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Treatment of Legally Privileged Information in Competition Proceedings

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The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

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**

Almost all OECD Members recognise legal professional privilege in competition proceedings, i.e. protect confidential communications between clients and their legal advisors from forced disclosure to domestic or foreign public bodies and third parties. The scope and coverage of legal privilege vary among jurisdictions. The level of protection depends on each particular jurisdiction's legal culture and history, and involves striking a balance between two competing policy objectives: on the one hand, the public interest in the effectiveness of antitrust investigations and decisions, and, on the other, the parties' rights of defence, legal representation and unconstrained access to legal advice.

Legal privilege limits competition authorities' investigative powers: information requests and dawn raids should exclude privileged materials. If a document used in an enforcement decision is privileged, this decision would be appealable before the courts in accordance with that jurisdiction's review system and standard of review, and may be set aside.

Given that the actions of a competition authority may affect firms outside its borders, some level of convergence of jurisdictions' approach to privilege may be desirable, both to ensure fairness to the investigated firms and maintain their ability to seek legal advice effectively, as well as to avoid frictions among enforcement systems.

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1. Introduction

1. Legal professional privilege refers to the protection of confidential communications between clients and their legal advisors from forced disclosure to domestic or foreign public bodies and third parties.
2. The scope of legal privilege depends on the applicable law and local practices. Legal privilege may cover only communications and material related to enforcement proceedings and/ or litigation, and clients' legal representation in them. In some jurisdictions, legal professional privilege may also extend to communications and material related to requesting and giving any legal advice, i.e. the legal advice does not necessarily need to be related to a specific enforcement or judicial proceeding. In all cases, the protected information needs to have been exchanged in confidence: confidentiality may not by itself be sufficient to attract the privilege, but it is always a condition to invoke it. The confidentiality refers to the attorney-client relationship and communications, and their protection from disclosure, and not to the nature of information exchanged. Legal privilege does not, therefore, refer to the protection of confidential business information, like business or trade secrets or other sensitive information – though such matters may be part of the attorney-client communications.
3. 34 out of 36 OECD Members recognise the concept of legal professional privilege, and protect, to a greater or lesser extent, the confidentiality of the relationship between a client and its attorney¹. Where recognised, legal professional privilege applies across the national legal order and is not limited to competition enforcement. The rest of this paper will refer to legal professional privilege in competition cases only, and will use the terms legal professional privilege, legal privilege and privilege interchangeably.
4. In October 2011, the OECD Competition Committee's Working Party 3 on Co-operation and Enforcement (WP3) held a roundtable on the *Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency* (OECD, 2011^[1]). That roundtable briefly looked at procedures for invoking legal professional privilege in antitrust investigations and resolving disputes regarding the delimitation of the privilege. Otherwise, the Competition Committee and WP3 have not examined the topic.
5. This paper is structured as follows. Section 2 gives a brief overview of the foundations of legal privilege. Section 3 examines the personal ("who") and material ("what") scope of legal privilege, and how it can be lost or waived. Section 4 looks at the implications of legal privilege for competition authorities' information requests and inspections. It also gives an overview of privilege claims by clients, and their assessment. Section 5 looks at the ways and implications of sharing potentially privileged information. Section 6 concludes.

2. Overview

6. The scope and conditions of legal privilege, the type of material and advice it concerns, the persons it covers, and how it can be claimed or lost, vary among jurisdictions that recognise legal privilege. The level of protection depends on each particular jurisdiction's legal culture and history, and involves striking a balance between two competing policy objectives.

7. On the one hand, the public interest in the effectiveness of antitrust investigations and decisions requires that competition authorities and prosecuting bodies have access to all information that will allow them to investigate, establish and adequately prove breaches of the law. Recent discussions on legal privilege in Japan (where legal privilege is currently not recognised in competition proceedings) turned on the need to protect the effectiveness of investigations, and not obstruct the Japan Fair Trade Commission's fact-finding powers (Kameoka and Marquis, 2017^[2]). Access to information and evidence is also required so that third parties, for example victims of anticompetitive conduct, are able to take legal action seeking to stop an unlawful act and/ or requesting harm to be compensated.

8. On the other hand, the rights of defence, legal representation and/or access to legal advice call for keeping attorney-client communications confidential. Free access to a lawyer requires that clients are in a position to consult their attorneys without limitations, disclose all the facts and ask all the questions, without fear that these communications may be disclosed and used against them.

9. Several OECD Members, in particular common law jurisdictions like Australia, Canada, Ireland, New Zealand, the UK, and the U.S., base the right to privilege precisely on the right to consult a lawyer in confidence and the need to protect the unconstrained relationship between attorney and client. These jurisdictions recognise a broad concept of legal privilege (i.e. covering all legal advice). European Union ("EU") case law also recognises that *"confidentiality serves the requirements, the importance of which is recognized in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it"*. In some of the EU Member States *"the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law"*. In others, *"the same protection is justified by the more specific requirement (which, moreover, is also recognized in the first-mentioned states) that the rights of the defence must be respected"*.² Under the European Convention of Human Rights, the right to privilege is an emanation of the right to privacy (article 8 of the Convention on right to respect private and family life, home and correspondence), and a component of the right to fair trial (article 6 of the Convention) (Nazzini, 2016^[3]). The links of the right to privilege with overarching legal principles like the rule of law, and fundamental human rights like privacy and the rights of defence, mean that the right is usually absolute and can only be limited exceptionally, in accordance with the law (Section 3.4).

10. Privilege protection is a right that belongs to the client, not the lawyer. In all OECD Members, lawyers have a professional obligation, subject to very limited exceptions, to protect the confidentiality of their communications with their clients. This duty of professional secrecy obliges lawyers to resist disclosure of such communications (unless legally compelled to do so), and prevents the inspection of their offices and seizure of documents belonging to them. However, in jurisdictions where confidentiality is only recognised as a lawyers' duty and not as a client's right (i.e. where legal privilege does not exist) it would in principle be impossible to protect information once it has left the possession of the lawyer and is with the client, as the client would not have an own right or standing to resist disclosure.

11. In competition enforcement, questions of privilege and protection from disclosure may arise during pre-trial antitrust investigations and merger reviews by competition

authorities, as well as in competition litigation. Clients can assert legal privilege against public authorities, third parties and courts, to:

- withhold and oppose the disclosure of privileged information during investigations (including merger control) with regard to documents sought by, inspected or seized by authorities;
- oppose requests to compel the production of privileged documents and communications under the applicable discovery rules, and oppose the use of privileged documents as evidence in court proceedings;
- prevent other parties (such as their lawyers) from disclosing privileged information; and
- challenge actions and decisions which inappropriately relied on privileged information.

3. Scope of protection

12. Section 3 examines the scope of legal privilege. It looks at the definition of the client who can invoke and waive the privilege, the definition of attorney, the type of information that can be privileged, and ways of losing or waiving the privilege.

13. The application and scope of legal professional privilege will be assessed by the investigating authority and the reviewing courts in accordance with the laws that they apply. When foreign attorney-client privilege may come into play, this will include applying national choice of law rules in order to determine which law applies to the claimed legal privilege.

Box 1. Which law decides if legal privilege applies?

The law of the country with predominant interest in the confidentiality (U.S.)

In the Veleron case, the U.S. District Court of the Southern District of New York applied Russian and Dutch attorney-privilege law to communications which involved Russian and Dutch attorneys and occurred in their respective countries. The court confirmed that U.S. federal courts may “*apply the law of the country that has the predominant or the most direct and compelling interest in whether [the] communications should remain confidential*” to disputes involving foreign attorney-client communications, “*unless that foreign law is contrary to the public policy of this forum.*” The jurisdiction with the predominant interest is “*either 'the place where the allegedly privileged relationship was entered into' or 'the place in which that relationship was centered at the time the communication was sent.'*” [...] American law typically applies to communications concerning ‘*legal proceedings in the United States*’ or ‘*advice regarding American law,*’ while communications relating to ... foreign law ... are generally governed by foreign privilege law.” In that case, the Court ordered the disclosure of communications (legal advice or work product provided by in-house or unlicensed attorneys) that would be privileged in the U.S., but were not privileged in Russia or the Netherlands.

Source: Veleron Holding, B.V., v BNP Paribas SA, et al., (S.D.N.Y. 2014) <https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2012cv05966/400067/219/0.pdf?ts=1411565309>

The law of the court’s forum (England and Wales)

English courts apply the law of the forum, i.e. it is a question of English law whether a document is privileged. In the RBS Rights Issue Litigation, the English High Court held that “*whether described as a rule, a convention or practice, it is the approach of the English Court to apply the lex fori to issues of privilege, and has been so since the mid-19th century.*” The Court dismissed RBS's claim for privilege and ordered disclosure of documents (i.e. records of interviews conducted by or on behalf of RBS with employees and ex-employees) which were said to be privileged under U.S. federal law, but were not privileged under English law.

Source: English High Court, Re the RBS Rights Issue Litigation, EWHC 3161 (2016) www.bailii.org/ew/cases/EWHC/Ch/2016/3161.html

3.1. Personal scope: who is the client?

14. Determination of who the client is for the purposes of legal privilege is crucial: the privilege is the client’s to create, claim, and waive. Communications from and to persons other than those recognised as the client, and claims or waivers by them, would not be recognised and in principle have no effect.

15. Not many OECD Members have developed formal rules or have specific case law determining the notion of “client” for purposes of legal privilege. Selected case law reviewed by the Secretariat indicates that privilege covers, at least, communications from and to a small group who manage the client, or are directly in charge of obtaining legal advice (such as the company’s in-house lawyers). This means that communications

between the lawyer and employees which are not empowered to bind the client or act on its behalf may not attract privilege.

16. In the U.S., attorney-client privilege may apply to a wider group of people within a corporate client, in cases where their professional duties make their input necessary for the provision of legal advice, i.e. when they are consulted on a need-to-involve basis. In these cases, their communications are deemed to be the client's, and are protected by legal privilege.

Box 2. Who is the client?

Person(s) in charge of communicating with the lawyers (England and Wales)

The British government had set up an independent inquiry of the Bank of England's supervision of the Bank of Credit and Commerce International (BCCI), which had gone into liquidation over a series of criminal activity allegations. When the inquiry report was published, BCCI creditors sued the Bank of England for failing to protect their interests, and sought disclosure of documents created and submitted by the Bank of England's employees to the Bank of England's solicitors in the course of the inquiry. The Bank of England claimed legal advice privilege.

The High Court found that, for the purposes of claiming legal privilege, the client was limited to three Bank of England officials who were in charge of co-ordinating communications with the Bank's solicitors. The High Court held that "*the fact that an employee may be authorised to communicate with the corporation's lawyer does not constitute that employee the client or a recognised emanation of the client*". Thus, information gathered from employees other than the three employees authorised to communicate with the Bank's solicitors was held to be no different from information obtained from third parties for legal advice privilege purposes, and was not privileged.

Source: Three Rivers District Council and others v the Governor and Co of the Bank of England (No 5) ([2003] EWCA Civ 474) <http://iclr.co.uk/document/2016083691/%5B2003%5D%20EWCA%20Civ%20474/html>

Communications with non-managerial staff may be privileged (U.S.)

In *Upjohn Co. v. United States*, the Supreme Court of the United States held that attorney-client privilege may apply to any client information that aids the administration of justice (such as information necessary to enable the lawyer to give an informed assessment and advice regarding potential litigation) including information from low- and mid-level (i.e. non-managerial) employees.

This case concerned an internal company investigation to ascertain the nature and magnitude of illegal payments made by one of the company's foreign subsidiaries to foreign public officials in order to secure government contracts. At the request of the Chairman, the company's in-house lawyers ran an internal investigation and sent out a questionnaire to foreign staff, including non-managerial staff, who provided answers and information. The company voluntarily submitted information on the illegal payments to the Securities and Exchange Commission. On the basis of this information, the Internal Revenue Service began an investigation to determine the tax consequences of the payments, and sought access to the internal investigation, including the questionnaire, answers and notes from interviews. The company refused, claiming that this information was protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation.

The Supreme Court, on appeal from the United States Court of Appeals for the Sixth Circuit, held that information from non-managers can be privileged, if the non-managerial staff, at the direction of corporate superiors, provided information to counsel concerning matters within the scope of their professional duties; the information was necessary for legal advice and the employee was aware that the information would be used to obtain legal advice; and this information was not available from upper-echelon management.

Source: *Upjohn Co. v. United States*, 449 U.S. 383, 1981 <https://supreme.justia.com/cases/federal/us/449/383/>

17. Legal professional privilege may not apply to communications and information exchanged between a parent company and its lawyers concerning a subsidiary's business. In these cases, the attorney-client relationship would need to be direct: the client is the entity seeking and receiving the legal advice.

Box 3. Legal privilege may not cover communications with the parent company (Regional Court Bonn, decision of 21 June 2012, 27 Qs 2/12)

A German subsidiary of a UK company was audited for antitrust compliance by an external law firm on behalf of the UK parent. The subsidiary was the object of the audit, but had not requested it.

The Bundeskartellamt conducted a surprise inspection of the premises of the German subsidiary and, *inter alia*, seized summaries of interviews that the law firm performing the audit had conducted with the subsidiary's management.

The Regional Court of Bonn found that legal privilege applied only to the entity which instructed the external lawyers for its defence, thus not to the subsidiary.

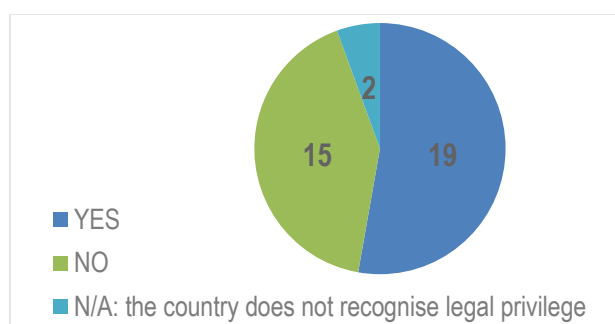
Source: Oest, I German Regional Court refuses to extend the protection of legal privilege to internal audit documents (Oest, 2012^[4])

3.2. Personal scope: who is the advisor?

18. All jurisdictions recognising legal privilege grant privilege to communications between clients and their independent external lawyers from the same jurisdiction.

19. 19 out of the 34 OECD Members that recognise privilege extend its scope to communications with in-house lawyers too³. Most of those jurisdictions recognise the privilege only to those in-house lawyers that enjoy a level of independence from their employer/client and are in a position to offer unconstrained legal advice. A usual requirement is that the in-house lawyer be registered with the Bar, since this makes the in-house lawyer subject to the Bar's rules of professional ethics and independence, including the applicable code of conduct and disciplinary sanctions for breach of professional duty.

Figure 1. Are communications with in-house counsel privileged in OECD Members?



Source: Secretariat's own research.

Box 4. Privilege and in-house lawyers

In-house lawyers do not benefit from privilege because they do not enjoy sufficient professional independence (European Union)

In *Akzo Nobel*, the Court of Justice of the European Union denied privilege to communications between companies and their in-house Dutch attorneys in a European Commission investigation, even though the lawyers were enrolled with the Dutch Bar, and the Netherlands considered such communications privileged in its domestic legal order.

The Court of Justice held that written communications are protected by legal professional privilege if exchanged with an independent lawyer. Independence, according to the Court, requires the absence of an employment relationship between the lawyer and his client. An in-house lawyer, despite his/her enrolment with a Bar and the ensuing professional ethical obligations, *“does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client”* because *“he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence”*. *“Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client”* and does not enjoy *“a level of professional independence comparable to that of an external lawyer.”* Thus, in the European Union (though not necessarily in the domestic legal orders of its Member States when pursuing national competition cases) legal privilege does not cover exchanges with any in-house lawyers, whether these are registered with a Bar nor not.

Source: Case C-550/07 [2010, Grand Chamber] *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission* <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-550/07>

Both external lawyers and in-house lawyers registered with the Bar can be independent; communications with them are privileged (Portugal)

Some EU Member States privilege, in domestic competition cases, communications between clients and their in-house lawyers registered with the Bar, as in-house lawyers are considered to be subject to the same professional ethics rules and enjoy the same independence as external lawyers.

For example, the Commercial Court of Lisbon confirmed that the independence, autonomy and integrity of in-house lawyers in Portugal derive from both the Constitution and the Portuguese Bar Association Regulations, neither of which draw any distinction between external and in-house counsel. The Portuguese Bar Association Regulations provide that any contractual clauses that limit the ethical principles to which all lawyers are subject, and any instructions issued by the employer limiting the independence of in-house lawyers, are null and void. Consequently, legal privilege extends to communications with in-house lawyers.

Source: Tribunal of Commerce of Lisbon [2007], *Unilever Jerónimo Martins*, www.concorrenca.pt/vPT/Praticas_Proibidas/Decisoes_Judiciais/contrordenacionais/Documents/Unilever_Sentença_TCL_16.1.2008%20DJC%2010_2007.pdf; (Martins, 2008^[5]).

20. The distinction between in-house and external lawyers for the purposes of granting legal privilege has been greatly debated. Commentators, including in-house and external lawyers, have argued for extending the privilege to include communications with in-house lawyers on the following grounds:

- clients should be free to choose which legal adviser they wish to consult;
- having to resort to external lawyers raises costs and may cause delays in getting legal advice for companies that have well-organised internal legal departments that could deal with questions and cases at no additional cost and time;
- the distinction between an external lawyer's independence and an in-house lawyer's dependence may be artificial, as in-house lawyers are often also bound by the same legal profession ethics and discipline, while external lawyers may also depend financially on their clients;
- in-house lawyers may be better suited to respond to the company's questions, as they have a better understanding of the company's business and needs, and an established relationship with their business counterparts;
- the distinction may ultimately lead to strategically involve external lawyers in cases where their advice is not indispensable in order to keep the confidentiality of the client's questions and the answers it receives;
- questions of foreign legal privilege may arise, where in-house created documents sought to be disclosed in one jurisdiction (where they are not privileged) originate from another jurisdiction, where they would be privileged and were created with the expectation that they would be kept confidential. (Levy and Karadakova, 2018^[6]) (Holtz, 2013^[7]) (González-Díaz and Stuart, 2017^[8])

21. Communications with lawyers from other jurisdictions may not be privileged, either. This is, for example, the case in the EU, where privilege covers communications with external lawyers qualified and registered with the Bar of one of the EU Member States (Case 155/79 *AM&S Europe Limited v Commission*, 1982); the implication is that communications with non EU lawyers are not privileged. The aim may be to make sure that protected information is exchanged between a client and members of the legal profession adhering to similar standards (Andreangeli, 2008^[9]). Professional qualifications are a matter of a jurisdiction's sovereign decision; thus, the qualifications for acceding to the legal profession and render advice outside the territory of the EU may be more varied than within that territory, where there is a common basis.

22. Whatever the policy reasons behind distinguishing among lawyers qualified in the forum and those qualified out of it, the different levels of privilege between domestically qualified and non-qualified attorneys (in addition to the different treatment of external and in-house lawyers) can be difficult to navigate for companies and reviewing bodies, whether agencies or courts, alike. For example, in the case of a transaction or conduct reviewable by the U.S. agencies and the European Commission (the "Commission"), the lawyers involved in advising the merging parties may be (a) external and members of a Bar of one of the EU Member States; (b) in-house and members of an EU Bar; (c) external and members of a U.S. Bar; (d) in-house and members of a U.S. Bar. The U.S. would likely privilege information exchanged between client and attorneys in all (a) to (d) cases, and the Commission would privilege only information in category (a). If the reviewing authority in the EU is not the Commission but one of the competition authorities of one of the

Member States, the extent of the confidentiality protection would depend on the coverage of the privilege in the relevant country.

23. This creates a fragmented legal landscape, difficult to navigate for companies, and may lead to the involvement of a domestic external counsel in cases or for questions where this is not strictly necessary in order to trigger privilege in that particular jurisdiction. Recognising privilege to lawyers qualified in the forum only may also raise questions of international comity with regard to a jurisdiction's expectation that documents created in its territory would be subject to its rules (and thus would keep their privilege status, even if they concern a case with extraterritorial elements). (Holtz, 2013^[7])

3.3. Subject matter: what type of advice is privileged?

24. OECD Members that recognise legal professional privilege are broadly distinguished between those that (a) only grant privilege to legal advice connected to open or anticipated investigations or litigation and those that (b) also grant privilege to legal advice on any matter.

25. All jurisdictions that recognise legal privilege grant it to advice sought or obtained in connection with investigations and litigation, i.e. advice aiming to guarantee the observance of the rights of defence. The OECD Members that extend privilege to cover all legal advice (indicatively, Australia, Canada, Ireland, New Zealand, Portugal, the UK, and the U.S.) usually afford additional protections to litigation advice in view of the parties' increased need for appropriate legal representation in such cases.

26. In either case, not all communications and documents exchanged between the attorney and the client are privileged. Communications and documents must be specifically prepared by the client to send to the attorney, or by the attorney to the client, in order to obtain legal advice or advice in litigation. Non legal, e.g. business, advice by a lawyer is generally not protected, unless business advice is integrated into legal advice.

27. Under EU law, privilege attaches to advice sought and obtained for the purpose of safeguarding the client's rights of defence and connected to the subject matter of specific competition proceedings only. It includes summaries of privileged advice and preparatory documents to seek legal advice, including drafts not sent to an attorney. General legal advice given for the purpose of guiding a company's regular operations is not protected, even if related to antitrust matters.

Box 5. Subject matter limitation in the case law of the Court of Justice of the European Union

In its first case on legal privilege the Court of Justice found that “*the national laws of the Member States [have] common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client’s rights of defence and, on the other hand, they emanate from independent lawyer, that is to say, lawyers who are not bound to the client by a relationship of employment.*” The Court of Justice held that legal privilege covers all written communications exchanged after the initiation of an investigation, as well as earlier communications which have a relationship to the subject-matter of the investigation. The Court of Justice therefore distinguished between privileged communications related to investigations, and non-privileged general legal advice.

Source: Case 155/79 AM&S Europe Limited v Commission [1982] <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1535459012312&uri=CELEX:61979CJ0155>

The Court of First Instance (now General Court) later expanded the scope of privilege to cover “*a letter sent to an undertaking by an independent lawyer after the initiation of the administrative procedure before the Commission, for the purposes and in the interests of that undertaking’s right of defence*” and clarified that the protection of written communications between lawyer and client extends to internal notes which are confined to reporting the lawyer–client communications “*for the purpose of distributing them within the undertaking and submitting them for consideration by managerial staff*”.

Source: Order of the Court of First Instance in Case T-30/89 Hilti AG v Commission [1990] <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1535460642323&uri=CELEX:61989TQ0030>

In its most recent case on legal privilege in 2010, the Court of Justice confirmed that the benefit of legal professional privilege covers communications between lawyers and their clients only if connected to the client’s rights of defence.

Source: Case C-550/07 [2010, Grand Chamber] Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-550/07>

28. The point in time at which legal privilege is triggered can vary among jurisdictions that link privilege to the exercise of the rights of defence. For example, in Germany the right to claim legal privilege arises only after a specific antitrust investigation has started. The subject-matter of the investigation will thus define the temporal (“when”) and material (“what”) scope of the privilege. As a result, only communications and legal advice obtained in the context and for the purposes of that specific investigation, and starting after the opening of the case, may be protected from disclosure (Oest, 2012^[4]). Pre-existing legal advice concerning the investigated conduct by the investigated entity, or advice triggered by a parallel investigation against another entity (for example, the investigation of the same conduct by another company in the same corporate group) will not be protected.

29. An interesting point is the scope of privileged information in the context of merger review. It could be argued that, in merger control, the scope of protection could be broader and cover, for example, legal advice on the different aspects of the transaction (and not only advice on matters linked to the specific merger review under way), even in

jurisdictions that do not privilege all legal advice. Since mergers do not, in principle, involve breaches of the law, there may be less reason to limit the scope of privilege to advice on the specific merger review and more reason to extend privilege to cover all legal advice on the merger. Competition authorities review transactions and take decisions based on information voluntarily submitted to them by parties: if this information is insufficient, authorities can ask for additional information, or, if their requirements are not met, suspend the review. Merging parties have an interest in clearing the transaction in all events. They therefore have incentives to submit information that is full as well as resolve privilege claims quickly and to the satisfaction of the parties and the authority. (Levy and Karadakova, 2018^[6])

30. In jurisdictions where privilege extends to all legal advice, it is important to distinguish between general legal advice and advice sought or given in preparation or anticipation of litigation, as litigation privilege is, in general, wider (DLA Piper, 2017^[10]). For example, in Canada, Ireland, Portugal and the UK, privilege related to litigation covers, in addition to attorney-client communications, communications between either the client or the lawyer and third parties (like experts and witnesses) for the purpose of preparing the litigation. In the UK, communications with third parties are privileged in the context of ongoing or reasonably anticipated litigation. Litigation can be reasonably anticipated after investigations become adversarial, arguably after the issuance of the statement of objections against the investigated company (Tesco v Office of Fair Trading [2012] CAT 6)⁴.

31. The wider litigation-related privilege may also cover materials prepared in anticipation of litigation which are not communicated to the client. For example, in the U.S. (where communications with third parties are in all cases privileged when they are necessary to render legal advice) an attorney can resist disclosure of not shared internal documents s/he prepares in anticipation of litigation under the work product doctrine. The work product right is an attorney (not client) right, which can be overridden under certain conditions. (Jenner & Block, 2015^[11])

32. The decision on whether privilege applies to third party consultant's involvement in communications between client and attorney is fact-specific, and will often depend on whether the involvement of the third party was necessary (and not complementary or incidental) for the purposes of enabling the attorney to provide legal advice.

Box 6. Privilege and third party information

Made for the purpose of obtaining legal advice from the lawyer (U.S.)

Kovel, the defendant, an accountant employed by a tax law firm (Kamerman & Kamerman – K&K), was subpoenaed to appear before the federal grand jury to testify regarding communications he had with a K&K’s client under investigation for alleged federal income tax violations. Kovel refused to answer questions claiming attorney-client privilege, and after being apprised by the Court that he had no privilege, he maintained his position whereupon he was held in contempt of court and condemned to one year in prison. This decision was then reversed by the United States Court of Appeals for the Second Circuit.

The Court found that communications to an accountant employed to interpret and relay information to an attorney are within the attorney-client privilege. The Court held that privilege should be extended to client’s communications with necessary third parties, such as accountants, employed by lawyers and indispensable for the lawyers’ work. The Court held that “*what is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer*”. Therefore, attorney-client privilege applies when a client makes a communication to a non-lawyer; that communication is confidential; and the communication is made for the purposes of the giving legal advice to the client. It is irrelevant where the client-third-party communication takes place (for example, outside the lawyer’s office), or whether the third party is employed by the lawyer. No privilege exists when the advice sought is the consulted third party’s rather than the lawyer’s.

Source: United States v Kovel, 296 F.2d 918 (2d Cir. 1961)

Legal privilege depends on the communication’s origin and purpose to ensure the company’s defence (Spain)

Coca-Cola España and its bottlers were ordered by the Spanish Competition Authority to disclose (a) a questionnaire prepared by a Coca-Cola’s external legal counsel with the purpose of preparing the company’s defence in a competition case before the European Commission; and (b) answers to the questionnaire sent by bottling companies directly to Coca Cola, at the instruction of Coca Cola’s lawyer. The claimants lodged an appeal against order claiming that both the questionnaire and the bottlers’ responses were privileged. The Spanish Tribunal de Defensa de la Competencia (TDC) assessed whether and to what extent legal privilege applies to documents exchanged between independent undertakings (not through lawyers) if the exchange occurred: (i) under the instructions of the external counsel of one of the companies concerned; (ii) with the purpose to prepare the company’s defence.

The TDC, first of all, confirmed that under both under European Union and Spanish case law the principle of legal privilege constitutes a limit to the duty to collaborate with competition authorities. The TDC held that there are two criteria to evaluate whether legal privilege applies to documents not directly exchanged between lawyers and clients: (i) the nature and purpose of the documents exchanged, and whether they were related to the company’s defence, absent which they would not have been produced; (ii) whether or not the external legal counsel took part in the creation of the documents

exchange. Legal privilege would thus depend on the communication's origin and purpose to ensure the rights of defence.

In this case, the questionnaire and responses to it were found to be privileged.

Source: Tribunal de Defensa de la Competencia, Pepsi Cola v Coca Cola [2002] Resolución n. 508/02, www.cnmc.es/sites/default/files/72999.pdf

33. Whether exchanges with lawyers in the context of internal company investigations or audits by lawyers, as well as communications with the in-house legal department in the framework of compliance programmes, are covered by legal privilege will depend on the scope of privilege in the country, and the applicable definition of client, advisor, and scope of advice. Thus, for example, in jurisdictions which recognise legal privilege for the purposes of the exercise of the rights of defence only, exchanges in the context of audits or corporate compliance would be protected only if they are related to, or in anticipation of, competition proceedings. In jurisdictions which recognise broader legal advice privilege, internal documents would probably be protected if prepared to provide necessary information for the lawyer to render his/her advice.

Box 7. Communications by and to non-attorneys serving as agents of attorneys in internal investigations are privileged (U.S.)

Kellogg Brown & Root (KBR), a defense contractor, had conducted an internal investigation into alleged fraud (price inflation and kickbacks) concerning the company's military contracts in Iraq. The internal investigation was overseen by the company's legal department. During trial on allegations of fraud, the claimant sought discovery of documents related to KBR's prior internal investigation into the alleged fraud.

The Court of Appeals found that privilege applied, and vacated the District Court's appealed document production order. The Court held that privilege applied although many of the interviews in KBR's investigation were conducted by non-attorneys, as the investigation was conducted at the direction of the attorneys in KBR's law department. It thus confirmed that communications made by and to non-attorneys serving as agents of attorneys in internal investigations are protected by the attorney-client privilege. The Court held that "*so long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.*" So documents would be privileged if one of their significant purposes was obtaining or providing legal advice (even if they have other purposes, such as providing business advice).

Source: In Re: Kellogg Brown & Root, Inc., et al, No. 14-5055 United States Court of Appeals for the D.C. Circuit

3.4. When is legal privilege waived or lost?

34. In many OECD Members that protect the attorney-client relationship, the privilege cannot be overridden by another public interest⁵, i.e. it is usually an inviolate right.

However, it may be limited by law in some cases and for specific reasons, and waived by the person to whom the privilege belongs, the client. Usually the client for the purposes of waiving the privilege is the client's management, or persons authorised to waive the privilege (and not any employee whose communications may be privileged).

35. Legal privilege can be waived expressly or by inference. Since by definition legal privilege is a confidentiality protection, sharing information that would otherwise be privileged within the company or with third parties, or otherwise releasing it in the public domain, are actions inconsistent with the privilege and forfeit its protection. In a recent case, the submission of information to the Canadian Competition Bureau by immunity and leniency applicants was held to have impliedly waived privilege as confidentiality was lost.

Box 8. Documents submitted as part of a leniency application may waive the privilege (Canada)

Cadbury Canada Inc. and Hershey Canada Inc. co-operated with the Canadian Competition Bureau in an investigation on price fixing in the chocolate industry in Canada. First Cadbury and afterwards Hershey disclosed to the Bureau information against other members of the cartel under the Bureau's Immunity (in the case of Cadbury) and Leniency (in the case of Hershey) Programs.

The information provided to the Bureau by Cadbury and Hershey was inadvertently disclosed by the Crown prosecutor to the other members of the cartel who were criminally charged with price fixing, in part on the basis of this information. In Canadian criminal law, the Crown must disclose to an accused person all information in its possession, whether inculpatory or exculpatory, unless the information is protected by privilege. Hershey alleged that part of the information submitted by it to the Bureau and disclosed to the cartel member Nestlé was protected by solicitor-client privilege, and had to be returned or destroyed.

The Ontario Superior Court of Justice confirmed Canadian case law that disclosure to a prosecuting authority such as the Competition Bureau is a waiver of the solicitor-client privilege, and that, therefore, the information can be disclosed to prosecuted parties. The cartel members were thus entitled to the information that had been provided to the Competition Bureau by Cadbury and Hershey.

Source: 2015 ONSC 810, R. v. Nestlé Canada Inc; www.martindale.com/litigation-law/article_McCarthy-Tetrault-LLP_2206170.htm

36. The requirement that protected communications are intended to be, and kept, confidential means that, if there is no such intention or no steps are taken to ensure that the communications are undertaken in confidence, the privilege can be considered to have been waived. This is the case if, for example, communications are witnessed by a third party who is neither part of the client nor of the attorney, and who is not a necessary third party consultant in jurisdictions where such communications can be privileged.

37. It follows that if the information that would be privileged is voluntarily shared, the privilege is lost. However, disclosure of privileged information made following a compulsory agency request (for example, by an agency in another jurisdiction) may not waive the privilege, either vis-à-vis third parties or in other jurisdictions with a higher level of privilege protection.

Box 9. Compulsory disclosures do not waive the privilege (U.S.)

In *In Re Vitamins Antitrust Litigation*, the U.S. District Court for the District of Columbia dealt with whether when a privileged document has been disclosed in a foreign jurisdiction this would amount to a waiver of privilege in a U.S. court. In this case, the plaintiffs had filed a motion to compel foreign defendants to produce documents submitted to ministries and competition authorities of seven jurisdictions. The defendants argued that those documents were privileged and thus protected from discovery.

The Court held that submissions under compulsion to adversaries, here foreign governmental authorities, do not waive otherwise applicable work product protections, whereas voluntary submissions do. Compulsion requires that: (a) a disclosure be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for non-compliance; and (b) any available privilege or protection be asserted. Therefore, if the disclosure is not compelled or the privilege is not asserted, the privilege is waived. Defendants have the burden of establishing that their claims of privilege or other protection are well founded and have not been waived.

In that case, the Court found that several submissions were produced voluntarily to the ministries and competition commissions of Brazil, Switzerland, New Zealand, Japan, Australia and the European Union that were investigating the market for vitamins. Being voluntary, the submissions waived attorney work product protections or other protections attached to the documents. Only one defendant's submissions to the Mexican Federal Competition Commission appeared to have been made under compulsion and, for that reason, remained protected from disclosure to the plaintiffs.

The Court noted that the fact that defendants may have received assurances, which were not expressly or specifically guaranteed, from foreign governmental authorities that their documentary submissions would be held in confidence was not sufficient to maintain the privilege. The Court also found that that, in this case, considerations of international comity were insufficient to deny disclosure when weighed against the U.S. interests in open discovery and enforcement of its antitrust laws.

Source: *In Re Vitamin Antitrust Litigation*, 2002, U.S. Dist. LEXIS 26490 (D.D.C. 23 Jan. 2002) www.americanbar.org/content/dam/aba/publications/litigation_committees/commercial/in-re-vitamin-antitrust-2002-us-dist-lexis-26490.authcheckdam.pdf

38. Leniency requirements are relevant for this discussion: if waiving the privilege is required of the applicant to secure his full co-operation during the process and is made a condition for the grant of immunity or leniency, the applicant may be considered to have been compelled to disclose the document, and thus be able to resist further disclosure to third parties or in other jurisdictions.

Box 10. Waivers of privilege, or submission of privileged documents, are not conditions for leniency (UK and U.S.)

The UK Competition and Markets Authority (the “CMA”) “*will not as a condition of leniency require waivers of legal professional privilege (LPP) over any relevant information in either civil or criminal investigations*”. However, “*the OFT (now CMA) will consider case-specific factors, for example whether the leniency applicant had made what, on any objective view, were manifestly baseless claims to LPP; whether a blanket claim was made in respect of a large volume of documents without sufficient specificity in relation to individual documents or categories of documents; and whether the leniency applicant appeared to be motivated by a desire to delay or otherwise prejudice the OFT investigation*”.

If the nature of a document is unclear, the CMA may “*require a review of any relevant information in respect of which LPP is claimed, by an independent counsel (IC) selected, instructed and funded on a case by case basis by the OFT*”. “*Failure or refusal in such a situation to provide the relevant information in question to an IC could result in the withdrawal of the leniency marker or revocation of the leniency agreement (as the case may be), on the grounds of non-compliance with the duty of complete and continuous cooperation*”.

“*Where an IC advises the OFT that the relevant information benefits from LPP, then the OFT will not require it to be provided by the leniency applicant as a condition of leniency*”.

Source: (CMA, 2013^[12])

The U.S. agencies do not ask privileged information to be disclosed by leniency applicants, or make this a requirement for co-operation. Any information disclosed “*by counsel for Applicant in furtherance of the leniency application will not constitute a waiver of the attorney-client privilege or the work-product privilege*”.

Source: (United States Department of Justice,(n.d.)(^[13])

4. Implications of privilege for competition agencies and companies

4.1. The principle: authorities should respect legal privilege in accordance with applicable laws

39. Competition authorities and reviewing courts should protect legal privilege in accordance with the applicable laws. The International Competition Network’s (the “ICN”) 2018 *Guidance on Investigative Process and Guiding Principles for Procedural Fairness in Competition Agency Enforcement* recommend actions and boundaries for enforcement bodies.

Box 11. ICN guidance on confidentiality protections and the handling of privileged information

Confidentiality Protections

Competition agency enforcement proceedings should include a process for appropriate identification and protection of confidential business information and recognition of privileged information. The decision to disclose confidential information should include consideration of the confidentiality claims, rights of defence, rights of third parties, incentives to provide information, effects on competition, and transparency to the public.

Source: (ICN, 2018^[14])

VI. Confidentiality Protections and Legal Privileges

12. Competition agencies should respect applicable legal privileges that are recognized in their jurisdiction during the course of their investigations and have policies regarding the handling of privileged information.

12.1 Parties and third parties should not be required to disclose information that is subject to applicable legal privileges in the agency's jurisdiction.

12.2 Parties and third parties should be required to identify and describe materials withheld on the basis of legal privilege to allow the agency to assess the claims.

Source: (ICN, 2018^[15])

4.2. In practice: requests for information and inspections should be limited to exclude privileged materials

40. In 2013, the ICN conducted a survey on competition agency confidentiality practices, to which 39 competition agencies responded (ICN, 2014^[16]). The survey concerned, among other issues, the impact of legal privilege on information gathering during investigations. 49% of respondents reported that they limit the scope of their information requests to companies so as to exclude privileged materials. Some of the responding agencies remind companies of privileges in their information requests, including by providing instructions regarding the preparation and submission of privilege logs identifying documents that are privileged and can thus be withheld from disclosure. Likewise, 49% of respondents do not collect privileged materials during raids or searches. Responses indicated that many competition agencies would talk to the requested or investigated party, and engage in consultations regarding the nature and treatment for specific information.

41. In dawn raids, the European Court of Human Rights (the “ECHR”) has held that the investigating agency should allow the investigated party’s counsel to be present during the inspection, to ensure the independent assessment of whether legal privilege attaches to the inspected documents and enable requests to withhold their seizure. The ECHR has also looked at whether widespread document seizures during inspections may violate legal privilege if the raided company is unable to screen all documents being seized, assess their nature, and claim privilege, if applicable.

Box 12. European Court of Human Rights (“ECHR”) on legal privilege in dawn raids

Presence of the investigated party’s advisors allows assertion of privilege

In a case brought before the ECHR in 2012, the applicant (Janssen Cilag) challenged the seizure of documents belonging to it by the French competition authority during a surprise inspection of its premises. The applicant argued that the lawyer-client privilege had been infringed and, in particular, that the number of its lawyers allowed to be present during the inspection was too low to allow the effective monitoring of the search operations, and the ability to check and claim legal privilege over seized documents, if applicable. During the inspection, 5 representatives and 3 lawyers of the raided company had been present. The investigating team was bigger (17 officials of the French competition authority and 6 prosecutors in total) but each of the 6 smaller break-out investigation teams was accompanied by a representative of the company.

The ECHR found the lawyers were, in terms of their number and status, able to review some of the documents seized and discuss their seizure by the investigators and, if applicable, to claim privilege. The ECHR held that the protection of legal privilege requires that (a) the investigated party has the opportunity to prevent seizure of privileged documents; and (b) if this is not possible, the party must have the right to seek the review of the lawfulness of the seizure. As, in this case, the lawyers present were found to be sufficient and the party had an effective remedy before the domestic courts (which it had in part successfully exercised), the ECHR found that article 6(1) (right to a fair trial) of the European Convention of Human Rights had not been breached.

Source: European Court of Human Rights, Janssen Cilag S.A.S. v. France application 33931/12 ECHR 130 (2017)

Can blanket document seizures violate attorney-client privilege?

In an earlier case, the ECHR had looked at whether blanket document seizures could be challenged for possible violation of the attorney-client privilege if the raided company is unable to usefully claim privilege as a result.

The ECHR held that widespread seizures are not, by themselves, unlawful as long as they are targeted and the company is informed of the seized documents.

In that case, the seizures had concerned numerous documents, including the entirety of certain employees’ professional email accounts which contained correspondence exchanged with lawyers. The investigated companies were unable to inspect the content of the seizures and object to the seizure of privileged documents while the operations were being conducted. The companies sought to review the lawfulness of the seizures afterwards but the review concerned the form, and not the facts, of the inspection. The ECHR therefore found that article 6 (right to fair trial) and article 8 (right to privacy) of the European Convention of Human Rights had been breached.

Source: European Court of Human Rights, applications 63629/10 and 60567/10 Vinci Construction and GTM Génie Civile et Services v. France [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-153318%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-153318%22]})

4.3. What happens if privileged information is unlawfully collected and/or used?

42. If privileged information is unlawfully collected, it should be excluded from the case, not used as evidence, and returned to the party.

Box 13. Exclusion of privileged seized documents from the case file (France)

In the context of an investigation for alleged vertical and horizontal infringements in the household appliances sector, the French competition authority carried out a raid at Whirlpool's premises in 2014. There had been an earlier surprise inspection of a competitor's premises in 2013. During the Whirlpool raid, the authority seized documents, including several emails referring to the company's defence strategy, which were not sent by or to an outside legal counsel but either forwarded or summarised an audit report by Whirlpool's law firm, recapped its annexes, or built upon the law firm's findings and recommendations. The audit report had been requested by Whirlpool because of the authority's earlier investigation of its competitors.

The Paris Court of Appeal, on appeal by Whirlpool for, among others, violation of attorney-client privilege and the rights of defence, recognised the privilege and granted the company's request to annul the seizure of emails containing the company's defence strategy, and exclude them from the competition authority's file. The Court found that the report was crucial for the preparation of the company's defence in case it would be investigated like its competitors. It also rejected the authority's argument that the audit report, by being distributed within the company, had become public and was not privileged.

The Court dismissed the company's claim that the seizures were too large. It held that at the preliminary stage of an antitrust investigation the scope of the seizure of documents must be extensive to allow gathering evidence. In particular not separable files such as email archives may necessitate a global seizure, and subsequent exclusion of privileged documents.

Source: Cour d'Appel de Paris, pôle 5, Chambre 15, Order of 8 November 2017, RG n. 14/13384, www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2017/12/14-13384.pdf ; (François, 2017^[17]).

43. If a document used in the decision-making process or relied on as evidence is later found to have been privileged (and the privilege claim had been properly asserted but incorrectly assessed), the final decision would be appealable before the competent courts. The review would be made in accordance with that jurisdiction's review system, grounds and standard of review, and could lead to the authority's decision being set aside (OECD, 2016^[18]). If the privileged information erroneously disclosed leads to new incriminating information, there may also be claims regarding the integrity of investigations, and whether unlawful disclosure and use of the privileged information has tainted the whole process, and thus rendered the decisions void (Hammond, 2015^[19]).

4.4. Companies' ability to resist disclosure

44. The parties' ability to protect privileged information is fundamental. There need to be procedures allowing parties to claim privilege and decline to produce privileged information or shield it from seizure.

45. As privilege is the party's right, the party must raise the privilege claim in accordance with applicable rules and timelines. Parties are expected *"to identify and describe materials withheld on the basis of legal privilege to allow the agency to assess the claims"* (ICN, 2018^[15]). Therefore, and depending on the relevant jurisdiction's applicable rules, invoking privilege over a broad range of documents without giving specific reasons for the claim over each specific (type of) document, or waiting too long to invoke privilege, may cause claims for privilege to fail.

46. According to 74% of the 39 respondents to the survey on confidentiality practices conducted by the ICN in 2013, companies and persons that respond to a compulsory information request during an investigation are able to decline to produce information that is privileged under that jurisdiction's laws (e.g., they are able to invoke attorney-client or legal professional privilege or privilege against self-incrimination). The majority of respondents provide for procedures allowing submitters of information to protect privileged information (e.g., provide for privilege logs identifying privileged documents). Domestic rules place the burden of establishing whether a privilege applies on the party asserting the privilege (e.g., by identifying the allegedly privileged material and describing the nature of withheld information, in a way that enables assessment of the privilege without revealing privileged information). (ICN, 2014^[16])

47. Needing to establish the privilege means that marking a document as privileged would not, by itself, guarantee protection without further explanation. Still, marking the confidentiality of a document may help establish the company's intention and view of the nature of the document, and help the authority's or court's assessment of whether the document should be privileged.

4.5. Who reviews privilege claims, and claims for breach of privilege?

48. According to the ICN report on competition agency confidentiality practices, there are different agency practices to review claims of privilege during a raid or search. 78% of the 39 respondents to the ICN survey review privilege claims. In some responding jurisdictions the review is only possible within the competition agency. To do this, some competition agencies take a "quick scan" or cursory look at the material to determine privilege, but do not inspect it or make copies or abstracts. Others seal and submit materials that are claimed to be privileged to the competition agency or senior staff for review. Some competition authorities designate filter teams or employees who are not involved in the investigation to review the allegedly privileged materials and evaluate if privilege should be granted. Some jurisdictions allow both internal and judicial review. In some jurisdictions, only court review is only possible. The materials are sealed and brought before a court to decide whether they are privileged. (ICN, 2014^[16])

49. In the EU, if an investigated party claims legal professional privilege to resist disclosure of a document, the Commission staff may take a cursory look at the documents to assess the claim. A party is entitled to refuse to allow the Commission officials to take even a cursory look, provided that it gives appropriate reasons why such cursory look would be impossible without revealing the content of the document. In this case, the officials seal the documents without taking a look, and the party can refer the matter to the Commission's hearing officer whose mandate is to decide impartially whether a document is privileged. According to the terms of reference of the hearing officer, he/she *"should be able to facilitate the resolution of claims that a document is covered by legal professional privilege. To this end, if the undertaking or association of undertakings making the claim agrees, the hearing officer will be allowed to examine the document concerned and make*

an appropriate recommendation, referring to the applicable case-law of the Court of Justice". (European Commission, 2011^[20])

50. The decision of the hearing officer is a recommendation to the competent member of the Commission. It is not binding and is therefore not appealable. However, if the matter is not resolved and the Commission decides to reject the privilege claim, the Commission's decision is reviewable by the Court of Justice of the EU. If the company brings an action to set aside this decision and applies for interim relief, the Commission will not open the sealed envelope and not read the documents until the Court of Justice has decided on the interim measures (European Commission, 2011^[21]).

51. In the investigations of the U.S. Department of Justice (the "DoJ"), if an investigated company raises legal privilege claims with respect to any seized documents, these are separated from the other documents and reviewed by a so-called taint or filter team, i.e. a team of DoJ prosecutors who are not assigned to the investigation and whose only role is to review privilege claims. The DoJ officials tasked with prosecuting the case and the agents of the Federal Bureau of Investigation that conduct the searches do not have access to seized documents until the legal privilege claims are resolved⁶. Any member of the prosecution team who is exposed to information that is determined to be privileged can be removed from the case. If the dispute is not resolved, the case can be heard by the competent court (United States Department of Justice,(n.d.)^[22]) (United States Department of Justice,(n.d.)^[23]) (Hammond, 2015^[19]).

52. The International Chamber of Commerce's Commission for Competition *Recommended framework for international best practices in competition law enforcement proceedings* (ICC Commission on Competition, 2010^[24]) recommends that *"any disputes between the agency and a party regarding the application of the legal professional privilege, such as whether specific documents or communications are privileged, should be resolved by an independent decision-maker, such as a court or an administrative law judge"*. The ECHR has held that the effective judicial review of a claim of breach of legal privilege in relation to specifically identified documents requires an assessment of the lawfulness and merits of the decision to seize documents, as well as the return of any unlawfully seized documents (ECHR, applications 63629/10 and 60567/10 *Vinci Construction and GTM Génie Civile et Services v. France*).

5. Sharing of privileged information in cross-border cases

53. The ability to exchange confidential information (of which privileged information is a subset) can help competition authorities' enforcement. Exchange of confidential information may take place through confidentiality waivers; through so-called "information gateway" provisions (i.e. legal provisions allowing for the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information) (OECD, 2012^[25]); or through competition enforcement co-operation agreements between governments or competition authorities. As a general rule, information claimed to be privileged is not shared.

5.1. The principle: privileged information should not be requested or transmitted

54. The OECD has looked at whether information lawfully gathered in one jurisdiction (where the information is not privileged) can be lawfully sent to and used by another jurisdiction offering higher protection (where the information would be privileged). The

OECD recommends that jurisdictions transmitting information should endeavour not to provide information deemed privileged in the receiving jurisdiction, and can consider consulting with the parties to identify which information would be privileged abroad. Receiving jurisdictions should not request information that would be privileged in their legal system, and not use any information thus privileged that has been transmitted to them.

Box 14. Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings (OECD)

Provisions applicable to information exchange systems

The transmitting Adherent should apply its own rules governing applicable privileges, including the privilege against self-incrimination and professional privileges, when transmitting the requested confidential information, and endeavour not to provide information deemed privileged in the receiving Adherent. The transmitting Adherent may consider working with the parties to identify privileged information in the receiving Adherent in appropriate cases.

The receiving Adherent should, to the fullest extent possible:

- (i) not call for information that would be protected by those privileges, and*
- (ii) ensure that no use will be made of any information provided by the transmitting Adherent that is subject to applicable privileges of the receiving Adherent.*

Adherents should ensure an appropriate privacy protection framework in accordance with their respective legislation.

Source: (OECD, 2014^[26])

55. Likewise, the U.S. DoJ and Federal Trade Commission (the “FTC”) Model Waiver of Confidentiality for use in civil matters involving non-U.S. competition authorities specifies that the agencies will not seek from agencies overseas information that would be subject to U.S. legal privilege, and will request the return of privileged information that is inadvertently produced and transmitted⁷. (United States Department of Justice and Federal Trade Commission, 2013^[27])

56. The ICN Cartel Leniency Waiver Templates and Explanatory Note clarify that, even when there is a waiver, this does not “*apply to the exchange of confidential information that, according to the applicable rules in the jurisdiction of the receiving competition agency, is considered “privileged information,” such as information subject to legal professional privilege. It is up to the leniency applicant to identify which information it considers to be privileged under the rules of the receiving competition agency and therefore should not be exchanged pursuant to the waiver. If privileged information is inadvertently disclosed, the receiving competition agency will return, sequester or destroy the privileged information in accordance with their rules.*” (ICN, 2014^[28])

57. In the case of cross-border mergers, where completeness and consistency of information submitted across all concerned jurisdictions is crucial to speed up the review and enable reaching consistent decisions, the reviewing authorities usually ask the merging parties for confidentiality waivers allowing them to exchange information. Waivers simplify the co-ordination of the merger review steps and allow better alignment of

decisions and remedies. However, the granting of a waiver will probably be unappealing for parties if they enable information not privileged (and thus submitted) in one jurisdiction to be sent to another where it is privileged (and could have been withheld). (Levy and Karadakova, 2018^[6]).

58. To overcome resistance to granting of merger confidentiality waivers, authorities may, like in the case of leniency documents, allow information to be carved out and not be sent to a jurisdiction where it would be privileged. According to the Commission's model merger confidentiality waiver "*it is understood and agreed that Company X or Y is responsible for informing the Commission of the existence of such privileged information*". If informed, the Commission "*shall not disclose to [competition authority B] any information or documentation obtained from X and /or Y in relation to which either X or Y has asserted a claim of legal privilege in [the jurisdiction in competition authority B] and that is clearly identified as being subject to such client/attorney privilege*" (European Commission, (n.d.)^[29]). This would still require parties that have sought or been given advice for the same merger to assess which information is privileged in each jurisdiction, and carve it out accordingly. Therefore, different approaches to privilege among jurisdictions will likely encumber and slow down the preparation of files. In some cases, parties might be able to negotiate with all authorities, limiting the confidentiality waivers to the standard of the jurisdiction with more generous privilege protections, and thus be able to carve out the information privileged in the most protective forum from submissions to all authorities.

5.2. Information exchange through competition Enforcement Co-operation Agreements and Networks

59. Information can be exchanged on the basis of competition enforcement co-operation agreements between governments (OECD, 2015^[30]) or competition authorities (OECD, 2017^[31]). Most agreements allow only the exchange of non-confidential information, or allow exchanging confidential information with the consent of the source of the information. Few agreements allow the exchange of confidential information without seeking prior authorisation from the source of the information (so-called "second generation" agreements) that contain confidentiality safeguards, including an obligation to maintain the confidentiality of information exchanged, and set conditions on the use and further disclosure of the exchanged confidential information (OECD, 2017^[32]).⁸

60. Even fewer agreements contain clauses that allow the exchange of privileged information.

Box 15. Exchange of privileged information in second generation competition enforcement co-operation agreements

Cooperation Arrangement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the provision of compulsorily-acquired information and investigative assistance (2013)

This cooperation arrangement allows the New Zealand Commerce Commission to share compulsorily acquired information (i.e., information that is not in the public domain, and which is acquired through the use of information-gathering powers) and provide investigative assistance to the Australian Competition and Consumer Commission. It provides safeguards to address public interest concerns, including the maintenance of legal privilege.

Protection and use of information

16. Where the NZCC provides any information or communication which is protected by privilege under New Zealand law:

16.1. the NZCC is not to be regarded as having waived that privilege; and

16.2. the ACCC will treat that information or communication as being subject to the analogous privilege under Australian law.

Cooperation Arrangement between the New Zealand Commerce Commission and the Commissioner of Competition (Canada) in relation to the sharing of information and provision of investigative assistance (2016)

This cooperation arrangement also provides safeguards regarding the protection of legal privilege.

Protection and use of information

15. Where a Participant provides any communication or information that is identified as protected by privilege under its domestic laws:

15.1. the responding Participant will not be regarded as having waived that privilege; and

15.2. the requesting Participant will receive that communication or information in confidence and, to the fullest extent possible, will not disclose that communication or information without the consent of the responding Participant.

Source: (OECD, 2017^[31]) (OECD, 2017^[32]) Provisions on exchange of information: www.oecd.org/daf/competition/mou-inventory-provisions-on-exchange-of-information.pdf

61. The EU Member States and the Commission co-operate through the European Competition Network (ECN). In the context of the ECN, information lawfully collected in the course of competition proceedings in one jurisdiction can be lawfully shared and used in a jurisdiction where the information would be privileged (and thus would not, in that jurisdiction, be lawfully collected). Article 12 of Regulation 1/2003 states that the “Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including

confidential information”, under conditions applicable to sanctions against individuals⁹. Thus a Member State can receive information that would, in domestic cases, be privileged.

62. On this issue, the UK Competition and Market Authority’s Powers of Investigation clarifies that *“when the OFT (now CMA) is investigating suspected infringements of Article 81 (now 101) or Article 82 (now 102) in the UK on its own initiative (or at the request of another NCA (national competition authority) or on behalf of the European Commission ... UK rules on legal professional privilege (‘privilege’) will apply. This means that the communications of in-house lawyers, in addition to lawyers in private practice, can benefit from privilege.”* However, *“the OFT could be sent the communications of in-house lawyers, or lawyers qualified outside the EU, by an NCA from another Member State where the communications of such lawyers are not privileged. Under those circumstances, the OFT may use the documentation received from the other NCA in its investigation.”* (CMA, 2004^[33])

5.3. Need for convergence?

63. When various competition authorities are reviewing a cross-border transaction or antitrust conduct, they each apply their rules on legal privilege. In the absence of a uniform approach to privilege among jurisdictions, and given that the actions of a competition authority may affect firms outside its borders, some level of convergence may be desirable, both to ensure fairness to the investigated firms as well as to avoid frictions among enforcement systems. International competition fora, like the OECD and the ICN, promote a meaningful discussion of the differences among jurisdictions and enable building consensus and identifying areas of convergence.

64. Firms may find it difficult to seek effective legal advice from the advisor they want for their international operations when different approaches to legal professional privilege makes them unsure of whether the information they obtain is theirs and can be kept secret, or not. At their end, authorities in systems with different levels of privilege protection may find it hard, or impossible, to exchange information. This complicates their co-ordinated review of cross-border cases, and essentially means that different authorities will have different information on the same conduct or transaction.

65. The conceivably more mature area for considering convergence is that of the extension of legal privilege to communications between clients and their in-house lawyers, recognised in 19 out of the 34 OECD Members that recognise privilege. If jurisdictions acknowledge in-house lawyers as able to provide privileged advice to companies in that jurisdiction, this could be considered to be sufficient grounds for other jurisdictions to also accept that¹⁰ (González-Díaz and Stuart, 2017^[8]). This would be particularly important for claiming legal privilege in merger review procedures, since in-house departments are often involved in and provide advice for corporate transactions (Holtz, 2013^[7]).

6. Conclusions

66. Legal privilege is recognised in almost all OECD Members, as an emanation of the rule of law and/ or the rights of defence. It is usually an absolute right, which can be limited exceptionally in accordance with the law.

67. The scope and coverage of legal privilege vary among jurisdictions. This can lead to challenges: for instance, this paper referred in Section 3.2 to the difficulties of asking for

and providing legal advice in more than one jurisdictions regarding the same conduct or transaction when the jurisdictions involved grant dissimilar protection to attorneys (not) qualified in the forum, or to external versus in-house lawyers.

68. International competition enforcement co-operation usually excludes privileged information: confidentiality waivers do not normally apply to it, and competition enforcement co-operation agreements rarely refer to privileged information, and even more rarely allow it to be exchanged.

69. In jurisdictions where legal privilege is recognised, this limits competition authorities' investigative powers: information requests should exclude privileged materials, and so should dawn raids. If a document used in an enforcement decision is privileged, this decision would be appealable before the courts, and may be set aside.

Endnotes

¹ According to the Secretariat's research of public resources, the OECD Members that do not recognise legal privilege are Japan and Korea.

² Case C-550/07 [2010, Grand Chamber] Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-550/07>

³ According to the Secretariat's research of public resources, the 19 OECD Members that extend legal privilege to communications with in-house lawyers are Australia, Belgium, Canada, Chile, Greece, Hungary, Iceland, Ireland, Israel, Latvia, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, UK, and the U.S.

⁴ “[OFT] proceedings may not be wholly adversarial or wholly inquisitorial [...] The proceedings in this case were confrontational by the time Tesco began collecting the Potential Witness Material in early 2011. By then, the OFT had issued a [Statement of Objections] and a Supplementary Statement of Objections, both of which proposed to find that Tesco had infringed the Chapter I prohibition; the investigation was not simply an inquiry to get to the bottom of the facts. Tesco stood accused of wrongdoing. In these circumstances I consider that the administrative procedure under the Act was sufficiently adversarial by the time Tesco contacted third party witnesses that the Potential Witness Material it gathered was subject to litigation privilege” (Tesco Stores Limited, Tesco Holdings Limited, Tesco Plc v Office Of Fair Trading Neutral citation [2012] CAT 6 Case Number: 1188/1/11 www.catribunal.org.uk/files/1188_Tesco_Judgment_CAT_6_200312.pdf)

⁵ In Canada, the privilege can be overridden where there exists a clear, serious and imminent threat to public safety, which would allow or require disclosure in cases where there is some impending harm to a person (Smith v. Jones, [1999] 1 S.C.R. 455), [www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-\(1\)/Solicitor-Client-Privilege/FAQ-Privilege-and-Confidentiality-for-In-House-Cou](http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Solicitor-Client-Privilege/FAQ-Privilege-and-Confidentiality-for-In-House-Cou)

⁶ U.S. Attorneys' Manual Title 9: Criminal, 9-13.420 - Searches of Premises of Subject Attorneys: “Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a “privilege team” should be designated, consisting of agents and lawyers not involved in the underlying investigation. Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team”.

⁷ “FTC/DOJ will not seek from [non-U.S. competition authority] information that is protected by U.S. legal privilege. To the extent possible, [entity] will clearly identify to [non-U.S. competition authority] information that would be subject to U.S. legal privilege. If the FTC/DOJ receives information from [non-U.S. competition authority] that [entity] claims as privileged in the U. S., it is understood that the FTC/DOJ will treat such information as inadvertently produced privileged information” (and will therefore not use it until the question is resolved). If “DOJ/FTC is notified of inadvertently produced privileged information, the DOJ/FTC will not provide [non-U.S. competition authority] with copies of such information or will request the return of such information, as appropriate”. (United States Department of Justice and Federal Trade Commission, 2013^[27])

⁸ For example, the 2017 Nordic Agreement on Cooperation in Competition Case allows the exchange of confidential information and its use as evidence, but stipulates that information exchanged shall only be used in evidence and in respect of the subject matter for which it was collected by the transmitting authority: “for the purpose of applying competition rules and merger control rules the competition authorities of the Parties shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. Information

exchanged shall only be used in evidence and in respect of the subject matter for which it was collected by the transmitting authority.” Agreement on Cooperation in Competition Cases (2017), article 3, www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf

⁹ Recital 16 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 [now 101] and 82 [now 102] of the Treaty explains that “*notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority*”.

¹⁰ “*Documents created by U.S. lawyers and U.S. business people seeking and providing U.S. legal advice would carry the full expectation that the documents would remain confidential. Compelling production of such documents and not affording [legal privilege] undermines the legitimate expectations of U.S.-based companies as to the legal rules governing their communications in the United States with U.S. counsel and interferes with the right of the United States to guarantee the confidentiality of written communications in the United States between U.S. companies and lawyers who are qualified members of a U.S. State bar*” (González-Díaz and Stuart, 2017^[8])

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