



Discussion Points

Presented by the Business at OECD Competition Committee to the OECD Competition Committee Working Party No. 3

Treatment of Privileged Information in Competition Proceedings

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I. Introduction

1. *Business at OECD* appreciates the opportunity to submit these comments to the OECD Competition Committee roundtable on the treatment of privileged information in competition proceedings.
2. Legal Professional Privilege (LPP) is a fundamental right for individuals and undertakings and a key element of due process. It is a necessary corollary of the right of every person to seek legal advice, and it plays a crucial role in ensuring the proper administration of justice.
3. Such right has its origin in common law jurisdictions. It has existed for over 400 years in England, and it is linked to a duty of disclosure in court proceedings in those jurisdictions. LPP protects from disclosure confidential communications, and material evidencing such communications, that take place between clients and their lawyers and in some circumstances also between those lawyers and third parties. In other words, it is the right of a client to talk or to give information freely to a professional legal advisor without fear of it being disclosed without the client's consent.
4. Even if its origins are in court proceedings, LPP is a key element of due process that requires protection and respect by governmental bodies.¹ It plays an important role in all competition law investigations which have always relied (and even more so today) on a large number of internal documents. LPP protects the company from an obligation to disclose their legal advice in these investigations, unless they consent to it.
5. LPP also plays an important role in fostering a culture of compliance within businesses. In recent years, compliance programmes have become more sophisticated. Most companies

¹ See, e.g., COMBINED COUNCIL AND BARS OF EUROPE, CCBE RECOMMENDATION: ON THE PROTECTION OF CLIENT CONFIDENTIALITY WITHIN THE CONTEXT OF SURVEILLANCE ACTIVITIES (2016), available at www.ccbe.eu/fileadmin/specialty_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SVL_2016042_8_CCBE_recommendations_on_the_protection_of_client_confidentiality_within_the_context_of_surveillance_activities.pdf.

provide face to face training or whistleblowing hotlines. Issues are sometimes raised at those sessions or through the hotline and LPP allows lawyers (internal and external) to provide quick advice to ensure compliance or investigate the matter efficiently. This is extremely important in a world where there is a large number of competition authorities, with diverging (and sometimes inconsistent) rules.

6. This paper will highlight some of issues which relate to the recognition of LPP by competition authorities.

II. Competition Authorities, Courts and LPP

7. Although some countries do not recognise the existence of LPP, most OECD countries do. But there are substantial differences even amongst jurisdictions that recognise it:² there are differences about its scope, the type of documents covered and the type of lawyers that can provide legal advice covered by LPP.
8. Since the origins of LPP are outside the area of competition law, it is also a subject that continues to evolve and to be refined by courts.³ It does not apply only to competition law investigations but also to all governmental investigations and to litigation between individuals. However, competition law investigations have some specificities that make the application of LPP more complex, especially when several competition authorities from different jurisdictions with different rules of LPP are involved.
9. Many of the concerns relating to LLP could be avoided by having greater harmonisation of LPP rules across the world but, considering that LPP is a concept mostly developed by the courts, what competition authorities should in any case do is seek to ensure a high level of protection of LPP and mutual respect of each other's rules. But there are other actions that competition authorities can take:
 - a. In their advocacy efforts, advocate for legal changes in their respective jurisdictions to secure adequate protection for LPP, including for in-house counsels, by stressing the compliance benefits outlined above;
 - b. Intervene in competition cases where LPP is challenged to support protecting LPP documents from disclosure;
 - c. Not requiring waivers of LPP as a condition for immunity applications, in order to qualify as having cooperated fully;
 - d. Complying with the OECD Recommendation (discussed later at para. 24.); and
 - e. Developing practical solutions in relation to the real problems faced by business dealing with massive disclosure requests within a very tight timescale (discussed later in Section IV). Industry would be willing to discuss options, one of which could be that document disclosure would be accepted "subject to LPP" allowing businesses to assert LLP at a later stage, without being held to have it waived by initially producing the documents.
10. Any discussion amongst OECD members that explores issues raised by LPP and increases an understanding of each other's obligations and approaches can only be helpful. Any effort by the

² The most obvious example is the differences for LPP in common law countries compared to civil law jurisdictions.

³ See for example, the UK Court of Appeal's recent decision in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006 (ENRC) which has helpfully departed from the High Court overly strict approach to the question of litigation privilege.

Competition Committee to analyse differences and provide assistance on how to reduce frictions between different LPP regimes is welcomed.

III. Increasing Importance of LPP

11. With an ever-increasing number of competition authorities across the world, stronger investigative powers for competition authorities as well as the substantial increase in fines, LPP is of increasing importance to business and the legal community for the reasons below. *Business at OECD* will cover some of those issues in the rest of this document.
 - a. LPP is relevant to all forms of competition law investigations, be they criminal or civil in nature, relating to cartels, merger review or unilateral conduct.
 - b. Given the multijurisdictional nature of many business activities, business will often need to seek legal advice across a number of different jurisdictions. LPP is therefore relevant in the context of globalisation of business models, the internationalization of competition law investigations and cooperation amongst authorities.
 - c. As authorities expand their information gathering abilities through forensic software information gathering tools and request many thousands of documents, it is becoming increasingly difficult for parties to both review and assert privilege on certain documents, especially when there are very tight deadlines.
 - d. With the increase of private actions for breaches of competition law across the world, questions of discovery claims relating to documents covered by LPP and information provided to agencies will only increase. This is likely to lead to tensions between the different approaches to LPP taken by courts and authorities, in particular where the action relates to investigations or companies in another jurisdiction, which has different LPP rules.

IV. Information Requests and LPP

12. Competition Authorities' requests for internal documents are becoming increasingly burdensome and can result in the submission of very large volumes of documents. For example, in merger cases in front of the European Commission, the number of documents requested has increased significantly in recent years, from a few hundreds to several hundred thousand, in particular in Phase 1.⁴
13. The European Commission announced in January 2018 that it is considering a set of best practices on requests for internal documents in merger cases based on current experience.⁵ The number of documents to be requested is substantial. In relation to LPP, it is understood that as regards LPP documents, parties may be required to submit a "privilege log" using a particular template that requires identification and explanation for each document (or part of a document) for which LPP is claimed. A wide definition applies to the notion of "document" and it includes all computer files (e.g., word processing files, spreadsheets, presentations, PDFs, emails and instant message files including any attachment). A document marked "privileged and confidential" or "from external counsel" would not suffice, and DG Comp would review and could reject unsubstantiated LPP claims. In each case, the parties would have to identify under which category of LPP each document falls (using the existing categories set out in the European Court's case law).

⁴ See, e.g., José Rivas & Bróna Heenan, *New Best Practice Rules For Internal Documents Under the EU Merger Regulation*, BIRD & BIRD (July 18, 2018), available at www.twobirds.com/en/news/articles/2018/global/new-best-practice-rules-for-internal-documents-under-the--eu-merger-regulation.

⁵ *Id.*

14. The increase of documents to be submitted in competition law cases raises serious issues relating to due process. Companies find themselves in difficulty when authorities seek blanket discovery of internal documents that may capture a significant number of documents some of which are likely to BE covered by LPP. While antitrust investigations face no formal deadlines (although challenging deadlines are sometimes set even in these cases), merger cases are subject to set timetables with businesses facing serious time pressure. And when an authority uses its formal powers to request information, non-compliance with the scope or the timing of the request can result in significant sanctions (even when LPP documents fall within the scope of the request).
15. The burden, the difficulties and the costs to comply with such requests should not be underestimated given the need to review each page of information requested to assess whether they are relevant and subject to LPP. Authorities should be more conscious of such difficulties as this has an impact of the fundamental rights of the parties to defend themselves, especially as the information often needs to be provided within a short deadline. More targeted information requests and better dialogues between the authorities and the parties in relation to LPP would be helpful.
16. The issues highlighted above (and indeed others relating to business secrets and confidential information) will only become more serious as authorities enhance their information gathering abilities through more sophisticated forensic tools that allow to search voluminous databases of documents. However, the use of such tools should not be the reason to allow authorities to make blanket information requests. Too wide requests place disproportionate burdens on the parties and make it difficult in practice to exercise the protection provided by LPP. And considering the importance of LPP as a right, authorities should ensure that appropriate protection is provided.
17. In order to manage documents protected by LPP, some authorities require the parties to submit a “privilege log,” using a particular template, that requires identification for each document (or part of document to which LPP applies). With a wide notion of what a “document” is and the increased large number of documents request, this places serious additional burdens on the parties. It also puts at risk the very protection of LPP that authorities should apply; due to time pressure, some documents covered by LPP may be disclosed to the authority by accident.
18. While we understand that certain enforcement authorities are concerned that LPP may be sometimes used to frustrate their efforts to undertake fully informed investigations, one must not forget that LPP is a fundamental right that must be protected. In situations where there are tensions between a fundamental right and the authority’s power to investigate, a proportionate approach should be taken to ensure a high level of protection of that right.
19. In addition, authorities should consider that fully protecting LPP has, in our view, net beneficial effects on compliance efforts by law abiding undertakings. At the same time, failure to protect privileged document might have an impact on the extent to which businesses are prepared to seek legal advice.

V. The Issue of Waivers

20. Nowadays, competition investigations routinely cover businesses with operations in multiple countries. In such a context, businesses will have usually sought legal advice in each affected jurisdiction. In order to understand the rationale and impact of transactions or practices on markets, competition authorities often seek information relating to the transaction, irrespective of where the information was generated or is held. In addition, investigations will often call for cooperation amongst authorities. However, different LPP regimes can cause very real practical and legal problems for businesses following the provision to one authority of information deemed privileged in another

jurisdiction, as this disclosure could lead to privilege being undermined in the jurisdiction originally conferring LPP.

21. Both the ICN and the OECD have begun to address some of these issues in the merger context, reflecting the importance of comity principles and the respect for jurisdictional sovereignty. For example, the ICN *Waivers of Confidentiality in Merger Investigations* specifically raises the issue of information protected by LPP in one jurisdiction but not another.⁶ The ICN notes, “This issue has arisen in particular in the context of cooperation between the U.S. authorities and the European Commission, for example, because in-house counsel advice is privileged under U.S. law, but not under European Community law.”⁷
22. The case law of the Court of Justice of the European Union relating to LPP⁸ essentially limits LPP only to external EU-qualified counsel, which would mean that, for example, that for the EU Commission U.S. outside counsel communication to U.S.-qualified in-house lawyer would not be considered privileged (whereas it is covered by LPP in the U.S.). In its investigations, it appears that the European Commission has so far used its discretion to ensure that such communications do not lose their privilege. The European Commission’s model waiver form notes that the European Commission shall not disclose to an authority included in the waiver information covered by LPP in *that* jurisdiction.⁹ The issue, however, still arises of whether by disclosing it to the European Commission the parties have waived their right to assert LPP for those documents.
23. The U.S. and EU *Best Practices on Cooperation in Merger Investigations* notes that, despite LPP rules being different, “the agencies will accept a stipulation in parties’ waivers given to DG Competition that excludes from the scope of the waiver evidence that is properly identified by the parties as, and qualifies for, the in-house counsel privilege under US law.”¹⁰ However, this only relates to cases where there is a voluntary waiver (that could sensibly only be achieved where the companies in question are confident that LPP communications would not lose its protection) and in a merger context. Such principles deserve broader recognition across the range of competition enforcement actions.
24. Indeed, the 2014 *Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings* recommended that authorities should “endeavour not to provide information deemed privileged in the receiving Adherent” and what systems have been put into place to conform to the recommendation that “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.”¹¹ *Business at OECD* would welcome Working Party 3

⁶ INT’L COMPETITION NETWORK, *WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS* (2005), available at www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf.

⁷ *Id.* at 7.

⁸ See *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission* (Case C-550/07 P); *AM&S v Commission* (Case 155/79) [1892] ECR 1575, *Hilti v Commission* (Case T30/89) ECR II-163.

⁹ See EUR. COMM’N, EUROPEAN COMMISSION CONFIDENTIALITY WAIVER, available at <http://ec.europa.eu/competition/mergers/legislation/npwaivers.pdf>.

¹⁰ U.S.-E.U. MERGER WORKING GROUP BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS 6 n.10 (Oct. 2011), available at www.ftc.gov/system/files/documents/public_statements/310481/111014eumerger.pdf.

¹¹ OECD, *Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings* 7 (Sept. 16, 2014), available at www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf.

to assess how the Recommendation has been enacted and what practical steps authorities have taken and consider possible best practices.¹²

25. It is useful to note that the U.S. agencies set out in their model confidentiality waiver letter that they will not seek from non-U.S. competition authorities information that is protected by U.S. legal privilege even where such information may have lost privilege, as the “the FTC/DOJ will treat such information as inadvertently produced privileged information.”¹³ In other words, the U.S. agencies have stated that they will not avail themselves of documents that may have lost LPP in the US as a result of disclosure to, for example, the European Commission.¹⁴
26. In order to reassure business, senior U.S. officials have more recently noted that “most modern authorities take the view that disclosure must be voluntary to affect a waiver” and that “... a target seeking to defend its privilege after a compelled foreign disclosure could argue that the disclosure was “involuntary,” and thus disclosure subpoena should not result in waiver”. For the avoidance of doubt, even in such situations the FTC would not seek access to materials deemed privileged in the US that are produced *voluntarily* to E.U. authorities.¹⁵
27. Similar statements by other competition authorities would be welcomed to reassure business.

VI. LPP and In-House Counsel

28. A particular point of tension exists in the difference in treatment of documents emanating from in-house lawyers (i.e. those linked by a relationship of employment to their “client”), which are deemed privileged in some jurisdictions and not in others. The issue is particularly acute in the European Union where in several cases the European Courts have rejected the application to LPP to advice by in-house lawyers in the context of European competition proceedings. Such differences become particularly troubling where an authority, that does not recognise in-house privilege, seeks access to documents generated in a jurisdiction that does recognise such privilege (and where such communications between counsel and client took place with the understanding that they were indeed covered by privilege).
29. *Business at OECD* would note that external lawyers cannot be the sole gatekeepers of legal advice. Indeed, exclusively relying on external counsel is costly and time-consuming, while lacking the day-to-

¹² See, e.g., INT’L COMPETITION NETWORK, ICN GUIDING PRINCIPLES FOR PROCEDURAL FAIRNESS IN COMPETITION AGENCY ENFORCEMENT 2 (2018), available at www.internationalcompetitionnetwork.org/uploads/library/doc1148.pdf (“Competition agency enforcement proceedings should include a process for appropriate identification and protection of confidential business information and recognition of privileged information”); INT’L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS ¶ 12, available at www.internationalcompetitionnetwork.org/uploads/library/doc1146.pdf (“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” including not requiring parties or third parties to disclose information that is subject to applicable legal privileges in the agency’s jurisdiction.)

¹³ U.S. DEP’T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM’N, UPDATED MODEL WAIVER OF CONFIDENTIALITY FOR INTERNATIONAL CIVIL MATTERS 2 (Sept. 25, 2013), available at www.justice.gov/atr/file/705856/download.

¹⁴ See also, OECD Competition Comm., Working Party 3, Information Sharing in Merger Control Procedures, Note by the United States, DAFFE/COMP/WP3/WD(2003)25 (May 9, 2003), available at www.ftc.gov/sites/default/files/attachments/us-submissions-oced-and-other-international-competition-fora/2003--Information%20Sharing%20in%20Merger%20Control%20Procedures.pdf (“The U.S. agencies have asked the EC not to send or discuss information that could be considered privileged under U.S. law and the U.S. agencies will refuse to consider and will return such information if it is provided inadvertently.”).

¹⁵ See Alden F. Abbott & Ashley Gum, U.S. Privilege Following *Akzo Nobel v. European Commission*, FED. TRADE COMM’N (Oct.3, 2018), available at www.ftc.gov/news-events/blogs/competition-matters/2018/10/us-privilege-following-akzo-nobel-v-european.

day understanding of the business. In-house counsels remain critical to foster a competition culture and should be supported in that role.

30. *Business at OECD* notes with some concern that some authorities increasingly target in-house counsels in competition investigations. This jeopardises the ability of in-house counsels to advise clients without fear that such communications become public.
31. Authorities, such as the European Commission, could argue that lack of legal protection for in-house legal advice is a consequence of the law created by the Courts and that they are allowed to see those documents. On the other hand, there would be nothing to stop a competition authority from adopting a protocol in which it would commit to refrain from targeting in-house lawyers, especially if they are members of a national Bar.
32. Competition authorities would do well to make such commitment. The role of in-house lawyers has become much more widespread and sophisticated. First, the number of companies that have in-house competition lawyers has increased exponentially in the last few years. Second, there is no reason to presume that the guarantees of independence for in-house lawyers provided by bar rules do not work in practice. Third, each business should be free to choose their legal adviser on how to exercise their rights of defence in competition matters.
33. Another key element for the recognition of LPP for in-house lawyers is the increased importance of compliance programs as recognised by several competition authorities. In-house lawyers are better placed to deal quickly with any competition issues: they are a readily available resource for the business in their day-to-day activities. In order to ensure compliance, in-house lawyers need to be in a position to draft documents that set out sensitive assessment of the risks involved by commercial propositions and that help the business focus on compliant solutions. And in case of competition breach or if a difficult situation is uncovered due to the effectiveness of a compliance programme, they also play a key role and need to act fast, without fear of disclosure of their analysis.

VII. Private Antitrust Actions

34. In the last few years, we have seen an increase of private antitrust action and changes to the legal process in some jurisdiction. The most obvious example is the implementation of the “Damages Directive” (Directive 2014/104/EU) in Europe, which has broadened the scope for claimants to seek disclosure of documents for a breach of EU or national competition law.¹⁶
35. Limitations on the rights of disclosure under the Directive include a requirement on Member States “to give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence”¹⁷ and to ensure that disclosure is limited to what is proportionate.¹⁸
36. It remains to be seen how the national courts will approach this privilege issue, especially in civil law jurisdictions which are not used to broad discovery requests, and also whether these new rules will creep into areas outside competition law.
37. But one important point *Business at OECD* would like to make here is that whenever disclosure requirements increase in a specific jurisdiction, there should be a corresponding increase of

¹⁶ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, 2014 O.J. (L 349) 1.

¹⁷ *Id.*, art. 5(6).

¹⁸ *Id.*, art. 5(3).

protection for documents containing legal advice. Courts should consider expanding the scope of LPP in those jurisdictions where there is a very restrictive and limited application of LPP. Without an increase in protection for legal advice, a strengthened discovery process might lead to rights of defence being undermined.

VIII. Conclusion

38. *Business at OECD* wishes to restate its support for further work in this area, given the importance of LPP to the fundamental rights of business and the practical impact on competition regulation. A level-Playing field amongst OECD countries and a high level of protection would be welcomed.
39. As the International Chamber of Commerce has said in its *Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings*, “agenc[ies] should respect the legal professional privilege of legal advice. 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.”¹⁹ *Business at OECD* would support this position.
40. *Business at OECD* would welcome any effort to:
 - a. understand better the scope of LPP in the various OECD countries;
 - b. how documents protected by LPP are reviewed;
 - c. the mechanisms to address disputes on documents protected by LPP;
 - d. how countries can improve recognition of each other’s LPP rules, under comity principles;²⁰
 - e. consider preparing possible best practices and, in particular, as requests for internal documents increase, authorities should give greater protection to documents covered by LPP and recognise that if any privileged document is disclosed inadvertently, protection will apply; and
 - f. clarify the agencies’ position in relation to waivers.
41. Finally, for all the reasons set out above, *Business at OECD* supports the recognition of LPP for legally qualified in-house lawyers.

¹⁹ INT’L CHAMBER OF COMMERCE, RECOMMENDED FRAMEWORK FOR INTERNATIONAL BEST PRACTICES IN COMPETITION LAW ENFORCEMENT PROCEEDINGS ¶ 2.4.8 (Mar. 8, 2010), available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/06/ICC-International-Due-process-08-03-10.pdf>.

²⁰ For example, the recent U.S.-Mexico-Canada Agreement (USMCA) calls for agencies to follow common legal practices to ensure due process such as mandating attorney-client confidentiality. *United States-Mexico-Canada Agreement*, Off. of the U.S. Trade Rep., available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico>.