

**Unclassified****English - Or. English****31 October 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Cancels & replaces the same document of 7 October 2019****Working Party No. 3 on Co-operation and Enforcement****Executive Summary of the roundtable on the treatment of legally privileged  
information in competition proceedings****Annex to the Summary Record of the 128th meeting of Working Party No 3. on Co-  
operation and Enforcement**

26 November 2018

The executive summary by the OECD Secretariat contains the key findings from the roundtable on the treatment of legally privileged information in competition proceedings held during the 128th Meeting of the OECD Working Party No. 3 on Co-operation and Enforcement of 26 November 2018.

More documentation related to this discussion is at [www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm](http://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm)

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**JT03453895**

## *Executive Summary of the roundtable on the treatment of legally privileged information in competition proceedings*

By the Secretariat\*

Working Party No. 3 of the OECD Competition Committee held a roundtable on the treatment of legally privileged information in competition proceedings on 26 November 2018. The roundtable took stock of how jurisdictions protect the confidentiality of the relationship between clients and attorneys and allow parties in competition cases to resist the disclosure of their communications with their attorneys. The discussion also sought to identify areas of policy convergence.

Based on the background paper prepared by the OECD Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

### **1. Legal privilege is almost universally recognised as a fundamental right grounded in public policy.**

34 OECD Members recognise legal professional privilege in law enforcement, and protect confidential communications between clients and their legal advisors from forced disclosure. The privilege can be asserted against public authorities, third parties and courts, in order to oppose access to documents, as well as challenge actions and decisions that have relied on information that should have been privileged. In competition law enforcement, questions of privilege and protection of privileged information from disclosure may arise during investigations by competition authorities as well as in competition litigation.

The recognition of legal privilege depends on each jurisdiction's legal culture and history. It involves a trade-off between two public policy objectives: on the one hand, the public interest in the effectiveness of antitrust investigations and decisions, and, on the other, the parties' rights of defence, legal representation and unconstrained access to legal advice.

Effective enforcement requires that all relevant information be requested, seized and discovered, and that investigations are not held up by legal privilege claims that may be inaccurate or abusive. The discussion at the roundtable showed that the procedures to protect legal privilege can be burdensome and costly, and the assessment of legal privilege claims may delay enforcement.

Parties' access to legal advice, without fear that their questions and their attorneys' answers will be disclosed, is recognised as a fundamental right in most legal orders, and is an element of due process. Therefore, it is appropriate that access to legal advice is not constrained unduly.

### **2. The personal and subject-matter scope of legal privilege varies among jurisdictions.**

The scope of legal privilege may differ depending on the professional position and/or qualifications of the attorney. The 34 OECD Members that recognise the concept of legal

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\* This executive summary does not necessarily represent the consensus view of the Working Party No3. It identifies key points from the discussion at the roundtable, including the views of a panel of experts, the delegates' oral and written contributions, and the background note prepared by the OECD Secretariat.

privilege apply it to communications between clients and their external attorneys. Of these, 19 Members extend this protection to communications between clients and their in-house lawyers. A usual requirement is that the in-house lawyer be licensed (i.e. is not only a law programme graduate), to make sure that the in-house lawyer is adequately qualified, and is subject to the legal profession's rules of professional ethics and independence.

At the roundtable, jurisdictions that grant privilege only to communications with external counsel stressed that they prioritise appropriate access to documents and avoiding excessive legal privilege claims. Jurisdictions that extend privilege to communications with in-house counsel highlighted that, in their experience, unconstrained access to legal advice increases antitrust compliance, as business people will only ask questions on legal risk of certain corporate conduct, if they are sure that such questions will not be subject to disclosure.

Private sector delegates noted that clients should be free to choose which legal adviser they wish to consult. Having to resort to external lawyers to ensure that communications are confidential raises costs and may cause delays in getting legal advice. Besides, in-house lawyers may be better suited to respond to the company's questions, as they have a better understanding of the company's business and needs.

Some jurisdictions recognise legal privilege to all qualified attorneys whereas others recognise this privilege to attorneys qualified in the forum only. For example, in proceedings conducted by the European Commission, communications with lawyers not licensed in the European Economic Area are not deemed privileged. The experts discussed whether not recognising privilege to communications with foreign lawyers raise questions of international comity or fair trial with regard to an expectation that documents created in a jurisdiction's territory would be subject to its rules.

The scope of legal privilege may also differ regarding the subject-matter of the advice. There is consensus that only legal advice provided by lawyers is privileged. Business advice, even from a lawyer, is not privileged. Some jurisdictions recognise legal privilege only to communications with an attorney that are connected to enforcement proceedings, like antitrust investigations and merger reviews, whereas other jurisdictions privilege all communications to seek and receive any kind of legal advice, whether related to enforcement proceedings or not.

**3. Competition investigations and proceedings should exclude privileged material, unless the privilege is waived. At the same time, there should be authority checks and balances and judicial oversight to prevent abusive invocation of legal privilege.**

Competition authorities' information requests and dawn raids should exclude privileged materials. Several jurisdictions have procedures to disregard, destroy or return a privileged document that has been disclosed by mistake. An enforcement decision that is based on evidence that should have been privileged may be appealable before the courts and may be set aside.

Delegates stressed that it is the parties' obligation to assert and demonstrate privilege in accordance with the applicable appeal rules and grounds, and give specific reasons for their claim in a way that enables assessment of the privilege without revealing privileged information. Invoking privilege without giving specific reasons may cause claims to fail. Marking a document as privileged would not, by itself, guarantee protection without further explanation.

Communications need to have been made in confidence to attract privilege. The confidentiality refers to the attorney-client relationship and communications, and their protection from disclosure, and not to the nature of information exchanged. Legal privilege does not, therefore, refer to the protection of confidential business information, like business or trade secrets or other sensitive information, though such matters may be part of the attorney-client communications.

Legal privilege can be waived expressly (through a waiver) or by inference. Since by definition legal privilege is a confidentiality protection, the sharing of information, that would otherwise be privileged, with parties with whom there is no shared privilege, generally waives the privilege.

The discussion at the roundtable pointed at the need of effective independent review of legal privilege claims to prevent abusive claims of legal privilege. Some competition authorities designate staff who are not involved in the investigation to review the allegedly privileged materials and assess if they should be excluded from the proceedings. Court review of legal privilege claims is usually available too, either on a standalone basis or against the enforcement decision that relied on allegedly privileged material. Delegates noted that judicial review of privilege claims may burden courts, especially if such claims are invoked frequently, and delay investigations.

#### **4. Different approaches to legal privilege among jurisdictions can make it difficult to assess which information companies are obliged to hand over or, conversely, can seek to protect from disclosure.**

Different approaches to legal privilege among jurisdictions can complicate the treatment of legal advice granted in a case concerning more than one jurisdictions. There are cases where communications sought to be disclosed in one jurisdiction (where they are not privileged) originate from another jurisdiction, where they would be privileged and were conducted with the expectation that they would be kept confidential. These differences slow down the parties' replies to requests of information and may lead to privilege claims that slow down investigations. The delegates referred to the OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings, which recommends neither seeking nor sending privileged information.

Private sector representatives pointed out that, given that the actions of a competition authority may affect firms outside its borders, some alignment of jurisdictions' approach to privilege may be desirable, so that companies are sure of whether the advice that they seek and receive can be kept secret. Policy alignment would help ensure fairness to the investigated firms and maintain their ability to seek legal advice effectively, as well as avoid frictions among enforcement systems.