

**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
the United Kingdom****26 November 2018**

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www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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United Kingdom

1. Introduction

1. 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.

2. Rationale for legal professional privilege in the UK

2. The protection of legal professional privilege applies in the UK as a ‘*fundamental human right established in the common law*’.¹

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,² 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.’

4. 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*’.³ 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”*’.

5. 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

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

² *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1 (“Prudential”), paragraph 117.

³ *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.

of expert legal advice, by qualified lawyers, protected where applicable by legal professional privilege.

3. Legal professional privilege in the UK – an overview

6. As a principle derived from the ‘common law’, there is no single definition of legal professional privilege enshrined in UK legislation, with the principles emerging from the case law of the courts.

7. The law on legal professional privilege is broadly similar in England and Wales, Scotland, and Northern Ireland, the constituent legal jurisdictions of the UK.⁴

8. As a matter of law, there is ‘*a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege*’⁵ but it is common practise to describe the ‘two sub-heads’ separately, which the below summary does.⁶

1. **litigation privilege**, applies to any confidential document, not only a document passing between client and lawyer, provided that it has been brought into existence for the sole or dominant⁷ purpose of litigation.⁸ For the purpose of legal professional privilege, litigation includes contemplated litigation,⁹ but it is limited to adversarial proceedings, and thus does not include an inquiry or inquest.¹⁰
2. **legal advice privilege**, applies to any confidential communication between client and lawyer for the sole or dominant¹¹ purpose of obtaining or giving legal advice, even where no proceedings are contemplated.¹² It applies to advice relating to the

⁴ *Prudential* 102-113, see also *Narden Services Ltd v Inverness Retail and Business Park Ltd & ors* [2008], paragraph 11. *Greenough v Gaskell* (1833) 1 My & K 98, in which Lord Brougham LC reviewed the English case law going back to the late eighteenth century, is generally regarded as the foundation of the modern law in this area and was accepted as reflective of Scots law by the Court of Session in *McCowan v Wright* (1852) 15 D 229.

⁵ *Three Rivers* (No.6), paragraph 105.

⁶ Summary from ‘*The scope and role of the Legal Professional Privilege and its proper place in the context of corporate internal investigations*’ an extra-judicial speech by Lord Neuberger, the then President of the UK Supreme Court, given on the 9 March 2016.

⁷ *Waugh v British Railways Board* [1980] AC 521, 530.

⁸ *Three Rivers* (No. 6), paragraph 27.

⁹ *ibid*

¹⁰ *Re L (A Minor)(Police Investigation: Privilege)* [1997] 1 AC 16, and the Court of Appeal in *Three Rivers District Council v. Bank of England (No 5)* [2004] QB 916, paragraph 2. The UK’s Competition Appeal Tribunal in *obiter* comments in its judgment in *Tesco v OFT* [2012] CAT 6, held that Tesco’s lawyer’s communications with third parties (potential witnesses of fact) in that case were covered by litigation privilege, as by that point in those proceedings the engagement between the parties was sufficiently confrontational as to be adversarial in nature.

¹¹ *The Sagheera* [1997] 1 Lloyd’s Rep 160, also *Three Rivers* (No 5) at paragraph 28 and at paragraphs 32ff.

¹² *Three Rivers* (No 6) paragraphs 29-35, disagreeing with the Court of Appeal; and *Prudential*, paragraph 120.

presentation of the client's case at an inquiry¹³ and any other 'advice as to what should prudently and sensibly be done in the relevant legal context'.¹⁴

3.1. Who is a lawyer for the purpose of legal advice privilege?

9. In the UK legal advice privilege is restricted to advice given by 'qualified lawyers', but that term can include a wide body of UK and non-UK professionals employed in a variety of contexts.

10. UK 'qualified lawyer' would include:

1. in England (sometimes only for limited purposes) a:

- solicitor (England and Wales),
- barrister (England and Wales),
- chartered legal executive,
- registered immigration adviser,
- authorised law costs draftsmen,
- licensed conveyancer,
- notary,
- trade mark attorney, and
- patent attorney;

2. in Scotland a:

- solicitor (Scottish), and
- an advocate (Scottish),

3. Northern Ireland a:

- solicitor (Northern Ireland), and
- barrister (Northern Ireland).

11. In the UK, for the purpose of the scope of legal professional privilege, 'qualified lawyer'¹⁵ is not limited to those in 'private practice' and would also include 'in-house' or 'employed' lawyers.¹⁶

¹³ *Three Rivers (No 6)*, paragraph 37.

¹⁴ *Ibid*, paragraph 38, citing Taylor LJ in *Balabel v Air India* [1988] 1 Ch 317, 330.

¹⁵ *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102, 129, cited with approval in *Prudential* paragraph 124.

¹⁶ This contribution sets out how legal advice privilege is treated by the law of the UK. It does not address the law of the European Union. It is worth noting that the European Commission currently has concurrent jurisdiction to enforce the TFEU in the United Kingdom and that EU law differs, in particular on the status of in-house lawyers and legal professional privilege. See in particular *Australian Mining & Smelting Europe Ltd v Commission of the European Communities* EU:C:1982:157 and in *Akzo Nobel Chemicals Ltd v Commission of the European Communities*

12. Legal professional privilege extends to the clients of non-UK qualified lawyers.¹⁷
13. Although there is legislation permitting it in England and Wales,¹⁸ the UK has not extended legal advice privilege to non-lawyers.
14. In the recent *Prudential* case referred to above, the Supreme Court considered whether legal advice privilege should be extended to accountants giving tax advice. Extending legal advice privilege to non-lawyers was rejected by a majority of the Court. Whilst as a matter of principle, the majority considered it would be appropriate to extend legal professional privilege to other professionals giving legal advice, for example qualified accountants on tax law, the court concluded that in the UK's constitutional order such a change was more appropriately left to Parliament rather than for determination by judges at common law.

3.2. Who is 'the client' for the purpose of legal professional privilege?

15. Where the client is an individual natural person the position on who is the 'client' is relatively clear.¹⁹
16. On the other hand, where the client is a legal person, such as a company, the analysis can be more complex. In the UK, as the law currently stands, not every employee or officer of a company will be 'the client' for the purpose of attracting legal advice privilege when communicating with the company's in-house or external lawyers.²⁰ The answer on 'who is the client' will turn on the relevant facts, but it is likely the 'client' will

EU:C:2010:512, where the position is *inter alia* parties to antitrust investigations by the European Commission into possible breaches of Article 101 and 102 of the TFEU cannot claim privilege for communications with in-house lawyers.

¹⁷ *Lawrence v Campbell* (1859) 4 Drew 485 (Sir Richard Kindersley V-C), and was approved and applied in *Macfarlan v Rolt* (1872) LR 14 Eq 580 (Sir John Wickens V-C), *In re Duncan, decd* [1968] P 306 (Ormrod J), and *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529, 536 (Templeman LJ), cited with approval in *Prudential* paragraph 124. It is beyond the scope of this contribution to address the point in detail, but it is the general (although displaceable) practice of the UK courts to assess such a claim for privilege as if the respective UK law of privilege applied to that lawyer (*lex fori*), rather than to engage in an analysis of the law of privilege of the jurisdiction of the lawyer in question (for example see *Re the RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), and authorities and texts cited).

¹⁸ For completeness in January 2018, the Legal Services Board of England and Wales, granted the application of the Association of Chartered Certified Accountants (ACCA) to introduce regulatory arrangements for probate activities (administering the estate of a deceased person).

¹⁹ Although the situation can be complicated, for example where a lawyer is instructed by a legal person, for example a company, and express provision is not made as to whether the lawyer also acts for the company's officers and employees in an individual capacity, see *Health and Safety Executive v Jukes* [2018] EWCA Crim 176.

²⁰ The leading case in this area (in England and Wales) concerns the Bank of England, *Three Rivers (No.5)* [2003] Q.B. 1556; where the Court of Appeal held that the relevant communications were not privileged, because a particular internal unit of the bank was 'the client', rather than the bank's employees at large. The Court of Appeal recently confirmed the case '*decided that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client*' (*SFO v ENRC* [2018] EWCA Civ 2006, ("ENRC") paragraph 123).

comprise those (potentially limited) individuals who are actually charged with obtaining legal advice and who directly communicate with the lawyer. This might be members of senior management, or for example could be an ad hoc group, such as a group formed to address a particular issue. As identified below, if adversarial litigation is not reasonably in prospect such as to trigger the wider applicability of litigation privilege, it may often be the case that those employees of a company with direct knowledge of the facts or matters in issue will not fall within the concept of 'client' for legal advice privilege to apply.²¹

3.3. Waiver of legal professional privilege

17. Privilege can be waived (or lost) by the client or those acting on its behalf, for example, by the client's lawyer making disclosure on express or implied authority.

18. This can be done expressly by consenting to the use of privileged material by another party or choosing to disclose the information to the other party in circumstances which imply consent to its use. Such a waiver may be either general or limited in scope (see below).

19. The other principle route is by collateral waiver; where a party waives privilege by deliberately deploying material in proceedings, the party also loses the right to assert privilege in relation to other privileged material relating to the same subject matter.²² The underlying principle is one of fairness to prevent 'cherry picking'.²³

20. Where a party (including a competition authority) is provided with privileged material, the receiving party is in principle free to use such material. However, a court in the UK considering the admissibility of such material may decide it is not in the interest of justice to permit the admission of the material.²⁴

21. In the UK it is in principle possible to make a partial or limited waiver of legal professional privilege, for example to a regulator or law enforcement body, whilst continuing to assert privilege 'against the world'.²⁵ That position applies to both disclosure

²¹ Whether interviews with particular employees of a company by its lawyers as part of an internal investigation are covered by legal professional privilege is ultimately always a fact specific question. Annex C to OFT1495 the leniency guidance, *Conducting internal investigation before a leniency application*, provides guidance on the conduct of internal investigations, and sets out the steps and precautions the OFT expects applicants to take, including with respect to interviewing witnesses, and keeping a record of the investigative steps taken if a party is considering applying for leniency.

²² *Great Atlantic Insurance Co. v Home Insurance Co.* [1981] 1 W.L.R. 529.

²³ For example see *Brennan v Sunderland City Council* [2009] I.C.R. 479, 483–4 at [16].

²⁴ An example, founded at common law, is where disclosure to the other party was an 'obvious mistake', for example as part of a disclosure exercise the party inadvertently included a privileged document, the receiving party may not be granted permission to use such material in proceedings, see *Rawlinson and Hunter Trustees S.A. & ors v Director of the Serious Fraud Office* [2014] EWCA Civ 1129, for a fuller description of the state of the law in England and Wales where this process is now largely codified within the civil procedure rules (*CPR 31.20*). Similar rules in the Competition Appeal Tribunal can be found at rule 65, *Restriction on use of a privileged document inspection of which has been inadvertently allowed*, Competition Appeal Tribunal Rules 2015 (SI 2015/1648).

²⁵ In the UK it is also possible for a client to share material protected by legal professional privilege on a

to a UK body or one in a foreign jurisdiction.²⁶ The extent to which legal professional privilege can continue to be asserted against third parties following a purported partial or limited waiver is a fact specific question.

4. Legal professional privilege in UK competition enforcement

22. The UK's principal civil competition law statutes the Competition Act 1998 and the Enterprise Act 2002, follow the approach set out at common law as described above, and make express provision that the CMA cannot require the production of material which 'would be protected from disclosure on grounds of legal professional privilege' before a court.²⁷

4.1. Testing claims of privilege

23. The CMA has set out in its guidance how it treats claims of privilege in civil competition inspections:

If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, a CMA officer may request that the communications are placed in a sealed envelope or package. The officer will then discuss the arrangements for the safe-keeping of these items by the

common interest privilege or joint interest privilege basis whilst still retaining privilege in the material against third parties, this detailed sub-set of legal professional privilege is not covered in this contribution.

²⁶ A recent example can be found in the partial disclosure the Royal Bank of Scotland (RBS) made to the US Department of Justice (and other international regulators). The High Court (of England and Wales) held that such 'limit waiver' permitted RBS, in principle, to continue to assert legal professional privilege, *PAG v RBS* [2015] EWHC 1557 (Ch), [102]-[113] and case law therein. In the UK, although it may be pragmatic to do so, such partial waivers do not, in principle, have to be expressly reduced to writing as a 'non-waiver agreement' as was done with the US enforcement bodies in the RBS situation to be valid, see *Gotha City v Sotheby's* [1998] 1 WLR 114. It is a precondition of a claim to privilege that the documents in question are confidential. If a document enters the public domain, it ceases to be confidential and no claim for privilege can be maintained. For an example, see the *RBS* case referred to above in respect of material which had entered the public domain.

²⁷ See section 30 of the Competition Act 1998 in respect of civil anti-trust investigations. Similar provision is made in respect of mergers, see s.109 of the Enterprise Act 2002, '(7) No person shall be required ... (a) to give any evidence or produce any documents which he could not be compelled to give or produce in civil proceedings before the court; or (b) to supply any information which he could not be compelled to supply in evidence in such proceedings.' and section 196 in respect of the cartel offence. The Acts make provision to cover the respective courts of the UK's constituent jurisdictions.

4.2. CMA pending resolution of the dispute.²⁸

24. The procedure for the treatment of legally privileged communications is also set out in the explanatory note which is served alongside the warrant on the occupier or person in charge of the premises subject to the warrant:²⁹

If you consider that a document or information is privileged, you should provide the named officer or other officer [or other person] with material of such a nature as to demonstrate to his satisfaction that the document or information, or parts of it, for which privilege is claimed, fulfil the conditions for it being privileged.

If you fail to do so, you should gather together the items for which privilege is claimed. These items will not be examined or copied unless you reach an agreement with the named officer that they may be examined or copied. If no agreement is reached on the day of the inspection, the named officer will request that you make a copy of the items and place this in a sealed envelope or package in his presence. The named officer will then discuss with you appropriate arrangements for the safe-keeping of these items pending resolution of the issue of privilege. For example, such arrangements may include a request that your legal adviser should give (or if no legal adviser is present, that you give), a written undertaking that the envelope or package will be retained safely and that its contents will not be concealed, removed, tampered with or destroyed until the issue of privilege is resolved.

25. The CMA's published leniency guidance provides that the CMA will not as a condition of leniency require waivers of legal professional privilege in either civil or criminal cartel investigations.³⁰ It describes in paragraph 3.15 to 3.23 the independent counsel process the CMA adopts to determine claims of legal professional privilege in respect of relevant material that the leniency applicant would otherwise be required to provide as part of their leniency applications. This provides that except where it is clear the material is protected by legal professional privilege (LPP), the CMA:

... will ordinarily require a review of any relevant information in respect of which LPP is claimed, by an independent counsel (IC) selected, instructed and funded on

²⁸ The appropriate internal approach to handling such material and to identify material that might be subject to legal professional privilege has been recently considered by the courts, for example in England and Wales in an allied context see *R. (on the application of McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin).

²⁹ Civil Procedure Rules, Practice Direction, Application for a warrant under the Competition Act 1998.

³⁰ The CMA's predecessor the OFT published this guidance following a public consultation, and in particular a 'supplementary consultation on legal professional privilege waivers and leniency applications' in October 2012 mainly related to the cartel offence. Footnote 30 of the guidance, provides 'The OFT does not rule out inquiring as to whether a leniency applicant may be prepared to waive LPP over certain material during the course of a possible criminal cartel prosecution. In such circumstances, it will be made clear that any refusal to waive LPP will not have any adverse consequences for the leniency application and furthermore, that granting such a waiver will not yield any additional leniency discount or any other advantage to the leniency applicant. Any such inquiry would be made for the purposes of clarity in a possible criminal cartel prosecution, so that the defence and the court can know as early as possible the leniency applicant's position with respect to LPP material.'

a case by case basis by the [CMA]. An IC in such a situation will be instructed by the [CMA] to provide an independent opinion to the [CMA] on whether the relevant information in question is protected by LPP.

26. A dispute on whether a document is protected by legal professional privilege can ultimately be referred to a court of the competent jurisdiction for determination. Taking the example of England and Wales, in the civil context, that would be done through a ‘Part 8’ claim which is a procedural mechanism for the Court to determine a point of law.³¹

4.3. Competition compliance programmes and internal competition audits

27. The OECD call for contributions identified that an area of particular interest was the treatment of communications in the context of ‘competition compliance programmes’ and ‘internal competition audits’.

28. As set out above, what material is within the scope of legal professional privilege is inherently a fact specific question, and much will depend on how the material comes into existence and to whom it is disseminated.

29. In principle, legal advice regarding a competition law compliance programme, and certain outputs from that work, could benefit from legal advice privilege.

30. Where a business commissions a competition audit, say after becoming aware of a potential competition law concern, and legal advice is obtained on a potential breach certain outputs from that work, notably the legal advice and the instructions to the lawyers, could in principle benefit from legal professional privilege. Pre-existing material that may be reviewed by the company’s lawyers as part of its compliance audit or advice will not typically be covered by legal professional privilege, however.³²

5. International co-operation with other competition authorities

31. With increasing globalisation, close and continuous co-operation between competition authorities across the world is more crucial than ever in ensuring the effective enforcement of competition law. The CMA (and its predecessors, the Office of Fair Trading and Competition Commission) has a long history of co-ordination and co-operation with

³¹ A recent example in an allied context is the *ENRC* case referred to above. See also the CMA’s leniency guidance which makes clear the CMA would expect material over which there is a dispute over its status to be produced for determination by the court (paragraph 3.23).

³² The issue of at what point litigation privilege may arise in an internal investigation, was considered earlier this year in England and Wales by the Court of Appeal in a criminal context, in *ENRC*. The Court of Appeal again made clear that the question of whether legal professional privilege applied turned on the facts of the case; whether or not litigation privilege is applicable in an internal investigation will be fact-specific. In that case interviews conducted with ENRC’s employees were protected by litigation privilege as an adversarial criminal prosecution was reasonably in prospect, and certain of the documents and interviews were brought into being for the purpose of expected litigation and were, therefore, covered by litigation privilege, paragraphs 120-122. As set out in footnote 10, the point at which litigation privilege may become available in an anti-trust inquiry was considered in *Tesco*, which identified on those facts the engagement between the parties at the end of the administrative inquiry was sufficiently confrontational as to be adversarial in nature.

competition authorities internationally and recognises the importance of building and maintaining close working relationships throughout partner organisations.

32. The CMA is an active member of the European Competition Network and has strong working relationships with other EU national competition authorities and the European Commission. The CMA will adapt to address changes in the legal regime flowing from the UK's exit from the European Union, and will work to ensure continued cross-border co-ordination and co-operation with other authorities, including its counterparts in EU Member States

33. The CMA is also an active participant in the work of the OECD and the International Competition Network, both of which play a key role in the building and maintenance of close, trusting working relationships amongst competition authorities internationally, in mutual learning and assistance, and in the promotion of best practice.

34. The CMA has not encountered significant issues accessing or sharing material protected by legal professional privileged as part of international co-operation. However, the CMA notes that is likely to be driven in large part by the fact the CMA would not routinely expect to be in possession of, or be seeking to receive, material protected legal professional privilege.