privilege to correspondence held by the client.

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