

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

**Treatment of legally privileged information in competition proceedings – Note by
the European Union**

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More documents related to this discussion can be found at

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

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1. Introduction

1. The protection of legal confidence is not explicitly foreseen in EU competition legislation. The case law of the Court of Justice of the European Union,¹ however, has recognised that certain communications between lawyer and client may, subject to strict conditions, be protected by legal professional privilege and thus be confidential as regards the Commission, as an exception to the latter's powers of investigation and examination of documents in competition proceedings. In line with that case law, the Commission cannot compel companies to disclose the content of protected documents or, *a fortiori*, use them as evidence. Companies may however disclose such documents to the Commission's services if they consider it in their interest.
2. In Commission's competition proceedings, undertakings regularly claim legal professional privilege for documents found during Commission inspections or identified in response to requests for information.
3. This background paper provides an insight into DG Competition's practice with regard to legal professional privilege.

2. Case law

4. In case *AM & S v Commission*, the European Court of Justice interpreted Regulation No 17/62 (the predecessor of Regulation (EC) No 1/2003) as protecting the confidentiality of written communications between lawyer and client.² In that judgment, the Court of Justice considered that the protection of the confidentiality of communications between lawyer and client is an essential corollary to the full exercise of the rights of defence.
5. The principle of legal professional privilege has as purpose both to guarantee the full exercise of the undertakings' rights of defence and to safeguard the requirement that any person must be able, without constraint, to consult a lawyer. Information provided by an undertaking to its lawyer or the content of the advice given by that lawyer can therefore not be used against an undertaking in a decision which penalises for a breach of the competition rules. Furthermore, the Commission cannot compel a company or its lawyer to disclose the content of a document covered by legal professional privilege.³
6. The protection is subject to two conditions.

¹ Case 155/79, *AM & S v Commission*, ECLI:EU:C:1982:157; Order in Case T-30/89, *Hilti v Commission*, ECLI:EU:T:1990:27; Joined Cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, as confirmed by Case C-550/07 P, *Akzo v Commission*, ECLI:EU:C:2010:512.

² Case 155/79, *AM & S v Commission*, ECLI:EU:C:1982:157.

³ Joined cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, para. 86.

7. First, the communication must be made for the purposes and in the interests of the client's rights of defence in competition proceedings. In the EU antitrust regime, the protection therefore covers all written communications exchanged after the initiation of the administrative procedure which may lead to a decision on the application of Articles 101 and 102 of the Treaty or to a decision imposing a pecuniary sanction on the undertaking. The protection is extended to earlier written communications which have a relationship to the subject matter of that procedure.⁴

8. Secondly, the protection only applies to communications emanating from independent lawyers, i.e. lawyers who are not bound to the client by a relationship of employment.⁵ According to the Court, this condition applies to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State where the client lives.⁶

9. This second condition has been upheld when undertakings argued that exchanges with in-house lawyers should also be able to benefit from the protection. The Court of Justice found that an in-house lawyer, even when enrolled with a Bar or Law Society and therefore subjected to 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. In-house lawyers are therefore less able to deal effectively with any conflicts between their professional obligations and the aims of their clients.⁷ The Court held that an in-house lawyer 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.

10. In the case law, the Court of Justice has further specified that the protection extends to internal notes which are confined to reporting the text of the content of privileged communications (i.e. with an independent, EU-qualified, lawyer containing legal advice) for the purpose of distributing them within the undertaking.⁸

11. Moreover, the protection extends to working documents or summaries that were drawn up exclusively for the purpose of seeking legal advice from a lawyer. Such documents may be useful, or essential to the lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought. The protection applies even if the documents were not exchanged with a lawyer at the time of the request by the Commission or were not created for the purpose of being sent physically to a lawyer. However, the mere fact that a document was discussed with a lawyer is not sufficient to give it the protection.⁹

⁴ Case 155/79, *AM & S v Commission*, ECLI:EU:C:1982:157, paras. 21-23 and 27.

⁵ Case 155/79, *AM & S v Commission*, ECLI:EU:C:1982:157, paras. 21-22 and 24.

⁶ Case 155/79, *AM & S v Commission*, ECLI:EU:C:1982:157, para. 25. With the Agreement on the European Economic Area, the privilege was extended to cover lawyers from EEA/EFTA states. See Declaration by the European Community on the rights of lawyers of the EFTA States under Community law, attached to the Agreement on the European Economic Area, [1994] OJ L1/567.

⁷ Case C-550/07 P, *Akzo v Commission*, ECLI:EU:C:2010:512, paras. 45-47.

⁸ Order in Case T-30/89, *Hilti v Commission*, ECR [1990] II-163, para. 18.

⁹ Joined cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, paras. 122-123.

12. The Court has explicitly stated that undertakings making clearly unfounded claims for protection under legal professional privilege, merely as delaying tactics, may be subject to fines pursuant to Article 23(1) of Regulation (EC) No 1/2003. Similarly, such actions may be taken into account as aggravating circumstances in any decision imposing a fine for infringement of Articles 101 and/or 102 TFEU.¹⁰

13. Finally, as mentioned above, the principle of confidentiality of privileged information does not prevent an undertaking from disclosing the written communications with its lawyer(s) if the undertaking considers that it is in its interests to do so.¹¹

14. None of the above-mentioned case law dealing with the scope of legal professional privilege relates to proceedings under the EU Merger Regulation. However, without prejudice to any future views of the European Courts, the Commission typically applies the same principles derived from the existing case law also in merger proceedings.

3. Legal professional privilege in the Commission's practice

15. In applying legal professional privilege, the Commission in its investigations follows the interpretation set out by the European Court of Justice. With regard to the personal scope of legal professional privilege, the Commission – in line with the conditions set by the Court in the *AM & S* case – respects the confidentiality of communications from external lawyers.

16. It considers however that communications between an undertaking and the lawyer of a third party are excluded from the scope of the privilege. Also excluded are communications between a lawyer and an undertaking if they are found at the premises of another undertaking. In view of the case law, the Commission furthermore considers that in principle the protection does not apply to the communications *between* lawyers.

17. The protection does also not apply to communications with other professional advisers, such as patent attorneys or accountants. Such communications are not related to an undertaking exercising its rights of defence in competition cases. As regards patent attorneys, this conclusion may be different if the undertaking can demonstrate that there is a link between the advice provided or sought and the assessment of future litigation under competition law.

18. In the *AM & S* case the Court granted the benefit of the protection to any external lawyer entitled to practise in one of the Member States. In practice, the Commission may waive the submission of communications with independent lawyers qualified also in jurisdictions other than the EU upon the request of an undertaking.

19. Legal professional privilege refers to information contained in documents, not the document itself. In practice, this means that parts of the same documents can be privileged and others not depending if the relevant parts meet the conditions. In order to be reviewed by the Commission, the Commission then needs to be able to separate the information.

20. Also, documents not falling within one of the categories set out in the case law, for example a contract with a third party or other documents prepared in the ordinary course of business, even if they were attached to a protected document, are in principle not

¹⁰ Joined cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, para. 89.

¹¹ Case 155/79 *AM & S v Commission*, ECLI:EU:C:1982:157, para. 28.

privileged. Legal professional privilege does not apply to attachments that exist independently of the seeking or giving of legal advice.

21. It is for the undertaking that claims legal professional privilege to demonstrate that the documents fulfil the conditions for legal protection. The undertaking is not bound to reveal the contents of the communications in question.¹² The mere fact that an undertaking claims that a document is protected by legal professional privilege is not sufficient to prevent the Commission from reading that document if the undertaking produces no relevant material of such a kind.¹³ To justify its claim for legal professional privilege, the undertaking may inform the Commission of the author of the document and for whom it was intended. It may explain the respective duties of the author and the addressee, and refer to the objective and the context in which the document was drawn up. It may also mention the context in which the document was found, the way it was filed and any related documents.

22. Finally, the distinctive nature of the European Competition Network entails that the Commission and the competition authorities of the Member States are able to provide one another with evidence they have obtained during their respective investigations. Documents which are therefore legally obtained by DG Competition in antitrust investigations can be used as evidence by the national competition authorities and *vice versa*.¹⁴

3.1. Legal professional privilege claims during Commission inspections

23. During a Commission antitrust inspection, a mere cursory look by Commission officials at the general layout, heading or other superficial features of a document will normally enable them to confirm or not the accuracy of the reasons invoked by the undertaking.

24. A company may refuse to allow the Commission officials such a cursory look, provided that such a cursory look is impossible without revealing the content of the document(s) in question and that it gives the Commission officials appropriate reasons for its view.¹⁵ If the undertaking fails to provide such reasons or if the reasons invoked can according to the case law not justify the protection or when the undertaking bases itself on factual assertions which are manifestly wrong, then the Commission officials may immediately read the contents of the documents or take a copy of it.¹⁶

25. In addition, when faced with undertakings that refuse the officials a mere cursory look without objective justification, the Commission may impose a penalty under Article 23(1)(c) of Regulation (EC) No 1/2003. The Commission may thus by decision impose a fine not exceeding 1% of the total turnover in the preceding business year. Alternatively, the Commission may take this refusal into account as aggravating circumstances when

¹² Case 155/79 *AM & S v Commission*, ECLI:EU:C:1982:157, para 29.

¹³ Joined cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, para. 80.

¹⁴ See Article 12 of Regulation (EC) No 1/2003.

¹⁵ Joined cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, para. 82.

¹⁶ Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/6, 20.10.2011, point 54.

calculating any fine imposed in the context of a decision imposing a penalty under the competition rules.¹⁷

26. Since 2013, the Commission systematically makes electronic copies of all (digital) material found during inspections. The software used contains a functionality that allows the operator to exclude specific items from indexing or from further searching. In practice, undertakings can therefore upon reasoned request provide the Commission with information which may allow it to exclude sets of documents that are legally privileged. Additionally, documents that are likely to contain privileged data may be held separate from the larger batch allowing the Commission reviewers to quickly establish whether possible privileged information is indeed present.

27. After an electronic search, the Commission inspectors normally select the documents considered relevant for the investigation for export to an investigation file. In order to keep the information complete and in original state, not only the specific information is exported but also the so-called family tree (i.e. an email together with its attachments). One recent General Court case concerned such email attachments that included the words "Legally Privileged" in the subject matter. Once the Commission was alerted of the presence of these documents on the export list, the documents were removed from the selection and not added to the case file. As with other cases concerning incidents during inspections, the General Court declared the appeal as inadmissible. This issue could only be raised in an appeal against the final decision or in an application for non-contractual liability against the Commission.¹⁸ In any event, merely marking a document as "Legally Privileged" does not mean that the document is actually protected by legal professional privilege or that additional substantiation of the privilege claim will not be required.

3.2. Legal professional privilege and requests for information

28. Issues relating to legal professional privilege occur also with respect to companies' replies to the Commission's requests for information.

29. In the past, the Commission has occasionally been faced with claims regarding legal professional privilege when requesting documents located in the United States. In the United States, legal professional privilege extends to communications addressed to or stemming from in-house lawyers. As the conduct under investigation occurred in or had effects in the EU/EEA markets, the investigation is therefore subject to EU law. In order for an undertaking to be able to comply with the request without waiving the protection in another jurisdiction, sometimes the Commission has opted for sending a request for information by decision under Article 18(3) of Regulation (EC) No 1/2003 or Article 11(3) of the Merger Regulation.¹⁹

30. In merger cases, claims relating to legal professional privilege often arise in connection with requests for internal documents that the Commission sends to merging parties in complex merger investigations. Documents responsive to such requests are often defined by a combination of a certain set of persons (so-called 'custodians') and search

¹⁷ Joined cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, para. 89

¹⁸ Case T-274/15 *Alcogroup v Commission*, ECLI:EU:T:2018:179.

¹⁹ Whereby the fact that the undertaking is under an obligation to cooperate obviously does not mean that it waives its claims as regards the privileged nature.

terms typically relating to the transaction, markets affected by the transaction or the parties' competitors.

31. To ensure that the undertaking claiming the protection of legal professional privilege complies with its obligation to provide appropriate justification, in merger cases the Commission typically asks for so-called 'privilege logs' in case undertakings are claiming legal professional privilege over a large number of documents. In the privilege log, the addressee is asked to specify in table format for each document (or part of a document) for which it claims legal professional privilege the author(s) of the document, sender(s), addressee(s), date, title, general subject matter, whether legal professional privilege is claimed for the full content and under which of the categories from the existing case law on legal professional privilege it claims protection.

32. The Commission is currently preparing "Best Practices on requests for internal documents under the EU Merger Regulation" which should assist companies in complying with such requests in merger proceedings.²⁰

33. EU merger proceedings are subject to strict legal deadlines, and the internal documents which the Commission requests are required for its assessment of the notified concentration. Therefore, if the undertakings withhold internal documents by making not sufficiently substantiated claims on legal professional privilege, the Commission may adopt a decision suspending the time limits of the merger proceedings until the request for internal documents has been complied with.

4. Sealed envelope procedure

34. There are several circumstances conceivable in which the Commission and the undertaking do not agree on whether a document should benefit from the protection under legal professional privilege. The Commission may for instance not agree that the material provided by an undertaking demonstrates that the conditions for protection are fulfilled according to the standards set by the case law. This may arise, in particular, where the undertaking concerned refuses to give the officials a cursory look but where it cannot be excluded that the document can be protected.

35. In such cases, the Commission officials may place a copy of the document or documents in question in a sealed envelope and then remove it with a view to a subsequent resolution of the disputes. This procedure avoids the risk of a breach of legal professional privilege while at the same time enabling the Commission to retain a certain control over the documents.²¹ This 'sealed envelope procedure' is also applied for data in digital form. The Commission puts a hard drive or DVD with a copy of the contested information in a sealed envelope.

36. An undertaking that unduly refuses the sealed envelope procedure may find itself opposing to submit to the inspection. In that case, the Commission may ask the assistance of the NCA officials to overcome the opposition by, for example, seizing the document.

37. If the undertaking agrees to the sealed envelope procedure, the envelope will be brought to the Commission's premises in Brussels. There, the Commission will invite the

²⁰ Speech by Margrethe Vestager "Fairness and competition", 25 January 2018.

²¹ Joined cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, para. 83.

company to justify its legal professional privilege claim in writing, or alternatively, to authorise the review of the documents. If the Commission is not satisfied with the information provided or rejects the claim, it will inform the undertaking that it intends to reject the claim for professional legal privilege.

38. In *Akzo*, the General Court has specified that, where it is not satisfied with the material and explanations provided by the representatives of the undertaking for the purposes of proving that the document concerned is covered by legal professional privilege, the Commission must not read the contents of the contested document before it has adopted a decision.²² If there is therefore no resolution of the dispute, the Commission will adopt a decision rejecting the legal professional privilege claim and allow the undertaking concerned to refer the matter to the European Court of Justice. The undertaking can bring an action for annulment under Article 263 of the Treaty against the Decision. Such action does not have suspensory effect. It is therefore for the undertaking concerned to make a prompt application for interim relief seeking suspension of operation of the decision rejecting the request for legal professional privilege. If the undertaking fails to bring an action against the rejection decision within the established time limit, the Commission may read the contents of the contested document.

5. Involvement of the Hearing Officer

39. In 2011, the scope of the Commission Hearing Officer's Terms of Reference was expanded to include the possibility for the Hearing Officers to intervene where a dispute arises regarding legal professional privilege claims in the exercise of the Commission's powers of investigation under Chapter V of Regulation (EC) No 1/2003 and in proceedings that can result in the imposition of fines pursuant to Article 14 of Regulation (EC) No 139/2004.²³

40. The Hearing Officer may only review the matter if the undertaking consents to the Hearing Officer reviewing the information. The Hearing Officer may also ask for related documents that are considered necessary for the review. Without revealing the potentially privileged content of the information, the Hearing Officer shall communicate to the responsible director within the Commission and to the undertaking concerned his or her preliminary view. The Hearing Officer may take appropriate steps to promote a mutually acceptable resolution. Where no resolution is reached, the Hearing Officer may formulate a non-binding reasoned recommendation to the Commissioner, without revealing the potentially privileged content of the document. The undertaking receives a copy of this recommendation.

41. If the matter is not resolved after intervention of the Hearing Officer, the Commission will investigate the matter further. Where appropriate, it may adopt a decision rejecting the claim.

²² Joined cases T-125/03 and T-253/03, *Akzo v Commission*, ECLI:EU:T:2007:287, para. 85.

²³ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, Article 4(2)(a).