DEPARTMENT OF JUSTICE

Attorney-Client Privilege in Global Antitrust Enforcement

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I. Introduction

I am delighted to be with you today to discuss the vexing problem of attorney-client privilege in global antitrust enforcement. Assistant Attorney General Makan Delrahim was scheduled to be here and sends his sincere regrets for not being able to speak with you today. We have a number of matters, including the Bayer/Monsanto merger, that precluded his ability to be here. Accordingly, he asked me to come in his place.

Chairwoman Alejandra Palacios and her colleagues at COFECE are some of our closest allies and strongest friends in the competition community. In the past few months, I have had the good fortune to meet with Jana and her colleagues in the United States, Europe and Asia. It is wonderful to meet here in Mexico. Jana Palacios is, without question, one of the leading lights in the international competition community, and I am happy to call her my colleague and friend.

This morning, I will discuss some approaches to the following problem: when multiple competition authorities are reviewing a cross-border transaction or perhaps investigating transnational antitrust conduct, what happens when these competition authorities have adopted different approaches to the attorney-client privilege such that there is not a single standard for the privilege? This is an issue that I know Mexico has been wrestling with for some time, and I welcome the opportunity to share with you the United States' experience.

I will acknowledge at the outset that while the United States has a long-established framework for recognizing and adjudicating the attorney-client privilege, there is a diversity of approaches to the attorney-client privilege among common law jurisdictions. And, as I'll discuss in more detail later on, there are also a number of reasons why many civil law jurisdictions do not recognize the attorney-client privilege. Despite these differences, I applaud all jurisdictions that are open to considering changes to their rules that may make their legal regimes more effective in the antitrust context.

II. General Overview of the Attorney-Client Privilege in the United States

Let me begin by briefly describing the attorney-client privilege in the United States. Benjamin Franklin famously quipped in *Poor Richard's Almanack*: "If you would keep your secret from an enemy, tell it not to a friend." There is a grain of truth to that maxim, but there are several grains of untruth as well. We don't *really* think that friends should never be trusted. And neither did Ben Franklin. "A true friend," he wrote, "is the best possession," and "'tis great confidence in a friend to tell him your faults[.]" Franklin knew and we all understand that true friends are deserving of great trust.

The legal twist to Franklin's maxim would be: *if you would keep your secret from the prosecutor, tell it not to your attorney*. Such advice rings hollow because we *want* clients to trust their attorneys. And yet, if we do not give that relationship privileged status, the maxim unfortunately holds true. The lawyer cannot be trusted if the law requires her to betray that trust. That is the spirit behind the attorney-client privilege.

When we view lawyers as trusted advisors, it is easy to understand why a client's relationship with her lawyer deserves special status. The traditional argument against attorney-client privilege is that one is sacrificing the pursuit of truth for the interests of the client. But there are many relationships in which we give priority to the concerns of persons within our care because we believe it serves the broader interests of society as a whole. We call those relationships positions of trust, and we sometimes give communications in those relationships—with spouses, attorneys, and physicians—special legal privileges against compelled disclosure.

Former U.S. Solicitor General Charles Fried recognized this distinction when he posed the question, "How can it be that it is not only permissible, but indeed morally right, to favor the interests of a particular person in a way which … is either harmful to another particular individual or not maximally conducive to the welfare of society as a whole?"[1] The answer, Fried argued, was to recognize the special role of the lawyer to act in the client's interests. "As a professional person one has a special care for the interests of those accepted as clients, just as his friends, his family, and he himself have a very general claim to his special concern." [2]

The recognition of special trust goes back centuries, long before the friendly relations between the United States and Mexico.[3] In common law jurisdictions, we have had the attorney-client privilege before there was a British empire, a United States of America, or even a Jamestown settlement. Its origins date back to the late 16th century in the British chancery case of *Berd v. Lovelace*,[4] not long after trial by jury replaced trial by ordeal. Since then, there has been a rich pedigree upholding the privilege.

The idea behind the privilege is straightforward enough. In order for clients to properly exercise their legal rights and duties, they cannot be expected to go it alone. So they confide in an expert in the law, who can be trusted with their confidences and tasked to vigorously defend their position as if it was their own.

The U.S. Supreme Court explained that the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administrative of justice….[It] rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."[5] Without the privilege, clients will be circumspect in what they tell their lawyers and when they tell them. And that circumspection undermines effective representation.

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[1] Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L. J. 1060, 1066 (1975).
[2] *Id.* at 1067.
[3] *See generally Developments in the Law—Privileged Communication*, 98 HARV. L. REV. 1450, 1455-56 (1985); Geoffrey C. Hazard Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1087 (1978).
[4] Cary 88, 21 Eng. Rep. 33 (Ch. 1577).
[5] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Stated simply, in the United States, the attorney-client privilege is a legal privilege that keeps communications between an attorney and his client secret. It can be asserted in response to legal demands for discovery[6] and other compelled disclosures, including testimony. Moreover, it applies in both civil and criminal matters, and can attach for private individuals, corporations, and even governmental clients.[7]

Like many common law doctrines, the attorney-client privilege has certain essential elements. The person asserting the privilege must be a client and the communication must be with a licensed attorney.[8] Attorneys are broadly defined to include in-house counsel, government lawyers, private lawyers, and those they hire to assist them (experts, paralegals, and support staff).

As we all know, lawyers are often loquacious, and they like to talk and write, and talk about what they've written, and write about what they've said. So it will not surprise you that both oral and written communications with clients are protected. So too are the written summaries that memorialize their conversations with clients.[9] But it is the *communications* that are protected, not the facts embedded in them. Clients cannot hide behind the privilege and refuse to disclose facts.[10]

The privilege does not attach to otherwise protected information if the client waives the privilege.[11] And if a communication is witnessed by a third-party or voluntarily disclosed by the client, the privilege is typically waived.[12] Notice that the privilege is the client's to waive. So the loquacious lawyer who reveals a client's confidences does not waive the privilege, but he may be subject to disciplinary action.

Given the purpose of the privilege, it should be obvious that not just any attorney-client communication will be protected. The attorney must be acting as a legal advisor and the communication must be confidential and relate to securing legal advice.[13] A lawyer giving her client business advice, for example, would not trigger the attorney-client privilege. Lawyers

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[6] Discovery is generally defined to mean efforts of a party in an investigation or litigation and his or her attorneys to obtain information before a trial through demands for documents, oral testimony, interrogatories, and admissions.

[7] *See United States v. Jicarilla Apache Nation*, 54 U.S. 162 (2011).

[8] *See In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984).

[9] *Loftin v. Bande*, 258 F.R.D. 31, 35 (D.D.C. 2009).

[10] *See Upjohn*, 449 U.S. at 395-96 ("[a] fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney") (citations omitted).

[11] *See Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 52-53 (D.D.C. 2009); *Convertino v. United States*, 674 F. Supp. 2d 97, 109 (D.D.C. 2009).

[12] *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (citing *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)); *see also United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). The precise scope of the waiver is a more complicated question. *See generally* Federal Rule of Evidence 502.

[13] *See In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) ("As oft-cited definitions of the privilege make clear, only communications that seek 'legal advice' from 'a professional legal adviser in his capacity as such' are protected."); *Alexander v. FBI*, 186 F.R.D. 102, 110-11 (D.D.C. 1998) ("[c]ommunications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence") (citation and internal quotation marks omitted); *United States v. Motorola*, 1999 WL 552553, at *3 (D.D.C. May 28, 1999) ("[C]ommunications made by and to a lawyer with respect to business matters, management decisions, or business advice are not protected by the privilege."); *Boca Investerings P'ship v. United States*, 31 F. Supp. 2d 9, 11 (D.D.C. 1998).

cannot use privilege to enhance the value of their legal license in order to secure business opportunities. Otherwise they would be hired as advisors just to be a walking shield of protection from disclosure of business discussions.

And it is not just business discussions that are unprotected. Even legal advice that crosses certain lines is not protected. The privilege is intended to encourage frank discussions between clients and their attorneys. But as Justice Cardozo put it, when frankness turns to fraud, "the privilege takes flight." [14] The privilege is not intended to protect clients who seek advice on how to commit fraud or perpetrate a crime. Clients cannot invoke the privilege to protect conversations with their lawyers about how to participate in crimes, including an antitrust crime such as a price-fixing cartel, although they certainly can discuss how to defend against allegations of these crimes. Lawyers have a duty to their clients, and a higher duty to uphold the law.

III. Attorney-Client Privilege in U.S. Antitrust Enforcement

Let me turn now to the issue of the attorney-client privilege in the antitrust context, with particular focus on transnational discovery issues. The globalization of antitrust enforcement raises difficult questions about how to address attorney-client privilege. Consider, for example, a merger between multinational corporations that triggers antitrust reviews by multiple agencies around the world. The parties in such investigations often sign confidentiality waivers permitting the sharing of information across those jurisdictions. In these situations, the question of how to address information that is privileged in one jurisdiction but not another is inevitable.

As antitrust enforcers, the issue of privilege sometimes arises in the merger context when we cooperate with other agencies. At the Antitrust Division, we do not seek information that is privileged under U.S. law from foreign competition authorities. We even invite companies who sign our model confidentiality waiver to clearly identify any materials that are privileged under U.S. law that are provided to those authorities.

In the unlikely event that a party claims that we received privileged information from a foreign authority and we have not reviewed or used the information, we will consider such information as though it were inadvertently produced to us in the first instance. We will sequester the information and refrain from using it until the privilege claim is resolved.

We also deal with the question of privileged information outside the merger context. In these instances, including criminal antitrust prosecutions, the Antitrust Division may request foreign documents from other competition authorities through legal channels, such as mutual legal assistance treaties (MLATs). In such instances, the Antitrust Division's requests are targeted and do not seek privileged documents. In the unlikely event that such a request yielded documents or information that are attorney-client privileged under U.S. law, the Antitrust Division would follow its typical procedures outlined above.

[14] *Clark v. United States*, 289 U.S. 1, 15, (1933) ("The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.").

IV. Attorney-Client Privilege in the Global Antitrust Context

Privilege issues in cross-border antitrust investigations do not exist in a vacuum and one must consider the legal framework that gives rise to discovery practices in the first place. In this regard, common law jurisdictions vary from civil law jurisdictions. And there is a considerable diversity of discovery protocols within each type of jurisdiction. Moreover, agencies may vary in their approach to privilege based on the underlying legal issue (e.g., a merger, civil non-merger, or criminal antitrust claim).

As competition agencies are converging with respect to sound antitrust enforcement, one of the important questions will be how to address questions of privilege going forward. This presents difficult issues of bridging civil and common law traditions.

Civil law jurisdictions, including Mexico, typically do not have discovery frameworks that provide for broad disclosure obligations. These jurisdictions, particularly in Western Europe, have enacted statutory confidentiality rules that obligate attorneys not to disclose confidential information the client provided to the attorney. Confidentiality is different from privilege in that the focus is not the communication itself, but rather, the attorney's duty not to disclose client confidences. And in some jurisdictions the confidentiality duty only applies to outside counsel, leaving in-house counsel less able to provide full and frank legal advice without the risk of disclosure.

Moreover, many civil law confidentiality protections generally apply only to the attorney—not the client. Some civil law jurisdictions protect against the disclosure of confidential documents in the attorney's possession, but not the client's. So a dawn raid of the client's offices, or a document request targeting the client but not the lawyer, may not trigger a valid claim of privilege. This approach was workable in an age when clients visited their attorney's offices to secure advice and exchange information.

But in a world of electronic communication and global business, this is a fundamental gap in privilege protections. It's like building a house with three walls, and leaving the fourth side open to the elements. It works wonderfully, until the rain of document requests pours down on the exposed side of the house. That's perhaps why civil law jurisdictions like Switzerland and mixed systems like the European Union have developed their laws to protect confidential information regardless of where it is located.[15] It is also why the recent development in Mexico regarding the protection of attorney-client privilege in the contexts of dawn raids is noteworthy.[16]

Antitrust investigations are special because the nature of antitrust discovery goes to the heart of a company's business. Therefore, documents and information that are relevant to, for example, a cross-border transaction or conduct that affects multiple geographies, can be quite

[15] Swiss Code of Civil Procedure, 160(1)(b) (2008); Swiss Code of Criminal Procedure, 264(1)(b) (2007); *Akzo Nobel v. Commission*, Case C-550/07, 2010 ECR I-1; *AM&S Europe Ltd. v. Commission*, Case C-155/79, 1982 E.C.R. 1575.

[16] Martha Loubet, *Mexico Court Recognizes Attorney-Client Privilege*, COMPLAW (Feb. 14, 2017); SAI Consultores SC, *Courts Recognize Attorney-Client Privilege in Antitrust Matter for First Time*, INTERNATIONAL LAW OFFICE (Jan. 12, 2017).

extensive. Thus, it may be possible for a jurisdiction to recognize the attorney-client privilege in one context but not others.

To the extent we increasingly gather evidence in investigations in similar ways, it raises the question whether we should recognize privileges in similar ways. There are several possible responses as to how to address this problem. Given the complexity of the issues, I will limit my discussion to the merger context, where parties voluntary allow agencies to share information pursuant to waiver agreements and agencies encourage international cooperation.

One approach is to continue with the *status quo* and accept privilege pluralism among competition authorities. With this approach, antitrust counsel will continue their practice of recognizing the different types of privilege in different countries, and engage with their clients accordingly. That effectively means that agencies will continue with their current practices in gathering evidence and attorneys and clients will accommodate the privilege rules of each agency and communicate depending on the scope of the privilege in the relevant jurisdictions.

In the case of a merger reviewed by multiple jurisdictions, this means that different privilege claims will be made to different agencies. When those agencies cooperate with another on merger investigations, certain agencies will have documents that other agencies might not.
A second approach is for competition agencies to recognize, formally or informally, the applicable privilege laws that naturally govern the relationship between the attorney and the client. This is the approach that the International Bar Association has recommended in a related context involving the transnational taking of evidence.[17] Under this approach, the competition agency reviewing documents in a merger would exclude and not seek evidence or the production of any documents or oral testimony if there is a privilege under the legal or ethical rules the agency determines to be applicable to the attorney-client relationship.[18]

In the merger context, this might mean that even if an agency does not ordinarily recognize attorney-client privilege, it would nonetheless do so if the jurisdiction that has the closest nexus to the attorney-client relationship recognizes such a privilege. But it might also mean that even though an agency ordinarily does recognize privilege laws, it would nonetheless not recognize attorney-client privilege claims if the jurisdiction that has the closest nexus to the attorney-client relationship does not. As discussed above, this is not the approach the Antitrust Division has adopted or recommends.

A third approach is for competition agencies to apply the most protective of the possible privilege laws that might govern the relationship. Under this approach, when the parties are subject under applicable laws to different privilege rules, the agency should apply the same rule to all parties, giving preference to the rule that provides the highest level of protection. Obviously that is an easier solution for competition agencies in jurisdictions that already have robust attorney-client privilege laws, and more difficult for other jurisdictions.

[17] INT'L BAR ASSOCIATION, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.
[18] *Id.* art. 9(2)(b).

A fourth approach is for competition agencies to agree upon a uniform approach with respect to attorney-client privilege and adopt that approach as part of best practices in competition enforcement. There is some evidence of general support for this approach. For example, the recent ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement state that "[c]ompetition 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 third parties, incentives to provide information, effects on competition, and transparency to the public."[19] This is a welcome attempt to suggest uniform application in protecting privileged information, but it does not specifically address attorney-client privilege. Of course, every jurisdiction, including the United States, would have to apply such a uniform practice consistent with domestic law.

It is noteworthy that in November 2018 the OECD Competition Committee is scheduled to address the topic of attorney-client privilege. This will give leading competition authorities an opportunity to explain their approaches to the issue. We are hopeful that there will be discussion in that context of ways to pursue convergence on the issue of attorney-client privilege. Or at a minimum, perhaps we will recognize there already is broad consensus on a particular approach with respect to the privilege, which will assist authorities in deciding how they should proceed.

Working toward common practices on attorney-client privilege is only one aspect of a much broader agenda of promoting procedural fairness. We at the Antitrust Division strongly support the effort to pursue common practices with respect to core due process standards. And we are hopeful that the competition community will consider new and fresh ways of thinking on how to pursue agreement on fundamental norms. That is a topic that Assistant Attorney General Makan Delrahim will be discussing in two days at the Council on Foreign Relations in Washington, D.C.

Thank you.

[19] INT'L COMPETITION NETWORK, GUIDING PRINCIPLES FOR PROCEDURAL FAIRNESS IN COMPETITION AGENCY ENFORCEMENT (Mar. 2018).