

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Treatment of legally privileged information in competition proceedings – Note by
Norway****26 November 2018**

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More documents 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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1. Introduction

1. Communication between client and lawyer, including documents produced in this regard, will be excluded from material seized by the Norwegian Competition Authority during inspections. This follows from the regulation of confidentiality concerning information confided to lawyers, the legal professional privilege (hereinafter the "LPP").

2. The main considerations supporting the LPP-rule concerns the need for confidentiality for a party seeking professional help and advice. The party should be able to seek such help within a relationship based on trust, and without the risk of disclosure concerning the information provided to the professional party. This is considered very important in order to provide the legal counsel with a thorough and correct factual basis, which again will be essential for the ensuing evaluation and advice from the lawyer. This will contribute to the issuing of correct legal decisions, and thus is an important guarantee for the rule of law.¹

3. Further, the protection of correspondence between a party and its lawyer is an integral part of the basic right to be assisted by a lawyer, as exemplified by Section 12 of the Public Administration Act.² The eventual protection of LPP-material and the scope of the protection will depend on the character of the information as well as the persons involved in the correspondence.

2. Legal basis

4. Under Norwegian law, the rule concerning exclusion of LPP-material follows from Section 25(3) of the Competition Act, which refers to the regulation prohibiting the use of information confided to lawyers as evidence and the prohibition of seizure concerning such material. This is regulated in Sections 119 and 204 of the Criminal Procedure Act, and the Competition Act states that these provisions "*will pertain insofar as they are relevant.*"

5. Section 119 regulates a prohibition against the use of information confided to persons in certain occupations as evidence, which covers information confided to lawyers. The provision states:

"Without the consent of the person entitled to the preservation of secrecy, the court may not receive any statement from [...] lawyers, defence counsel in criminal cases [...] about anything that has been confided to them in their official capacity.

The same applies to subordinates and assistants who in their official capacity have acquired knowledge of anything that has been confided to the persons mentioned above.

¹ Rt-2010-1638, para 33.

² "A party has the right to be assisted by a lawyer or other representative at all stages of the proceedings."

The prohibition no longer applies if the statement is needed to prevent an innocent person from being punished.

If the person who is entitled to the preservation of secrecy does not consent to the examination taking place in public, the statement shall only be communicated to the court and to the parties at a sitting in camera and subject to an order to observe a duty of secrecy."

6. Further, Section 204 states:

"Documents or anything else a witness may refuse to testify about pursuant to [section 119], and that is in the possession either of a person who can refuse to testify or of a person who has a legal interest in keeping it secret, cannot be seized. In so far as a duty to testify may be imposed in certain cases pursuant to the said provisions, a corresponding power to order seizure shall apply.

The prohibition in the first paragraph does not apply to documents or anything else that contains confidences between persons who are suspected of being accomplices to the criminal act. Nor does it prevent documents or anything else being removed from an unlawful possessor to enable them to be delivered to the person entitled thereto."

7. From this follows that the question concerning what can be considered LPP-material, and therefore excluded from seizure, will depend on whether the information has been "*confided*" to lawyers "*in their official capacity*". The delimitation of this regulation will be further discussed and illustrated by relevant cases below.

3. Scope of the privilege

3.1. Which parts of the correspondence will be confidential?

8. In Supreme Court practice, the scope of LPP-exemptions has been reviewed on the basis of what has been considered to be *genuine legal practice*. This can be illustrated by a case concerning a lawyer suspected of involvement in criminal acts, together with his clients.³

9. The Supreme Court stated that only the *genuine legal practice; legal assistance and counselling*, is subject to the prohibition in Section 119 of the Criminal Procedure Act. When it comes to instances where a lawyer is conducting real estate or wealth management services, the protection does not apply to advice given as a part of these services. However, if legal issues arise in connection with real estate or wealth management services, the lawyers legal advice in these instances will be considered as protected.

10. As mentioned above, the shield from forced disclosure covers anything that has been *confided* to a legal counsel. In principle, all information regarding legal review, including the advice given by the lawyer, will be included. This can be illustrated by a case concerning property taxation, where a municipality claimed that advice given by external lawyers were protected. In this case, the Supreme Court, with reference to previous case

³ Rt-2008-645, para. 47.

law, stated: "*It is considered to be certain law that the prohibition regarding the use of information confided to lawyers as evidence covers the lawyer's advice to clients.*"⁴

11. The protection covers information given from the client with the prerequisite of confidentiality. This includes information that is given to the lawyer concerning the legal assignment, and could also cover information given by other parties.

12. In 2016, a government-appointed committee suggested a new regulation concerning the protection of information confided to lawyers.⁵ The suggested new wording stated a prohibition against the use of evidence regarding *confidential communication* with lawyers and defense counsel in criminal cases. In the preparatory works, it is stated that this will mean a codification of previous practice.⁶

13. Further, the new regulation codifies that not only confidential communication will be protected. The protection also covers information that forms a basis for, or is closely connected to, the confidential communication. This could for example include a lawyer's documents concerning evaluations and assessments prepared as a basis for the communication with the client. And likewise; also preparatory notes from the client or others prepared as a basis for conversations with the lawyer could be covered, independently of whether the information has been received by the lawyer or not.

14. In previous court practice⁷ the Supreme Court has stated that the considerations supporting the protection of LPP-material, implies that it should not matter whether the information has reached the knowledge of the lawyer. As the scope of the protection is based on the character of the information, the same rule should apply irrespective of whether the documents have reached the lawyers knowledge or for the time being is only intended for the lawyer.

3.2. Which persons must be involved for the information to be protected?

15. The legal professional privilege covers the disclosure of information that has been confided to "*lawyers [...] in their official capacity*". It is not required that the information must have been confided in connection to the preparation of a legal defence. The provision in Section 119 of the Criminal Procedure Act includes "*defense counsel in criminal cases*", but there is in addition a general exemption from seizure regarding communication with "*lawyers*".

16. Under Norwegian law, also communication with in-house lawyers may be considered protected. This was stated by the Balder-verdict,⁸ a civil case concerning the exemption of evidence regarding information confided to an in-house lawyer.

17. The lawyer involved was employed as a counsel for an American parent company. He was not employed by the Norwegian branch of the undertaking and he did not hold a

⁴ Rt-2010-740, para. 31.

⁵ NOU 2016:24 new law on criminal procedure, Section 8-3.

⁶ NOU 2016:24, page 574.

⁷ Rt-2012-1601, para 25.

⁸ Rt-2000-2167.

Norwegian license regarding the practice of law. He had the license to act as a lawyer for several U.S. federal courts, as well as the U.S. Supreme Court.

18. The disputed document under consideration was an internal document regarding strategy, where two pages were exempted from disclosure. These pages contained legal advice written by the company's American legal in-house counsel, in cooperation with the legal in-house-counsel of the Norwegian branch.

19. In this case, the Norwegian Supreme Court stated, with regard to the exemption for the use of privileged information as evidence: *"The provision also includes foreign lawyers and lawyers employed by a company. The deciding factor must be whether the lawyer performs a job for his client or employer, of such a nature that it must be regarded as services provided by a lawyer."*

20. To support its view, the Court also referred to a previous case concerning a lawyer employed by the municipality in Oslo.⁹ The case stated that legal advice the employed lawyer had given the municipality, as a party to a case, would be protected.

21. In this regard, the regulation 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 to be independent of the employer to such a degree, that their role can be considered as collaborating in the administration of justice by the courts.¹⁰

22. Under Norwegian law, however, court practice¹¹ 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.

23. The previously mentioned Balder-case¹² also illustrates that communication with lawyers holding a foreign licence may be excluded. Also communication with junior associate lawyers not holding their own licence could be considered as privileged, and the same applies to communication with subordinates and assistants. This includes persons assisting a lawyer in such a way that access to privileged material is obtained.

24. Communication with contractual assistants, auditors, external accountants, private investigators or computer consultants, could be covered by the LPP-protection, depending on the content of the assistance and the relationship concerning the work of the lawyer. The relevant question is whether the service is provided as an independent service or as a part of the legal assignment.

25. The considerations supporting the regulation of LPP-protection implies that information that reaches the assistant in relation to the role as an assistant concerning the

⁹ Rt-1999-1248.

¹⁰ C-155/79 AM & S Europe Limited v Commission of the European Communities, paragraph 24, T-125/03 and T-253/03 Akzo Nobel Chemicals and Akcros Chemicals v Commission para 166, and C-550/07 P.

¹¹ Rt-2000-2167, page 2172.

¹² Rt-2000-2167.

legal assignment, and intended to be available for the lawyer as part of the assignment for the client, in reality must be considered as confided to the lawyer and therefore protected.¹³

26. The closer delimitation of considerations concerning "*subordinates and assistants*" could be illustrated by a case concerning competition law, the SAS Braathens case.¹⁴ In this case, SAS claimed that documents containing evaluations and reports from the consultancy RBB Economics should be removed from the seizure. The same should apply to correspondence and internal resumes from SAS that were connected to contacts with this consultancy.

27. The question was whether the economic consultancy firm could be considered as an assistant for the law firm Thommessen in a way that should lead to the exclusion of the disputed material. In the view of the Court, the tasks of the assistant would have to be derived from the lawyer's assignment in such a way that it could be considered as an integral part of the lawyer's assignment in order to be regarded as LPP-material. In conclusion, RBB Economics did not hold such a role, they provided an independent service, and the disputed material could therefore not be exempted as LPP.

4. Exclusion of LPP from electronic copies seized during inspections

28. In principle, any paper documents seized will be assessed on site, in such a way that possible LPP-material will be excluded from the seizure. However, in competition law investigations today, the Norwegian Competition Authority experiences that material seized during inspections for the main part consists of electronically stored data.

29. The seized electronic material can consist of several different e-mail accounts, as well as files and folders from home areas and public areas. This is secured in such a way that the chain of custody is safeguarded. In order to facilitate the process concerning searches and exclusion of LPP, the seized material is prepared through an indexation process.

30. As a basis for the LPP-process, the undertaking will be asked to provide a complete list of the lawyers that have been giving legal advice to the company, where LPP potentially could be a part of the seized material. The Authority takes the initiative to ask for such a list, irrespective of whether the company is asserting the legal professional privilege or not. The Authority will in this regard, by its own measures, take steps to exclude documents subject to confidentiality.

31. The list provided by the company should include the full name of all lawyers potentially involved in LPP-material, as well as e-mail-addresses and names of the law firms used. Based on this, a search is conducted in order to exclude all potential communication with lawyers.

32. The basic search is based on the names of lawyers provided by the company. However, on top of this, further searches are conducted in order to run a quality assurance of the process. This might include searching for headers from major law firms, even firms that were not included in the list originally provided by the company.

¹³ Rt-2006-1071, para. 29.

¹⁴ RG-2005-449.

33. After the initial searches, the Competition Authority will engage in further dialogue with the company based on the results. If the results are too extensive, the Authority will request further information from the company, in order to narrow down the number of hits presumed to be false positives.

34. What will be considered a too extensive number of hits, may vary with different parts of the seized material. For a person who to a large extent has been involved in legal processes on behalf of the company, a greater extent of LPP-material can be accepted than for a person where such involvement and legal advice is not a part of this person's general tasks. In principle, an amount of LPP-material exceeding an unacceptable percentage, will invoke further control.

35. From this follows, that the process of excluding LPP-material in principle is an automated process, but if the process leads to a very extensive exclusion further quality checks are conducted.

36. When the process of excluding LPP-material is fulfilled in a satisfactory way, with an excluded extent of material that is acceptable, there will be a procedure of opening the seizure in order for the case handlers to start reviewing the material. In this regard, the undertaking is invited to have a representative present. This follows from Section 25(4) of the Competition Act, which states:

"The controllee shall receive a copy of all electronic material which has been seized. When the Competition Authority initiates the investigation of the electronic material, the controllee, or its representative, has the right to be present to clarify whether the material contains evidence which is privileged under Sections 117 to 120 of the Criminal Procedure Act.[...]"

37. The preparatory works¹⁵ clarifies that the purpose of the provision is to facilitate a process where the undertaking or its representative can review the seized material together with the Competition Authority in order to clarify whether it contains documents subject to confidentiality.

38. When the Authority initiates the procedure of reviewing the seizure, the undertaking has the right to be present and to suggest searches in order to verify that all LPP-material has been excluded.

39. Instead of being present during the opening procedure, the undertaking may on its own review its copy of the seized material and submit a list identifying the documents that should be excluded due to confidentiality. The undertaking may also choose to submit such a list, in addition to being present during the opening of the seized material.

40. Further, Section 12 of the regulation on inspections and duty to provide information states that: "The right to be present when the Competition Authority initiates the investigation of the electronic material does not prevent the Competition Authority from making the technical preparations necessary in order for the electronic material to be investigated."

41. If the undertaking chooses to be present during the opening procedure, the representative (normally a lawyer) will receive thorough information about how the search and exclusion procedure has been conducted.

¹⁵ Prop. 75 L (2012-2013), page 150.

42. Further, the representative will be able to review the seizure, and suggest further quality checks that can be conducted while the representative is observing. When the representative is assured that LPP-material is removed in a satisfactory way, the seized material will be opened and the review process can begin.

43. If the undertaking, after the opening of the seizure, discovers indicators of possible LPP-material that has not been reported and excluded, they will still have the possibility to supplement the list of lawyers or other indicators of LPP-material. In such instances, the Authority will search for possible LPP-material related to the new names on the list, and make sure that also privileged information related to these persons will be excluded.

44. In the instances where case handlers during their searches find LPP-material that has not already been excluded, this will be marked as LPP and excluded afterwards.

45. If these new discoveries give any indication that there could be more LPP-material that has not been properly excluded, the search process of the case handlers will be temporarily terminated, until further searches and exclusion of LPP-material is completed.

5. Disagreement concerning the scope of LPP-material – the legal review procedure

46. What happens if the Competition Authority and the company does not agree with regard to the extent of LPP-material that can be excluded from the seizure?

47. This is regulated in Section 25(4) of the Competition Act, last sentence, which states: *"If the controllee and the Competition Authority does not agree as to which information is privileged under Sections 117 to 120 of the Criminal Procedure Act, this matter shall be settled by the District Court."*

48. The NMD-case¹⁶ is an example of a case that concerns the right to maintain the seized material. In this case, the Borgarting Court of Appeals stated: *"If a claim regarding LPP would imply that the court had to review all the seized material, this would mean a significant barrier to effective enforcement of the Competition Act."*

49. Further, the Court found that preferably, the company itself would be able to sort out the documents presumed to contain LPP-material, and provide a list of documents claimed to be excluded. The Competition Authority could subsequently review the list. In case of further disagreement, the documents could be printed and submitted to the Court, without the Authority having access to the content. If exclusion of the documents from the storage medium was not possible, the Court could order the Competition Authority not to review the material that the Court had stated to be protected.

50. Another example concerns a case regarding seizure of electronic information in the course of an investigation against a lawyer suspected of financial crime. The case was investigated by the National Authority for Investigation and Prosecution of Economic and Environmental Crime ("Økokrim"). In this case, the Supreme Court held that the considerations underlying confidentiality indicate that the assessment should be conducted by the court, not the prosecutor. If the conflicted documents were stored together with other

¹⁶ RG-2004-799.

documents not protected by the seizure ban, all of the material should in principle be sent to the court for an assessment.¹⁷

51. The question concerning the legal review procedure is further elaborated on by the Supreme Court in a more recent case.¹⁸ This case involved a seizure of comprehensive e-mail correspondence, where the party claimed that all LPP-material generally should be excluded from the seizure.

52. The Supreme Court concluded that the defendant had to be able to confine the request to specific parts of the data seizure, if these were reasonably clear and simple to extract. The Court pointed out that the obligation to hand the seizure over to the court, without any review and sorting of documents in advance, should be limited to cases where the seizure had been carried out at the premises of a law firm.¹⁹

53. This Supreme Court practice is further confirmed in a later case²⁰ related to a tax audit, where the Tax Authorities required access in order to conduct an inspection, of a part of the taxpayer's electronic records that the taxpayer claimed contained LPP-material.

54. The Supreme Court concluded that the Tax Authorities were allowed to conduct an inspection of the taxpayer's electronic files, as long as this was considered relevant for the tax assessment. However, documents assumed to contain LPP-material should be excluded from the inspection without further review. In the specific assessment, the Court placed emphasis on the fact that the relevant documents were selected according to search criteria based on sound discretion. Further, the Supreme Court underlined the importance of effective safeguards against abuse, and due process protection that satisfied the requirements under ECHR Article 8.

6. Final remarks

55. Today, most cases in which there is a disagreement between the undertaking and the Competition Authority concerning the extent of privileged information, will in practice be solved before the case reaches the court. This is good news for the effectiveness of the competition investigation processes.

56. However, the process of identifying and excluding privileged information demands resources. This process may be further delayed in cases where the seizure contains a large amount of possible LPP-material. Particular complex issues could arise in cases involving in-house legal counsel, where further assessment may be needed in order to clarify whether the communication is related to genuine legal practice.

57. If the results of the initial searches related to names of lawyers are too extensive, this indicates that a significant degree of the material may be presumed to be false positives, in other words; not privileged material. The company will then be asked to provide more information, in order to make a more accurate assessment.

¹⁷ Rt-2011-296, para 43-44.

¹⁸ HR-2017-111.

¹⁹ HR-2017-111, para 41.

²⁰ HR-2017-467.

58. A qualitative and thorough review of every document reported as possible LPP-material could be very resource demanding, and lead to a significant delay of the investigation process. But if the Competition Authority and the company does not agree on the extent of privileged information to be excluded, this may be the final option.