

Privilege

European Union

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Published November 2016

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Scope of the privilege

1 Are communications between an attorney and client protected? Under what circumstances?

The laws protecting communications between lawyers and their clients are not uniform across the 28 member states of the European Union (EU). Each member state has its own body of laws that protects, to different degrees, communications between lawyers and their clients.

EU legal professional privilege has developed in a particular field of EU law, namely EU competition law, in the context of investigations carried out by the competent EU competition law authority, the European Commission (the Commission) into violations of the provisions of the Treaty on the Functioning of the European Union prohibiting anticompetitive agreements and abuse of a dominant position (although, in principle, the privilege could protect communications relating to other proceedings brought by the Commission in which the rights of defence arise). These rules are relevant in circumstances where a party is or may be investigated by the Commission, or indeed any national competition enforcement authority exercising powers on behalf of the Commission, and in subsequent litigation before the Court of Justice of the European Union. In cases where a party is or may be investigated by a national competition authority, national legal professional privilege laws will typically apply.

The competent EU court, the Court of Justice of the European Union (which is composed of two courts for purposes relevant to competition investigations – the General Court, which hears actions for annulment of European Commission decisions, and the Court of Justice, which hears appeals from the General Court, among other competencies), has said that legal professional privilege represents a limitation on the EC's investigatory powers and that those powers are exercised for combating the most serious infringements of EU competition law, including price-fixing cartels. As such the privilege has been defined narrowly, and protects a significantly smaller range of communications than under most US or English privilege laws.

EU legal professional privilege protects written communications between lawyers and clients for the purpose of exercising the rights of defence in the context of Commission competition investigations. The privilege applies only to communications

with external lawyers, qualified to practice in a jurisdiction of the European Economic Area (EEA), as well as to documents prepared exclusively for the purpose of seeking their advice. The privilege applies to written communications exchanged after an investigation has commenced and those exchanged earlier, provided they have a relationship with the subject matter of the investigation.

The purpose of the privilege is to guarantee the full exercise of individuals' rights of defence and to safeguard the requirement that any person must be able, without constraint, to consult his lawyer. See *Akzo Nobel Chemicals v Commission* [C-550/07 P].

To a practitioner accustomed to privilege laws in common law jurisdictions, the protection afforded by EU law to legal professional privilege may appear rather limited, and the case law comparatively thin. In fact, it was not until 1982 that the concept of legal professional privilege was recognised in EU law and since then the number of cases that have developed the scope and nature of the privilege has been small. It follows that nuances and details that have been argued at length over time in common law jurisdictions and upon which there is a rich body of case law to draw on, are in many cases unaddressed in the EU jurisprudence.

2 Does the privilege only protect legal advice? Does it also protect non-legal communications between an attorney and client, such as business advice?

The privilege is limited to advice provided by an external lawyer for the purpose of exercising the client's rights of defence, and any advice relating to the subject matter of the investigation. Non-legal communications, for example, containing business advice, are not protected. In the case of communications that include a mix of legal and business advice, only those sections of the communication that contain the legal advice are protected.

3 Is a distinction made between legal advice related to litigation and other legal advice?

No such distinction is made in the relevant case law. EU legal professional privilege applies to communications made for the purpose of exercising the rights of defence in the context of a Commission competition investigation, and any advice relating to the subject matter of the investigation.

4 What kinds of documents are protected by the privilege? Does it cover documents that were prepared in anticipation of an attorney–client communication?

EU legal professional privilege can protect the following types of written documents:

- (i) Communications between a lawyer and client, provided that
 - (i) such communications are made for the purposes of the exercise of the client’s rights of defence and
 - (ii) they originate from an external EEA qualified lawyer, which are exchanged after the initiation of an investigative procedure or to earlier written communications which have a relationship to the subject matter of that procedure;
- (ii) Internal notes circulated within a client that are confined to reporting on the content of a communication caught by (i) above;

Caution must be exercised as any comments or observations regarding the advice included in the note by its author will not be protected by the privilege.

- (iii) Documents prepared by the client exclusively for the purpose of seeking legal advice from an external EEA qualified lawyer in exercise of the rights of the defence, even if they were not exchanged with the lawyer or were not created for the purpose of being sent physically to the lawyer.

This is a narrow category of documents and the exclusivity test is closely observed.

Here the court will consider a number of factors to determine the purpose for which the documents were prepared, including for example whether the document itself hints at whether it has been prepared for the exclusive purpose of gathering facts or material for legal advice (eg, because it is addressed to a lawyer, or is marked as being subject to privilege), as well as the wider context (eg, who the author is, or the circumstances in which the document was found).

The following will not be protected by EU legal professional privilege: legal advice of a general nature (ie, not connected to the client’s rights of defence or the subject matter of the investigation), internal company communications with an in-house lawyer, communications between a company and its external lawyer qualified only in the US, internal reports or documents that were sent to a lawyer but that were not created for the exclusive purpose of seeking legal advice and file notes of meetings with lawyers, unless those notes record advice received from an EEA qualified external lawyer.

5 To what extent must the communication be confidential? Who can be privy to the communication without breaking privilege?

The case that established that the European Court of Justice would protect legal professional privilege in Commission investigations was the 1982 case of *AM & S v Commission* [1982] ECR 1575. In that case the European Court of Justice recognised a general principle of EU law, common across member states, that provides protection (albeit to varying degrees) for individuals and companies of confidentiality over their communications with lawyers.

The EU privilege is designed to provide a protection for confidential communications. To the extent that communications are no longer confidential, they are unlikely to be afforded protection

by the privilege. There is limited case law of the Court of Justice considering the types of circumstances in which documents over which privilege may be asserted may be considered not to be confidential.

6 Is the underlying information privileged if it can be obtained from a non-privileged source?

EU legal professional privilege protects communications between EEA qualified external lawyers and their clients, notes or summaries of such communications, and documents prepared for the exclusive purpose of consulting with such lawyers.

Underlying information that can be obtained from a non-privileged source is not protected by the privilege. Moreover, underlying information will not become protected by the privilege simply because it was communicated to an EEA qualified external lawyer.

7 Are there any notable exceptions or caveats to the privilege?

EU legal professional privilege is narrowly defined. It is not an unqualified or absolute right and three points are notable here:

First, EU legal professional privilege is confined to communications between a client and its external lawyers. Communications with in-house lawyers are not protected by the privilege, on the basis that in-house lawyers are not sufficiently independent from their employers to render independent advice. This is the case even where the in-house lawyer is admitted to a national bar or law society and holds a valid licence to practise.

Second, the privilege only applies to communications with external lawyers admitted to the bar of an EEA state. Therefore, communications between a client based in a member state and its external lawyer admitted to practise only in New York would not be protected by EU legal professional privilege and therefore within the scope of material obtainable by the Commission in a competition investigation.

Third, the privilege will only attach to documents that have been prepared for the purposes and in the interests of the client’s rights of defence, and in the context of advice relating to the Commission investigation or subject matter of the investigation.

The result is that the following will not, without more, be privileged under EU law:

- advice given by a US qualified external lawyer to its client based in Europe;
- advice given by a US or EU qualified in-house lawyer to their company; and
- communications between a company and its in-house lawyer based in Europe, even if they relate to the rights of defence or the subject-matter of the investigation.

8 Are there laws unrelated to privilege that may protect certain communications between attorney and client?

No – in the context of Commission competition investigations EU legal professional privilege is the only means by which a party can refuse to hand over communications. This is the case even if the communications are confidential or contain business secrets, although the Commission does take steps to protect onward disclosure or use of such material beyond the investigation in question.

Protected parties

9 To what extent does the privilege extend to in-house counsel?

In the 1982 case of *AM & S v Commission* [1982] ECR 1575, the case that first recognised the concept in EU law, it was held that legal professional privilege protects confidential communications between a client and their independent lawyer, namely one who is not bound to his or her client by a relationship of employment.

In the 2007 case of *Akzo Nobel Chemicals v Commission* [C-550/07 P], the Commission had seized during the course of a dawn raid emails exchanged between a UK-based manager and the company's in-house competition lawyer, who was a member of the Dutch Bar. The company argued that the lawyer was sufficiently independent (including because the lawyer was bound by external professional standards imposed by the Dutch Bar), but the Court found that EU privilege law as identified in the *AM & S* decision excludes in-house counsel, even in circumstances where the counsel in question was a member of a national bar. On that basis the Court found that the emails in question were not protected by the privilege. The Court said that "independence" means a lawyer who "structurally, hierarchically and functionally is a third party in relation to the [client] receiving that advice", which excludes in-house lawyers. The Court of Justice reached this decision, which was highly controversial, after conducting a review of the scope of the protection afforded to communications with in-house counsel across the member states of the EU, and finding there not to be a sufficiently broad consensus on this point to justify the extension of the privilege, given that it was identified as being one of the fundamental principles of law common to the constitutional traditions of the member states.

Therefore, EU legal professional privilege will not protect a request from a client to its in-house lawyer for legal advice, nor that in-house lawyer's advice to a company. Documents prepared by in-house counsel for the exclusive purpose of seeking advice from an external lawyer can be protected by EU privilege, including in circumstances where the person preparing the document is not a lawyer.

The result of limiting EU legal professional privilege is such that documents prepared by in-house lawyers that are subject to privilege under local laws (for example, in England and Wales) will not generally be protected vis-à-vis the Commission (or other parties) in the context of a competition investigation.

10 Does the privilege protect communications between an attorney and a corporate client's employees? Under what circumstances?

EU legal professional privilege applies to communications between a client and its EEA qualified external lawyer. Communications between in-house counsel and their in-house client are not protected.

Despite significant judicial discussion on the point in many common law jurisdictions, there is little discussion in EU cases about who the client is or whether communications with external lawyers and a client's corporate employees are protected. There can be no question that privilege can certainly apply to communication between at least some client employees, such as senior managers who communicate with an external lawyer to seek advice or employees who prepare documents for the exclusive

purpose of seeking legal advice from external counsel. How far this extends has not been tested.

11 Does the privilege protect communications between non-lawyers if they are acting at the direction of counsel or gathering information to provide to counsel?

EU professional privilege is an exception to the EC's powers of investigation and as such the competent EU courts have defined the scope of the privilege narrowly.

As it is considered a part of the fundamental rights of defence, it protects confidential communications between a client and its external lawyer. It also covers documents prepared by the client exclusively for the purpose of seeking legal advice, even if they were not exchanged with the lawyer or were not created for the purpose of being sent physically to the lawyer.

Communications between non-lawyers will be protected, even if they are not acting at the direction of external EEA counsel, provided they were prepared exclusively for the purpose of seeking legal advice from an external EEA lawyer.

Communications prepared at the direction of external EEA counsel, but not for the purposes of seeking advice from external EEA counsel, may not be protected, although this issue has not been clarified in case law.

12 Must the attorney be qualified to practise in your country to invoke the privilege?

EU legal professional privilege can only be invoked in circumstances where the external lawyer in question is EEA qualified.

Communications between an external lawyer qualified in the US and his or her client are not protected by EU legal professional privilege, and production of them can be required by the Commission during a competition investigation.

13 Is there an analogous privilege extended to non-lawyer professionals?

No. There is no analogous privilege that applies to protect the advice or communications of other professional advisers, such as tax advisers, from production or inspection by the Commission in the context of competition investigations. EU legal professional privilege only applies to external lawyers, and even then only if they are EEA qualified.

14 Does the privilege apply to communications with potential clients?

Yes – it can, although given the narrow scope of the privilege and the fact that it only applies to communications in connection with the potential client's rights to defence, including the subject matter of the investigation. To the extent that an EEA external lawyer's communications with a potential client reveal details that would affect its rights to a defence it is likely that a claim to legal professional privilege would be upheld, particularly where the potential client later becomes a client.

Ownership of the privilege

15 Does the attorney or the client hold the privilege? Who has rights under the privilege?

The right to refuse to provide communications to the Commission on the basis of privilege is a right of the client. An external lawyer is not entitled to waive the client's privilege without the client's instructions. Moreover, any external lawyer who provides the Commission with privileged documents without authority to do so would be exposed to potential disciplinary action under the rules of the national bar association of which the lawyer in question is a member.

16 Can the privilege be waived? Who may waive it?

EU legal professional privilege is not unqualified and can be waived. The cases are clear that the privilege does not prevent a client from disclosing otherwise privileged material to the Commission if they decide it is in their interests to do so.

Caution should be exercised, however, as a decision to waive privilege for the purposes of a Commission investigation is likely to give rise to wider collateral waiver issues in other jurisdictions, particularly those that do not recognise any concept of limited or qualified waiver whereby a party can agree to waive privilege vis-à-vis one party for a particular purpose but at the same time continue to exert that privilege against all others.

17 Is waiver all or nothing? Is it possible to waive the privilege for certain communications but not others?

It is possible for a client to waive privilege over communications and provide them to the Commission if they feel it would help their case. The Commission may not be willing to accept such documents on the condition that they are returned at the completion of an investigation or not otherwise shared with other national competition authorities.

18 If two defendants are mounting a joint defence, can they share privileged information without waiver? What about two parties with a common interest?

Rather than asking whether privilege is waived in a communication if it is shared with a party with a joint or common interest, a party needs to ask whether the communication in question will fall into any of the categories for which EU legal professional privilege has been recognised in the existing case law.

Strangely, given the genesis of the EU protection of privilege in antitrust cases, a field in which joint defence agreements are commonplace, there is little case law of the Court of Justice dealing with joint defence arrangements.

19 Is it common for attorneys and clients to agree to a confidentiality provision in a contract?

The contractual relationship between a lawyer and his client is not governed by EU law but by local national law. It is common within member states for engagement letters to include confidentiality provisions, but practice is likely to vary from state to state.

Enforcement considerations

20 Describe the legal basis of the rules governing the privilege. Are these rules found in a constitution or statute, or in case law?

There are no EU treaties or statutes that establish legal professional privilege in EU law.

Nevertheless, the Court of Justice recognised in 1982, in the case of *AM & S v Commission* [1982] ECR 1575, that legal professional privilege forms part of the fundamental rights of defence recognised in EU law (then EEC law). This was particularly remarkable at the time, given the silence on the point in the statutes and the fact the Commission argued before the Court that legal professional privilege should not be afforded at all. That case established the principle of legal professional privilege as attaching to communications with an independent lawyer, provided the lawyer is entitled to practise in one of the member states, as a corollary to the right of a party to a defence after the initiation of a competition investigation by the EC.

The scope of the privilege was expanded in the case of *Hilti v Commission* [1994] ECR I-667 to cover internal notes circulated within a client, which are confined to reporting the text of content of a communication caught by the *AM & S* decision.

The scope was further expanded in the case of *Akzo Nobel Chemicals v Commission* [C-550/07 P] to cover documents prepared by the client exclusively for the purpose of seeking legal advice from an external EEA qualified lawyer in exercise of the rights of the defence, even if they were not exchanged with the lawyer or were not created for the purpose of being sent physically to the lawyer.

21 Is the privilege primarily characterised as a procedural or evidentiary rule, or is it characterised as a substantive right?

EU legal professional privilege is a substantive right, forming part of the fundamental rights that the European Court of Justice identified as forming part of EU law (and which are now codified in the EU Charter of Fundamental Rights).

22 Describe any differences in how the privilege is applied in the criminal, civil, regulatory or investigatory context.

Privilege typically provides a ground for a party to refuse to produce communications or documents that would otherwise be disclosable in litigation or to a state authority in an investigation. In the EU context, legal professional privilege provides a ground to refuse to produce communications or documents requested by the Commission in the context of a competition investigation. The privilege thus does not apply in the different contexts mentioned. There are no criminal or civil proceedings between non-state actors before the Court of Justice of the EU.

23 Are the rules regarding the privilege uniform nationwide or are there regional variations within your country?

EU legal professional privilege applies in the context of competition investigations conducted by the EC.

Each of the 28 EU member states has its own rules that govern the protection of communications between lawyers and their clients, including in competition investigations carried out by national competition authorities in those states.

24 Does a professional organisation enforce the maintenance of the privilege among attorneys? What discipline do attorneys face if they violate privilege rules?

EU legal professional privilege operates in respect of communications with EEA qualified external lawyers. There is no pan-EEA organisation that regulates the conduct of lawyers qualified in the EEA. However, each EEA state has its own national or regional bar associations or other regulators of legal practitioners that regulate the conduct and affairs of local lawyers, including in respect of client confidentiality and maintenance of any relevant legal professional privilege.

A lawyer who violates the EU professional legal privilege would not be subject to any sanction at EU level; this would be a matter for the national or regional body that regulates the lawyer.

25 What sanctions do courts impose for violating the attorney–client privilege?

No sanctions are imposed at EU level for breaching legal professional privilege. Any lawyer who breaches that privilege would likely be sanctioned by his or her national or regional bar association or law society. The sanctions lawyers from EEA states could face will differ from state to state.

26 How can parties invoke the privilege during investigations or court proceedings? Can the privilege be invoked on the witness stand?

EU legal professional privilege can be invoked in the context of Commission competition investigations. Typically, legal professional privilege is invoked by a client in receipt of a formal request for information or whose offices are subject to a Commission on-site inspection, commonly referred to as a dawn raid.

In the case of a receipt of a request for information the client can refuse to provide documents on the basis that they are subject to legal professional privilege. The Commission may take that at face value, but in reality the Commission will expect to be given sufficient information in order to determine for itself that the privilege claim is valid. This will include, for example, details of the author of the documents and the names of any actual or intended recipients, the respective duties of each person, and the objective and the context in which the document was created. This can include the provision of the documents in question with all privileged material redacted. Penalties can be imposed by the Commission on parties who seek to abuse the privilege or refuse to provide relevant details or the documents themselves.

In the context of a dawn raid the handling of claims to privilege can be more complicated. The initial step is for a subject to the investigation to assert privilege over a document which the Commission seeks to review or collect. If, having orally provided the details listed above with a view to explaining why a document is privileged, there remains a dispute between the Commission and client about the privileged status of a document or documents, the client may consider giving the Commission a cursory glance at the document, if this would assist the Commission

in understanding why the document is privileged. However, a client is entitled to refuse to allow Commission officials to take even a cursory look at such a document, provided that the client considers that such a cursory look is impossible without revealing the content of the documents. In the case of a dispute the Commission will follow the “sealed envelope procedure”, which is recognised by the Court of Justice as a means of avoiding the risks of legal professional privilege being breached, while at the same time enabling the Commission to retain control over documents relevant to its investigation and avoiding the risk that the documents will be destroyed or disappear.

As part of the sealed envelope procedure Commission officials will separate any document over which privilege is alleged from other material seized, and place it in a separate envelope, which they are entitled to take with them back to their offices after a raid. Having seized the document in a sealed envelope the Commission officials conducting the investigation must not read it until a formal decision has been made to the effect that the client has not established that the document is subject to legal professional privilege. While the document is in the hands of the Commission the client has an opportunity to provide further supporting evidence of the privileged status of the document to officials. The client may also ask a Commission Hearing Officer who is independent from the Commission investigative team to examine the claims for privilege, although before agreeing to do so the Hearing Officer must be allowed to review the documents at issue. The Hearing Officer will then deliver his or her opinion and take steps to propose an outcome that is acceptable to the client and Commission investigative team. If no agreement can be reached the Hearing Officer will issue a non-binding recommendation to the Commission. The Commission then takes a formal decision on the privilege status of the material, which can then be challenged before the General Court.

27 In disputes relating to privilege, who typically bears the burden of proof?

In disputes relating to EU legal professional privilege it is the subject of the investigation, rather than the Commission, who bears the burden of arguing that a communication or document is privileged. The European Court of Justice is the final arbiter in the case of disagreement.

28 Does the privilege protect against compulsory disclosures such as search warrants or discovery requests? Is there a distinction between documents held by the client and documents held by the attorney?

The privilege can be invoked in the context of both formal requests for information and search warrants – or dawn raids (see question 26).

The rules apply to documents held by the client and lawyer in the same way. In practice, it is very uncommon for a lawyer to receive a request for information or to have his or her offices subjected to a Commission dawn raid.

29 Describe the choice-of-law rules applied by your courts to determine which country's privilege laws apply. To what extent does your country recognise the validity of choice-of-law provisions in contracts, particularly as they apply to privilege?

EU legal professional privilege applies only in the context of Commission competition investigations, irrespective of how national laws may apply in analogous contexts.

Termination of the privilege

30 Does the privilege terminate on the death of either the attorney or the client?

This point is not discussed in the leading cases or commentary (although individuals can be subject to Commission investigations). However, it is possible for the Commission to investigate a client in respect of competition law violations that may have been committed by a company that it has acquired, including in circumstances where the acquired company has been wound up. In circumstances where a parent acquires the rights and liabilities of a subsidiary it is likely to be the case that the Court of Justice would treat this as including the right to assert any EU legal professional privilege enjoyed by the subsidiary, although the point does not appear to have been tested in jurisprudence. The death of the attorney is likely to be treated as irrelevant to the protection of privilege by the Court of Justice.

31 Does the privilege terminate on the conclusion of the attorney-client relationship?

This point is not discussed in the leading cases or commentary. However, as EU legal professional privilege is part of the rights to defence in Commission competition investigations it would be inconsistent with the fundamental nature of the principle if the subject of the investigation were to lose the protection of privilege by virtue of deciding to terminate its relationship with its lawyer and instruct new counsel.

32 Is the privilege destroyed if the client communicates information to the attorney to further a crime or perpetuate a fraud?

This particular point has not yet been addressed in this context by the Court of Justice. Given that the Akzo judgment and the related jurisprudence of the Court of Justice was adopted in the content of general principles of law common to the constitutional traditions of the member states, the approach adopted by the Court of Justice to the EU to this question is likely to be influenced by the equivalent jurisprudence of the European Court of Human Rights, and by the manner in which this issue is treated in the members states. The domestic treatment of this issue varies somewhat between the member states, and as a result, the Court of Justice's likely approach to this issue is difficult to predict with any certainty.

33 Is the privilege terminated if the attorney makes an inadvertent disclosure? If such a disclosure is made, can the attorney retrieve the privileged information or otherwise correct the error?

This particular point has not yet been addressed by the Court of Justice. Again, the approach adopted by the Court of Justice on this question is likely to be influenced by the equivalent case law of the European Court of Human Rights.

34 Is the privilege terminated if a third party is included in the communication or is subsequently forwarded the communication?

This particular point has not yet been addressed by the Court of Justice. Again, the approach adopted by the Court of Justice on this question is likely to be influenced by the equivalent case law of the European Court of Human Rights. However, in the Hilti case the Court would not allow intervenors in an investigation access to documents held by the Commission, despite the fact those documents were originally privileged but waived vis-à-vis the Commission, which suggests that disclosure to a third party will not terminate the privilege in the document.

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Mr Doris' recent commercial disputes experience has extended to advising corporations, UK public and regulatory bodies and sovereign states in claims before a range of domestic courts and tribunals in the UK, the General Court and the Court of Justice of the European Union, the European Court of Human Rights and international arbitral tribunals.

He is recognised by The Legal 500 UK 2015 in the fields of Administrative and Public Law and Commercial Litigation. Before entering private practice, Mr Doris taught EU law at the University of Warwick and worked in the Criminal Law Division of the Law Commission of England & Wales, the UK government's primary law reform body.

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Recent work includes the defence of a large financial institution in connection with the LIBOR and FX investigations conducted by the Criminal and Antitrust Divisions of the DOJ, the CFTC, the SEC, the FCA and a range of other international criminal, competition and regulatory authorities across Europe. Mr Melrose's advisory work regularly covers competition law, insider dealing, tax and bribery and corruption matters.

Before entering private practice, Mr Melrose was a Legal and Policy Adviser for the New Zealand Law Reform Commission where he worked on a range of criminal and public law enquiries. Mr Melrose holds a Bachelor of Laws and Bachelor of Arts in political science and Japanese from Victoria University of Wellington.

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