

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Summaries of contributions****26 November 2018**

This document reproduces summaries of contributions submitted for Item 2 at the 128th Meeting of the Working Party No 3 on Co-operation and Enforcement on 26 November 2018.

More documentation related to this discussion can be found at www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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Treatment of legally privileged information in competition proceedings - Summaries of Contributions

This document contains summaries of the various written contributions received for the discussion on Treatment of legally privileged information in competition proceedings (128th Meeting of the Working Party No 3 on Co-operation and Enforcement on 26 November 2018). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia

The Australian submission focuses predominantly on the scope of legal professional privilege in Australia. It also explores the limits of international cooperation in relation to information that is either privileged or confidential.

In Australia, legal professional privilege protects communications between clients and their legal advisors if those communications were confidential and made for the dominant purpose either of giving or receiving legal advice, or for use in existing or anticipated litigation. It protects those communications from any compulsory disclosure including subpoenas, search warrants (dawn raids) and compulsory document requests from agencies like the ACCC.

Legal professional privilege in Australia generally extends to advice provided by in-house, employed and foreign lawyers. There are several exceptions to legal professional privilege, including most relevantly that privilege is not available if a client seeks legal advice in order to facilitate the commission of a crime.

A person will be deemed to have waived LPP if they act in a way that is inconsistent with the confidentiality that privilege is supposed to protect. A waiver may occur explicitly or implicitly in respect of certain issues or parts of a document, or generally. A limited waiver of privilege may also be obtained in favour of certain parties. Disputes about assertions of LPP in competition investigations may ultimately be decided by a court.

Differing privilege protection around the world has not previously posed difficulties for the ACCC when accessing documents. Generally the ACCC does not seek access to documents held by international regulators that are protected by legal professional privilege.

The ACCC is party to several international cooperation agreements with other competition regulators. These agreements can refer to statutory information gateways that enable confidential information to be shared, usually on the basis of certain conditions. The ACCC has also obtained waivers of confidentiality from companies allowing competition regulators to share information in cross-border merger reviews and cartel investigations. Confidentiality waivers and statutory information gateways complemented by relationships with high levels of trust between competition regulators can generate effective information sharing between agencies.

*BIAC**

LPP is a key element of due process that requires protection and respect by governmental bodies. It plays an important role in all competition law investigations which have always relied (and even more so today) on a large number of internal documents. LPP protects the company from an obligation to disclose their legal advice in these investigations, unless they consent to it. LPP is relevant to all forms of competition law investigations, be they criminal or civil in nature, relating to cartels, merger review or unilateral conduct.

LPP also plays an important role in fostering a culture of compliance within businesses. In recent years, compliance programmes have become more sophisticated. Most companies provide face to face training or whistleblowing hotlines. Issues are sometimes raised at those sessions or through the hotline and LPP allows lawyers (internal and external) to provide quick advice to ensure compliance or investigate the matter efficiently. This is extremely important in a world where there is a large number of competition authorities, with diverging (and sometimes inconsistent) rules.

Given the multijurisdictional nature of many business activities, business will often need to seek legal advice across a number of different jurisdictions. LPP is therefore relevant in the context of globalisation of business models, the internationalization of competition law investigations and cooperation amongst authorities. BIAC supports the recognition of LPP for legally qualified in-house lawyers.

As authorities expand their information gathering abilities through forensic software information gathering tools and request many thousands of documents, it is becoming increasingly difficult for parties to both review and assert privilege on certain documents, especially when there are very tight deadlines.

With the increase of private actions for breaches of competition law across the world, questions of discovery claims relating to documents covered by LPP and information provided to agencies will only increase. Whenever disclosure requirements increase in a specific jurisdiction, there should be a corresponding increase of protection for documents containing legal advice. Courts should consider expanding the scope of LPP in those jurisdictions where there is a very restrictive and limited application of LPP. Without an increase in protection for legal advice, a strengthened discovery process might lead to rights of defence being undermined.

EU

Although not explicitly foreseen in EU competition legislation, since long the Commission has implemented in its competition proceedings the case law of the Union courts that recognises legal professional privilege. According to this principle, certain communications between lawyer and client are regarded as confidential *vis-à-vis* the Commission, as a corollary to the exercise of the rights of defence. It thereby forms an exception to the Commission's powers of investigation. Companies may also waive their rights of protection if they consider that it would be in their interest to do so.

Protection of legally privileged information is subject to certain conditions. The communications must be made for the purposes and in the interests of the client's rights of defence in competition proceedings. Moreover, the protection only applies to communications emanating from independent lawyers entitled to practice in the EU. The case law has brought further nuances to the application of the principle. Although the case law so far only relates to antitrust proceedings, the Commission typically applies the same principles also in merger proceedings.

In the Commission's practice, issues concerning legal professional privilege come up mainly with regard to inspections and requests for information. During a Commission inspection, a mere cursory look by Commission officials at the features of a document will normally enable them to confirm the accuracy of the legal professional privilege claim of the undertaking. The Commission may impose a procedural fine on companies that refuse to provide reasoning for their claim. Special functionalities in the Commission's software also allow the Commission to exclude sets of legally privileged documents in electronic searches. The Commission applies a sealed envelope procedure in case of disagreement about the legally privileged nature of documents. This procedure avoids the risk of a breach of legal professional privilege while at the same time enabling the Commission to retain a certain control over documents.

In merger cases, legal professional privilege claims often arise in connection with requests for internal documents that the Commission sends to merging parties in complex merger investigations. In such cases, the Commission typically asks for so-called privilege logs to facilitate the provision of confidentiality claims.

Since 2011, parties may call upon the Hearing Officer to intervene when a dispute arises between the Commission and an undertaking regarding legal professional privilege claims.

Hungary

The Hungarian competition rules provide protection for communications between client and attorney and the documents produced in connection with legal advice from forced disclosure to third parties and public bodies (legal professional privilege, LPP). According to the respective legal definition, a document can only be qualified as LPP if the following three conditions are jointly fulfilled:

- First, the document must have been prepared for the purpose of defence in proceedings of a public authority.
- Second, the document must have been prepared during or for the purpose of communications between an attorney engaged in legal practice and his/her client. It is important to note that the privilege only covers communications between the client and the attorney appointed by the client itself. As of 1 January 2018, the scope of the privilege covers in-house counsels registered with the Bar Association as well.
- Third, the document has to be in the possession of the client or the client's attorney engaged in legal practice.

Items that are subject to LPP cannot be seized by the Hungarian Competition Authority, however, the seizure of electronic devices suspected to contain LPP is authorized where it is not reasonably practicable and feasible to separate the LPP material from the non-LPP material contained on the device. In this case, the undertaking subject to the proceeding is requested to make a statement if any of the documents should be qualified as a document prepared for the purpose of defence and to clearly indicate the document or the affected part thereof.

If the undertaking states that the documents include LPP, such documents shall be separated in the presence of the party affected. In case of electronic devices, the separation is prepared by using a copy enabling the separation of data.

In case of disputes on the qualification of a document as having been prepared for the purpose of defence, the dispute shall be decided by the court in a non-litigious procedure upon the request of the Hungarian Competition Authority.

Japan

In Japan, specific laws have provisions regarding protection of communication between lawyers and clients which is in lawyers' possession, on one hand, so-called legal professional privilege, which allows a client to refuse disclosure of communication with its attorney to public bodies, is not recognised as a substantive right or interest in Japanese whole legal system including the AMA, on the other hand.

While at the same time, accompanied with the expansion of the leniency programme, the treatment of legal professional privilege in the AMA is discussed separately from other laws. JFTC is now considering to take account of legal professional privilege by imposing a limitation to access of its investigators to communication between lawyers and clients.

*Latvia**

Latvian law protects the confidentiality of communications between a client and its external lawyer registered with the Bar.

Investigations and inspections are handled by Executive directorate (Directorate) of competition authority. The Directorate is separate and independent within the authority. Officials of Directorate have the powers to decide on LPP (and accept it, or not) and separate it from other collected information.

The burden to prove LPP is with the party claiming it.

Mexico (IFT)

In Mexico, there is no specific regulation regarding professional privilege before competition authorities. Nevertheless, article 73 of the Federal Law on Economic Competition (LFCE) states that the Investigative Authority of both the Federal Economic Competition Commission and the Federal Telecommunications Institute (IFT) is entitled to require any information or documents related to their investigations, through requirements and dawn raids.

This contribution presents relevant judiciary precedents and a systemic review of the standard that prevails when defining and identifying client-attorney communications that can be claimed as privileged (protected) within antitrust investigations.

For instance, Courts have deemed valid to import criminal law principles to administrative procedures when they are compatible with the circumstance or the rules applicable in the procedure stage. Thus, when the IFT is in use of the State's punitive powers it can apply criminal law principles to competition law, according to judiciary criteria. These are the grounds to determine that confidentiality of personal communications and client-attorney privilege is applicable to competition law.

There are specific circumstances under which the IFT can access privileged information and use it as evidence. These cases are mostly related to:

1. International mergers and leniency program cases, if the stakeholders willingly submit the information or if they sign waivers for that purpose;
2. Proceedings where the attorney could have aided and abetted the unlawful conduct.

In any case, the IFT has the power to determine by itself, when and in which cases it can use privileged legal information, in accordance to constitutional provisions and case law.

Norway

Information that has been confided to lawyers will be exempted from any seizure made by the Norwegian Competition Authority, related to the investigation of a possible infringement of the competition law. This exclusion covers communication taking part in relation to "genuine legal practice", which includes legal assistance and counselling. Also communication with in-house lawyers may be considered as privileged information, thus covered by the legal professional privilege. The deciding factor is whether the lawyer performs a job for the client or an employer, of such a nature that it must be regarded as services provided by a lawyer.

In this regard, the regulation in Norway differs from the regulation concerning inspections conducted by the European Commission or the EFTA Surveillance Authority. Under EU/EEA-law, communication with in-house lawyers will not be protected from seizure. The reason for this is that in-house lawyers are not considered independent of their employer to such a degree, that their role can be considered as collaborating in the administration of justice by the courts.¹ Under Norwegian law, however, court practice² illustrates that the question concerning protection from seizure depends on the role of the lawyer in relation to the information concerned, not the lawyer's dependence on the employer.

¹ C-155/79 AM & S Europe Limited v Commission of the European Communities, para. 24, T-125/03 and T-253/03 Akzo Nobel Chemicals and Akcros Chemicals v Commission para 166, and C-550/07 P.

² Rt-2000-2167, page 2172.

Russian Federation

The Federal Antimonopoly Service of the Russian Federation, in carrying out its functions, as part of conducting inspections, handling cases of violation of antimonopoly legislation, monitoring economic concentration, its own requests, receives and uses information, including information that is classified as commercial secret.

According to the Russian legislation, a commercial secret is a mode of confidentiality of information, allowing its owner to increase incomes under existing or possible circumstances, avoid unnecessary costs, maintain a position in the market of goods, works, services or obtain other commercial benefits to which third parties do not have free access on a legal basis and in respect of which commercial secret has been introduced.

The mode of commercial secret is implemented only after the owner of the information constituting a commercial secret takes measures to protect it. At the same time, information containing data that cannot be a commercial secret in accordance with the legislation (for example, information contained in applications, objections, explanations and other materials submitted at the initiative of a person participating in a case of violation of the antimonopoly legislation, written or oral form on issues arising during the consideration of the case of violation of the antimonopoly legislation).

Thus, during consideration of a case, a balance must be ensured between the interests of the persons who provided information constituting a commercial secret to the case materials and those involved in the case of violation of the antimonopoly legislations whose rights and legal interests are affected by the relevant case.

The presence in the case file of information constituting a commercial secret cannot itself constitute a basis for an unreasonable restriction of the rights of persons involved in a case of violation of the antimonopoly legislation in properly preparing and stating their own position.

The rights of persons involved in a case of violation of the antimonopoly legislation are ensured, among other things, by providing persons who have established a commercial secret mode in relation to the information they have submitted, to agree to familiarize themselves with information containing commercial secret to other persons involved in the case.

In the absence of such consent, the announcement in this meeting of information containing a commercial secret, submitted at the request of the antimonopoly body, is carried out in the absence of persons who do not have the right to familiarize themselves with materials containing a commercial secret.

South Africa

The right to legal professional privilege (i.e. legal advice privilege and litigation privilege) is a substantive rule of law and not merely a rule of evidence. Regulatory investigations and administrative procedures are not automatically considered to be adversarial from the outset and may thus not necessarily attract litigation privilege.

Legal professional privilege applies not only to practising attorneys and advocates, but also to salaried in-house legal advisors (albeit not in respect of their ordinary employment functions). The South African courts have not yet considered whether or not privilege extends to foreign qualified lawyers or non-enrolled attorneys or advocates. The extent of legal privilege in competition criminal proceedings has also not yet been determined.

Privilege must be claimed as a defence, with a rational justification. No distinction is drawn between privilege in the context of litigation, criminal investigations and investigations by the Commission. Only the client can waive privilege. The waiver can be express, implied or imputed.

It is information in a document and not the document itself that is privileged. Accordingly, privilege may be claimed in respect of hard copies and electronic data.

The Tribunal can be approached immediately after the claim to privilege has been made and the dispute is not stayed until review of the final decision in the main dispute between the parties.

The Commission is not a party to any agreements with any other competition authorities that regulate the exchange of potentially privileged information.

*Spain**

Article 24 of the Spanish constitution guarantees the confidentiality of the external lawyer-client relationship as an expression of the right to effective judicial protection. This right cannot be violated in the inspections carried out by the Spanish competition authority, the CNMC.

Under Spanish case law, legal privilege is restricted to external lawyer-client communications that could affect the right of defence of the undertaking in an investigation. The privilege does not extend to internal company lawyers.

The CNMC follows procedures in dawn raids to, first, detect whether information is privileged and, second, that this information is not seized. The inspection of the offices and computer equipment is done in the presence of the company's employees or representatives, or the external lawyers, to facilitate identifying the privileged documentation. At the request of the undertaking inspected, the names of external legal counsels and law firms of that undertaking are used as keywords in the electronic data selection process to avoid seizing potentially privileged information.

Information requests by the CNMC to the undertakings only require data and information, not legal assessments or statements about possible involvement in a conduct, and thus avoid legal privilege concerns.

Ukraine

The Antimonopoly Committee of Ukraine (hereinafter – AMCU) while considering and investigating complaints and cases of infringements of economic competition protection laws as well as in conducting inspections has the authority to require information (including limited access information) from economic entities, associations, state and municipal authorities, bodies of administrative and economic management and control, their officials and officers, other individuals and legal entities. The addressees of the AMCU information requests are obliged to submit documents, objects, explanations, other information, including with restricted access and bank secrecy, necessary for the AMCU performance of its tasks. Such an extensive authority of the AMCU in requesting restricted information is conditioned by the AMCU special status in the state executory system, including the AMCU role in shaping the competition policy.

Restricted information received by the AMCU and its regional offices in the course of exercising their powers shall be used solely for the purpose of ensuring the fulfillment of the AMCU tasks specified by the economic competition protection laws and is not subject to disclosure. Such information may be provided to the investigating authorities and the court in accordance with the law. Decisions passed as a result of consideration of complaints, cases of concerted actions or merger, shall be published on the official AMCU website within 10 working days from the day of their adoption, except for the information that is defined as the information with restricted access. Information with restricted access should be excluded or otherwise altered to ensure its sufficient protection and, on the other hand, sufficient transparency regarding the reasoning of the decision taken by the Committee.

Restrictions on access to the official information are related to the interests of national security, reputation protection and the rights of others, in order to prevent the disclosure of information received by the AMCU in a "confidential" mode, since disclosure of such information may seriously harm those interests, and a harm caused by the disclosure of such information would override the public interest in its disclosure.

When reviewing the attorney's requests, the AMCU provides the requested information, copies of documents (with exception of confidential or official information) within the existing deadlines. As for AMCU's information request to attorneys, applicable laws expressly prohibit the review, disclosure, requesting or seizure of documents related to the attorney's practice, the AMCU as well has no right to request the disclosure of the privileged attorney-client information.

In the process of merger control, while providing information with restricted access a person should clearly indicate which information has limited access (including which particular documents or parts of documents contain information of restricted access), also in doing so, the applicant must provide the justification for classifying information indicating why it should not be disclosed or otherwise made public. Information which related to commercial secrets, shall be submitted separately from the confidential information. Secondly, the restricted information received by the Committee in the process of merger control, is used by the Committee solely for the purpose of processing of applications/cases, as defined by the economic competition protection laws, and is not subject to disclosure, except for the following cases: providing information to law enforcement bodies and court in accordance with the law; non-compliance with the

requirements set out in part two of Article 6 of the Law of Ukraine "On Access to Public Information"; other cases specified in the laws.

Concerning international cooperation, the AMCU as of today is a party to 14 international agreements (mostly memorandums of understanding between competition agencies) which involve provisions regulating the exchange of information and documents (protection of potentially privileged information as well). Such provisions are usually included in separate articles or even sections of the agreements and may indicate that the exchange of information between authorities that is not of a confidential nature may be implemented with regard to improving the legislation and practice of investigating cases of violations in the field of competition.

United Kingdom

Legal professional privilege is an important feature of the United Kingdom (UK) competition enforcement regime. This contribution briefly describes the rationale for legal professional privilege in the ‘common law’ case law of the UK, summarises its general application in the UK and in UK competition enforcement, and then address international co-operation with other competition authorities.

Rationale for legal professional privilege in the UK

The protection of legal professional privilege applies in the UK as a ‘fundamental human right established in the common law’.³

Legal professional privilege derived from common law of the UK to promote the observance of the law and administration of justice. In a recent UK Supreme Court case,⁴ Lord Scott cited with approval the earlier rationale for legal professional privilege given by the then Advocate-General Slynn in *A M & S Europe Ltd v European Commission*, where after reviewing the law relating to the protection of confidences imparted to lawyers across the member states of the European Community he observed:

‘[Legal Professional Privilege] springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.’

In that same case, the UK Supreme Court also adopted the rationale given by Justice Rehnquist of the Supreme Court of the United States that the right of ‘*full and frank communication between attorneys and their clients*’, acts to ‘*promote[s] broader public interests in the observance of law and administration of justice*’.⁵ Lord Scott, further explained ‘*the principle “that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers’ legal skills ..., should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else” is founded upon “the rule of law”*’.

This rationale is consistent with the UK competition regime, which depends on businesses and individuals being well placed to analyse the effect of their own conduct under the competition rules to ensure they comply with the law; facilitated by the provision of expert legal advice, by qualified lawyers, protected where applicable by legal professional privilege.

³ *R v Special Commissioner ex p Morgan Grenfell & Co Ltd* [2003] 1 AC 563, paragraph 7;

⁴ *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1 (“Prudential”), paragraph 117.

⁵ *Upjohn Co v United States* (1981) 449 US 383, 389, quoted by Lord Scott in *Three Rivers (No.6)* [2004] UKHL 48 (“*Three Rivers (No 6)*”) at paragraph 31, and cited in the majority judgment in *Prudential*, paragraph 21.

*United States**

The United States has long recognized the attorney-client privilege alongside several other means of protecting confidential material. The privilege is grounded in the belief that to best exercise their legal rights and fulfil their legal duties, individuals must be able to confide in a legal expert who will vigorously defend their position. Absent the privilege, clients will be circumspect in what they tell their lawyers and when they tell them. Such circumspection undermines effective representation.

As the U.S. legal system favors transparency, privileges, including the attorney-client privilege, are usually narrowly applied.

The person or entity asserting the privilege bears the burden of establishing that the circumstances warrant application of the privilege.

There are four elements necessary to establish the attorney-client privilege. First, the person or entity asserting the privilege must be a client. Second, the person to whom the communication is made must be licensed as an attorney. Third, the communication must be intended to be confidential. And, fourth, the communication must be made for the purpose of seeking legal advice or representation. Responsive communications from an attorney to a client are privileged to the extent they would reveal the client's privileged communication.

The U.S. agencies will not specifically seek from parties during civil or criminal investigations information that is privileged under U.S. law. The agencies do require parties that withhold otherwise responsive materials pursuant to a claim of privilege to provide a privilege log that identifies the materials withheld and the privilege providing the basis for withholding.

The Agencies will not seek information that is privileged under U.S. law from foreign authorities through waivers or other cooperative activities. Under the agencies' Model Waiver, if parties notify the U.S. agencies of inadvertently produced privileged information, the agencies will not provide a non-U.S. competition authority with copies of such information or will request the return of such information, as appropriate. If the U.S. agencies receive information from a non-U.S. competition authority that an entity claims is privileged in the United States, the U.S. agencies will treat such information as inadvertently produced privileged information.