

LEGAL PROFESSIONAL PRIVILEGE IN EU COMPETITION INVESTIGATIONS: STRIKING A BALANCE BETWEEN DUTY AND PROTECTION

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Abstract: In competition law investigations, the right of defence is, among others, guaranteed by the exercise of the Legal Professional Privilege. The right of the client under investigation to maintain the secrecy of communications with his lawyer before the EU Commission is ensured only by the manner in which the legal instruments provided correspond to effective protection, which have to be harmonised with ECHR jurisprudence on the topic. The rules on protection are the result of a delicate balancing act between the rights of the party and the interest of the investigation. The Commission's Guidance on best practices in such investigations, as a soft-law instrument, raises some interesting challenges with respect to the power of the investigative party when conducting dawn raids in relation to Legal Professional Privilege. The present study analyses the legal regime of attorney-client privilege in EU competition investigations and the manner of handling documents containing such information in the context of an investigation and their compatibility with the principles laid down in Article 6 and Article 8 ECHR.

Keywords: legal professional privilege, Article 6 ECHR, Article 8 ECHR, right to defence, competition investigation, European Commission

Introduction

Legal Professional Privilege ('LPP'), also known as attorney-client privilege, has its ideological origin in the rule of law and the right to defence, guaranteed by both the European Union ('EU') and the law based on the European Convention of Human Rights ('ECHR'). This concept represents a cornerstone in ensuring the fairness and equality of both criminal and civil trials, as well as investigative procedures. Its general legal regime and ideological foundation in the EU and ECHR systems determine specific rules in the field of competition investigations conducted by the European Commission, aimed to ensure the efficient application. The in-depth analysis reveals the risks and perils associated with respect to erroneous application of LPP and explains some interesting provisions of the EU soft law instruments regarding the investigations. Based on these considerations, striking the balance

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between the protection of the rights of the investigated party and the pursuing of public interest remains a sensitive, difficult issue.

History and foundations

Appearing for the first time as a notion in seventeenth-century England, LPP was first brought into law stemming from the need to increase the confidence of individuals in resorting to legal advice services, as the oldest instrument for the protection of confidential communications². Since then, attorney-client privilege was the central point in dramatic cases that have inspired fiction literature³ and had a tumultuous history that saw both the broadening and the restriction of its scope of application. Initially viewed as absolute and a mean of protecting the lawyer's honour and interests, the perspective shifted to the importance of the client's trust and the benefits to the administration of justice and the integrity of legal representation⁴. Consequently, the literature discussed the possibility of being outweighed by an opposing interest⁵.

Over the course of its application, several theories have been advanced to justify the necessity for LPP's existence and its place among the fundamental rights of a democratic society based on the rule of law.

On the one hand, the utilitarian theory holds that LPP is necessary in order to encourage honest communication between the attorney and his client, and that quality legal assistance ultimately serves a social purpose, said quality being dependent on the full disclosure of information⁶. The public interest argument shows that withholding key aspects will base the advice on half-truths and render it inefficient, and efficient legal advice increases compliance with the law, as well as the frequency of which the clients will call upon such advice, further achieving compliance⁷.

On the other hand, the fundamental rights theory places the origin of LPP in the right to private life, as a corollary to the right to defence, being inextricably linked to the

² WIGMORE, John Henry: Evidence in Trials at Common Law. Boston: Little, Brown and Company, 1961, vol. 8 § 2290, (McNaughton rev.ed.)

³ *Annesley v. Anglesea*, 17 How. St. Tr. p.1139, 1743, apud. HAZARD JR, Geoffrey C.: An historical perspective on the attorney-client privilege. California Law Review, vol. 66, (1978) p. 1073 – 1080, credited as a source of inspiration for Robert Louis Stevenson's novel *Kidnapped*

⁴ HO, Hock Lai. Legal professional privilege and the integrity of legal representation. Legal Ethics, Volume 9, No. 2 (2006), p. 163-186.

⁵ ANDERSSON, Helene: Dawn Raids under Challenge: Due Process Aspects on the European Commission's Dawn Raid Practices, Oxford: Hart Publishing, 2018, p. 181

⁶ *Upjohn Co. v. United States*, 449 U.S. 383 (1981)

⁷ BROUN, Kenneth S., et al.: Attorney-Client Privilege. McCormick on Evidence. 8th ed. St. Paul: West Academic Publishing, 2006, p. 150.

latter⁸. At the same time, LPP is also related to the right against self-incrimination because the accused party would either have to waive this right or the right to a lawyer, should the latter be forced to disclose sensitive information.

Regardless of the theory one chooses to favour, there is consensus that LPP is essential in a democratic society based on the rule of law and respecting the fundamental right of individuals. Starting from protecting at least the information of whose disclosure would cause significant prejudice to the client, the regulation of LPP entails striking the balance between the two categories of interests, when drawing the limits of the application of LPP: (i) the rights and interests of the party which confides in the lawyer and need to create a *safe haven* for strategizing the defence, to the extent of the inclusion of the non-disclosure of extremely relevant information to authorities, and (ii) the associated public interest of protecting the investigation and coming as close as possible to the truth.

From the perspective of the authority's means to collect evidence, the same reasoning behind prohibiting fishing expeditions, namely inspections carried out without factual or legal basis also applies to the protection of LPP⁹.

LPP as a fundamental right under ECHR

Both theories mentioned above as theoretical foundations of the concept are accepted by the European Court of Human Rights ('ECtHR') in applying the ECHR. One basis for the protection of LPP comes as a result of Article 6 para. 1 of the ECHR, which sets forth the right to a fair trial. Confidentiality of communications between the lawyer and his client can be viewed as a component of the right to effective legal assistance, derived through interpretation from Article 6 para. 3 lit. c of the ECHR on the criminal side, which provides the rights of the accused. At the same time, the secret of the communications is also protected in the context of Article 8 of the ECHR, concerning the right to private life, which provides an extensive and more generous protection of LPP¹⁰.

On numerous occasions, the ECtHR has established that the right to a fair trial in criminal matters provided by Article 6 includes the right of the accused to communicate privately with their lawyer, considering that a productive relationship

⁸ GIPPINI-FOURNIER, Eric. Legal professional privilege in competition proceedings before the European Commission: beyond the cursory glance. In: Fordham Int'l LJ, Volume 28, Issue 4, Article 5, (2004) p. 989.

⁹ MICHAŁEK, Marta: Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe. Yearbook of Antitrust and Regulatory Studies, Vol 7, Issue 10 (2014), p. 135

¹⁰ ANDEANGELI, Arianna: EU Competition Enforcement and Human Rights, Cheltenham: Edward Elgar Publishing Limited, Northampton: Edward Elgar Publishing Inc., 2008, p. 115-120.

between them is based on mutual trust and understanding¹¹. Therefore, any restriction of confidential communications between the lawyer and his client may only be imposed in exceptional circumstances and on the condition that adequate and sufficient guarantees against abuse are in place¹². Interference in communications between lawyer and client has been considered legitimate by the ECtHR in very few cases, which strictly concerned cases of terrorism or organized crime¹³, and restriction of communications have to be based on a legitimate cause¹⁴, such as fraudulent collusion or suspicions regarding the legality of the lawyer's behaviour¹⁵.

The ECtHR jurisprudence offers an additional level of protection for LPP from the perspective of the right to privacy, set out in Article 8 ECHR. Early decisions have started by requiring the protection of correspondence between the accused and their chosen defender¹⁶ and have since, relatively recently, expressly included the communications between lawyer and client in the notion of 'private life', in the case *Altay v. Turkey no. 2*¹⁷. The reasoning provided argues the fact that, most of the time, the information provided to the lawyer is sensitive and personal to the client, with the purpose of making an informed decision regarding their own life. As such, both in the case of information provided in the context of possible or actual litigation, civil or criminal, as well as in the case of consultancy, when seeking advice without the threat of a court, individuals can reasonably expect that confidentiality of their discussion with the lawyer¹⁸.

It follows that the object of protection represents, as a matter of principle, any discussion that the client would have with the lawyer for the purpose of obtaining legal assistance, since any discussion is susceptible to stay under the umbrella of consultancy. A much broader protection is thus offered than in most countries at national level, and even broader than that offered at the European Union level. At the same time, given that any investigations are most definitely an interference with an undertaking's right to privacy, any inspection must also pass the test of pursuing a legitimate aim, being a proportionate means of achieving said aim and appropriate procedural safeguards are in place¹⁹.

¹¹ *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 102, 2 November 2010

¹² *M v. the Netherlands*, no. 2156/10, § 88, 25 July 2017

¹³ For example, *Erdem v. Germany*, no. 38321/97, §§ 65 et seq., ECHR 2001-VII, *Öcalan v. Turkey*, nos. 24069/03 and 3 others, 18 March 2014

¹⁴ *Atristain Gosabel v. Spain*, no. 15508/15, § 49-51 18 January 2022

¹⁵ *Rybacki v. Poland*, no. 52479/99, §59 13 April 2009

¹⁶ *Campbell v. the United Kingdom*, no. 13590/88, 25 March 1992, § 49-51 Series A no. 233

¹⁷ *Altay v. Turkey (no. 2)*, no. 11236/09, § 569 April 2019

¹⁸ *Ibid.* § 49

¹⁹ NAZZINI, Renato: *Competition Enforcement and Procedure*. Oxford: Oxford University Press, 2016, 2nd edn., p. 183, fn. 162

The restrictions imposed by the Convention on searching the professional premises of the lawyer, considered by ECtHR jurisprudence as domicile, within the meaning of the provisions of art. 8 of the Convention, cannot go unnoticed either. The strong wording that "persecution and harassment of legal professionals strikes at the very heart of the Convention system"²⁰ highlights the importance of the existence of procedural guarantees that defend the confidentiality of communications between lawyers and clients²¹.

Of particular interest to the present study is the *Vinci Construction*²² case, in which the ECtHR was faced with a potential breach of Article 8 ECHR, the right to privacy, in a competition investigation carried out by the French competition authority. The applicant claimed that the widespread and indiscriminate seizure of electronic documents, which included entire mailboxes of employees and managers, unrelated to the investigation and filled with trade secrets is not necessary and proportionate to achieve the legitimate aim of finding evidence of an anticompetitive breach²³. It was shown that the investigated party did not have the opportunity to take note of the document being seized or argue about the appropriateness of the seizure, and should have been able to judicially obtain the return of LPP-covered documents. While the existent judicial review of the investigation decision was considered a procedural guarantee, the ECtHR decided that this safeguard was not practical and effective, because only a formal evaluation of legality was carried out, without a 'tangible' examination of evidence²⁴, which led scholars to look to the Commission and National Competition Authority practices for guidance²⁵. Of note is the fact that the ECtHR did not automatically deem these extended seizures as unlawful under Article 8 ECHR, and ruled that the right to privacy is sufficiently protected if documents protected by LPP are returned following judicial review. It was rightfully pointed out that by that time, the competition authorities will have already inspected the protected files²⁶.

Expanding on the topic of procedural guarantees and electronic seizures, noteworthy is the solution offered in the case *Särgava v. Estonia*²⁷, concerning a situation where digital documents are taken by the investigative party through copying entire

²⁰ *Kruglov and Others v. Russia*, no. 11264/04, § 125, 4 June 2020

²¹ A relatively recent example is *Saber v. Norway*, no. 459/18, § 51, 17 December 2020

²² *Vinci Construction and Gtm Génie Civil et Services v. France*, no. 63629/10 and 60567/10, 2 April 2015

²³ *Ibid.*, para. 48-49.

²⁴ *Ibid.*, para. 78-79

²⁵ GOFFINET, Pierre – BONTINCK, Thierry: The 'Tangible' Examination of Inspections and Seizures: A Requirement After the ECtHR *Vinci* Judgement? In: *Journal of European Competition Law & Practice*, Vol. 7, issue 4, (2016) p. 247-253.

²⁶ ANDERSSON, Helene: Dawn Raids (...). 2018, *supra*, n. 4, p. 192

²⁷ *Särgava v. Estonia*, no. 698/19, 16 November 2021

archives. The immense number of files would preclude the lawyer from accurately determining which of them fall under the incidence of LPP, especially in the context where examination of the archive is not usually done at the inspection site.

Moreover, the sheer number of documents (entire email boxes, with drafts and attachments, internal preparatory documents, sometimes generated by a computer or even AI) does not allow their one-by-one analysis, so investigators resort to searching said databases by using keywords and interpreting the results based on the search results. In the aforementioned decision, the Court accepted the fact that mirroring the lawyer's entire archive is a guarantee of respecting art. 8 ECHR, because the files therein cannot be subsequently modified by the investigation team²⁸, but retains that the use of keywords in search and their selection cannot be left to the exclusive discretion of the authorities, without the possibility of judicial review. The case highlighted that a traditionally used guarantee, such as the participation of the investigated party or their representative to the process of sorting documents has limited effects, as is not able to ensure adequate protection²⁹. At the same time, the ECtHR emphasizes the importance of having judicial review and that the existence of contested documents at the disposal of authorities before a specific judicial analysis has been conducted translates into a deficiency of the previously mentioned guarantees³⁰.

Additional concerns pertaining to the consistency in interpretation of LPP rules stem from the application of art. 52 para. (3) of the Charter of Fundamental Rights of the European Union³¹ ("Charter"), which requires at least equivalence between the rights protected by the ECHR and those offered by the Union, the latter being able only to offer a higher standard of protection. This second layer of rules confirms that different standards are applied in the Member States, the differences resulting not only from the substantial law, but also from the procedural provisions having a significant impact on the protection configuration. As LPP fundamentally pertains to procedural rules, it consequently mirrors the nature and the specificities of each national procedural system³².

²⁸ Ibid., § 100

²⁹ Ibid. § 108

³⁰ Ibid. § 107

³¹ Charter of Fundamental Rights of the European Union, OJ C 326, 2012, p. 391

³² For overviews of procedural rules concerning dawn raids and LPP in member states, see: AUTIO, Riina: Explaining Dawn Raids: A Soft Law Perspective into European Competition Authorities' Explanatory Notes on Unannounced Inspections. In: *Journal of European Competition Law & Practice*, Vol. 11, no. 9, (2020), p. 479-484; BERNATT, Maciej – BOTTA, Marco – SVETLICINII, Alexandr: The Right of Defence in the Decentralized System of EU Competition Law Enforcement: A Call for Harmonization from Central and Eastern Europe. In: *World Competition*, Vol. 41, Issue 3, (2018), p. 309-334

LPP in ECJ Case-law

In the EU, LPP is presently deducted from the combined application of Article 7 and Article 47 of the Charter, the former enshrining the right to respect for private life, the latter concerning the right of any person to be advised, defended and represented (efficiently). Article 48 para. 2 must also be noted, as an additional mention of the guarantee regarding the rights to defence. However, to reach essentially the same standard as the ECHR, the cases had a much longer way around. Competition investigations represented the first opportunity for the European Court of Justice ('ECJ') to establish the applicable rules in this matter and the limitations imposed.

The pilot case in this matter is the widely discussed *AM&S*³³, where the ECJ started from analysing LPP in member states and found at least two criteria to be common: that privileged information be communicated in exercising the client's right to defence and that the communication involved an independent lawyer, who is not in an employment relationship with the client³⁴. The ECJ ruled that LPP should cover all communications made after the beginning of the competition investigation procedure and may be extended to prior communications if they relate to the subject of the investigations that followed³⁵.

The notion and requirements of independent lawyer are based on the legislative traditions of member states, in which the defender contributes to the administration of justice and is required to independently provide adequate legal assistance. Even though, fundamentally, the benefit from LPP is aimed to protect the client, who the privilege belongs to³⁶, simultaneously, LPP ensures adequate representation, the lawyer's independence and effectiveness in providing the legal services. Consequently, LPP is counterbalanced by rules of general interest concerning professional ethics and deontology³⁷, and these rules are applicable only to lawyers from member states of the Union.

The next key decision comes as a result of the *Akzo*³⁸ case, where the ECJ restated the aforementioned principles while detailing that the notion of independent lawyer does not include in-house lawyers, who are in an employment relationship with the company, who, although registered with bar associations and subject to professional

³³ Case 155/79, *Australian Mining & Smelting Co. v Commission of the European Communities*, [1982] ECR 1575 (CJ)

³⁴ *Ibid.*, para. 21. See also JONES, Alison – SUFRIN, Brenda – DUNNE, Niamh: *EU Competition Law. Text, cases and materials*. Oxford: Oxford University Press, 8th edn., 2023, p. 930

³⁵ *Ibid.*, para. 23

³⁶ WHISH, Richard – BAILEY, David: *Competition Law*. Oxford: Oxford University Press, 11th edn., 2024, p. 294

³⁷ *Ibid.*, para. 24

³⁸ Case C-550/07, *Akzo Nobel Chemicals & Akros Chemicals v Commission* [2010], EU:C:2010:229

obligations arising from this capacity, does not have the same independence, which is insufficient³⁹. It was shown that the existence of the employer-employee relationship does not allow the lawyer to ignore the company's commercial strategy⁴⁰, and does not offer the same guarantees of independence as an external lawyer. Solely in the context of exercising the legal profession within an independent body that provides legal services to clients, the reasoning corroborating the protection with the legal services could be observed.

Both before and after the Akzo decision, scholars have called for the expansion of the scope of LPP, arguing that an external lawyer entails additional costs and that the distinction is artificial and increases the difficulty in distinguishing between situations of external lawyers and lawyers in an employment relationship. It was also shown that the treatment of lawyers is discriminatory, since all members of the bar are bound by the same professional obligations⁴¹. Nevertheless, it was also rightfully pointed out that these arguments too easily disregard the difficulty the ECJ's mission to balance the right to defence and the European Commission's powers in investigating violations of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU")⁴²⁴³. At the same time, it is unclear why confidential communications with an external lawyer would be insufficient to guarantee fundamental defence rights, given that companies that have in-house lawyers can certainly also afford to hire an independent defender⁴⁴.

With the ECtHR jurisprudence evolving alongside the ECJ one, the EU was to reconsider its position on LPP, from the perspective of Article 52 of the Charter. As a result of this provision, the broad protection offered by the Convention system should be harmonized with the restrictive one from the Union system, if the latter guarantees fundamental rights at least as substantial.

³⁹ Ibid., para. 45

⁴⁰ Ibid., para. 47

⁴¹ See, for example, 4. KAMEOKA, Etsuko: Proposals for Legal Professional Privilege in EU Competition Investigations. In: Market and Competition Law Review Vol. VI, nr. 1, (2022), p. 29; and OECD, DAF/COMP/WP3(2018)5, Working Party No. 3 on co-operation and enforcement, Treatment of legally privileged information in competition proceedings, available at [https://one.oecd.org/document/DAF/COMP/WP3\(2018\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2018)5/en/pdf), accessed on 26.09.2025, p. 13.

⁴² FRESE, Michael J.: The development of general principles for EU competition law enforcement—the protection of legal professional privilege. In: European Competition Law Review, No. 2011-03, (2011), p. 4, available at SSRN: <https://ssrn.com/abstract=1762046>

⁴³ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326

⁴⁴ WILS, Wouter P.J.: Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure. In: World Competition: Law and Economics Review, Vol. 42, No. 1, (2019), p. 10-11, available at SSRN: <https://ssrn.com/abstract=3281576>

The ECJ addressed this problem directly in the case *Orde van Vlaamse Balies v. Vlaamse Regering*⁴⁵ in the context of applying Directive 2011/16/EU⁴⁶, as amended by Directive (EU) 2018/822⁴⁷ regarding the exchange of information relevant to the application of member state legislation concerning taxes and duties. The Directive imposes reporting obligations for intermediaries involved in certain cross-border arrangements that would or could offer tax advantages to those involved. Since lawyers can also be parties to such cross-border arrangements, as well as consultants to the parties involved in these types of transactions, even though they maintain the capacity of intermediaries⁴⁸, the Directive⁴⁹ leaves to the member states' discretion to make exceptions to this duty, should it consider LPP to be an obstacle. The Directive stresses that, in these cases, the intermediaries are obligated to notify without delay another intermediary, if known, or the client on whom the reporting duty falls. The ECJ was called to rule on the validity of these provisions of the Directive, given that this reporting obligation would constitute interference in the right to confidential communications between lawyers and their clients.

Unlike *Akzo*, where the problem concerned an administrative investigation procedure conducted against the client, therefore in a context of litigation, in this case the question arose whether legal advice (consultancy) offered in such cases can also be protected by LPP. Citing from the *Altay* ECtHR judgment⁵⁰, the ECJ expressly acknowledged that the object of protection is not only defence activity, but also legal advice⁵¹, considering the provisions of the Directive inapplicable and giving prevalence to Article 7 of the Charter. The Court held that in this case, interference is not proportional to the rights violated and is not strictly necessary to achieve the purposes of the Directive, since there are other intermediaries who have the reporting obligation.

The importance of acknowledging that both Article 7 and 47 of the Charter should be taken into account when examining the scope of the privilege cannot be understated and affects the entire system of protection of lawyer-client communications is

⁴⁵ Case C-694/20, *Orde van Vlaamse Balies v. Vlaamse Regering*, [2022] ECLI:EU:C:2022:963

⁴⁶ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC OJ L64, 13 march 2011, p. 1-12

⁴⁷ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements OJ L139, 5 June 2018, p. 1-13

⁴⁸ Article 3 p. 21 of Directive (EU) 2018/822

⁴⁹ Article 8ab para. (5) Directive (EU) 2018/822

⁵⁰ *Supra.*, n. 16

⁵¹ Case C-694/20 *Orde van Vlaamse Balies (...)*, para. 27

substantial⁵². By aligning with the ECtHR level of protection and essentially including LPP as part of the right to private life, and not only as part of the right to defence, the ECJ opens up the possibility of applying LPP to all communication between the lawyer and the client⁵³, litigation be present or not. Since the judgment was given based on the fundamental rights of Union citizens, as follows from Article 51 of the Charter, this means that any communication with the client, in all areas of Community law may be subject to protection through LPP, including competition investigations.

Thus, the condition maintained in the *Akzo* case that privileged documents must be related to the investigation is no longer applicable and numerous discussions regarding what constitute preparatory documents for litigation are put to bed. Apparently, the only condition that remains is the one requiring an external lawyer, independent of the company. In an even more recent case and in the same context of applying Directive 2011/16/EU⁵⁴, the Court reiterated the same considerations regarding the incidence of fundamental rights, establishing that communications made with the lawyer on corporate law matters are also privileged.

As such, showing that rights, including their scope, are evolutionary and not set in stone^{55,56}, *Orde van Vlaamse Balies* decision tipped the scales of the balance, which sure to also impact the competition investigation procedure and the powers that the Commission has in conducting these investigations, as they are set forth in European Union Regulation No. 1/2003⁵⁷. For example, compliance related documents may become protected by LPP as opposed to after *Akzo*, that being one of the most

⁵² STURLI, Enrico Salmini – HENRY, Thibault: Extension of EU Legal Professional Privilege: Case C-694/20 *Orde Van Vlaamse Balies*. In: *Journal of European Competition Law & Practice*, Vol. 14, No. 3 (2023), p. 166

⁵³ ANDERSSON, Helene: The Legal Professional Privilege in Competition Law Cases – A Key Element in Protecting the Proper Administration of Justice. In: *Nordic Journal of European Law*, Vol. 7, No. 2 (2024), p. 31

⁵⁴ Case C-432/2023 - *Ordre des avocats du barreau de Luxembourg v. Administration des contributions directes*, [2024], ECLI:EU:C:2024:791

⁵⁵ As beautifully predicted in 2005 by VESTERDORF, Bo: Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Trends. In: *Fordham Int'l LJ*, Vol 28, Issue 4, (2004), p. 1189

⁵⁶ Changes, albeit smaller in scope, are also happening at a national level, the French legislator extending LPP to consultancy as well as recently as 2021, with the caveat that it be related to the exercise of the rights of the defence. See *Loi n°2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire* and JOURDAN, Jérémie – GAFSEN, Henry: Competition Law and Fundamental Rights: Survey of Recent Developments Concerning the Right to Good Administration, Dawn Raids, Legal Professional Privilege, and Other Procedural Rights. *Journal of European Competition Law & Practice*, Vol. 13, Issue 4 (2022), p. 313.

⁵⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1, 4 January 2003, p. 1-25

controversial aspects of the judgement⁵⁸. Amongst the multitude of problems that can be raised related to LPP, the particularities of the procedural safeguards in place hold a key role. At practical level, the small print in the rules could be very differently interpreted in cases where the investigators and the investigated party disagree on the documents which are covered by LPP.

In conclusion, while the EU and ECHR systems are interdependent, with respect to the application of LPP, the protection configuration varies, stemming different interpretation. The evolution of the standard of protection was staggered between them, and only recently the ECJ has rightfully come closer to an equivalence between these rights. In this time, the ambit of protection of the right to fair trial and, consequently, the right to defence has seen significant increases in both systems. Specific application to competition investigations will be interesting to observe, given the interplay between these systems, the struggle to identify instruments rendering consistency in application at national level.

Investigative powers of the Commission and procedural peculiarities in applying LPP

At the outset, it must be stressed that in addition to the limitation that protection granted by LPP solely covers certain client-lawyer communication, the ambit of protection in competition law investigations is significantly smaller than in other types of investigations, such as criminal law investigations, as the protection is strictly correlated with the investigation powers the authority holds. LPP concerns solely the communication collected by the authority during dawn raids, remaining inapplicable for other types of information for which the protection can be ensured directly by the investigated parties and their lawyers.

According to Regulation no. 1/2003, when investigating a breach of Articles 101 or 102 of the TFEU, the Commission is empowered to conduct 'all necessary inspections of undertakings'⁵⁹, which includes the right to both examine and take copies of the books of the business, irrespective of the medium on which they are stored⁶⁰. Without mentioning LPP, the Regulation leaves to the Commission's assessment through soft law instruments to further detail the procedural quirks of the

⁵⁸ For example, MICHAŁEK, Marta: Right to Defence in EU Competition Law: The Case of Inspections. Warsaw: University of Warsaw, Faculty of Management Press, 2015, p. 262-263; TURNO, Bartosz - ZAWŁOCKA-TURNO, Agata: Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change? In: Yearbook of Antitrust and Regulatory Studies, Vol 5, Issue 6 (2012), p. 205

⁵⁹ Article 20 para. 1 of Regulation no.1/2003

⁶⁰ Article 20 para. 2 (b) and (c) of Regulation no. 1/2003.

investigation, the most important one being the Best Practices⁶¹. In the absence of specific guidance in interpretation by means of additional rules, the consistent application of LPP cannot be ensured.

The additional rules aim to tackle the sensitive issue of handling abuse of the right to LPP, of setting an impartial assessment criterion in determining what constitutes abuse, of addressing abuse by setting the adequate corrective measures, as well as the respective procedure.

As a starting point, the Best Practices place the burden on the undertaking claiming LPP to provide 'appropriate justification and relevant material to substantiate its claim' and recommends submitting redacted documents. What follows is describing a three-step procedure that must be followed in cases where LPP claims become contentious⁶². First, If the Commission observes the lack of such evidence, it may impose fines until it is produced or the contested document is submitted⁶³. Second, in a summary of the *Akzo*⁶⁴ decision, after invoking LPP, the Commission would be entitled to 'a cursory look' over some external elements of the document like the general layout, heading, title, to determine the accuracy of the reasons provided, if the undertaking does not refuse even a cursory look, on the grounds that such 'a cursory look' would reveal the contents of the documents.

The *Akzo* decision follows by establishing a procedure in which contested documents are placed in a sealed envelope and place it aside pending resolution of the dispute⁶⁵, and prohibits the Commission from reading any documents pending a decision to reject the LPP claim that the investigated party may appeal⁶⁶. The Court also established that the Commission reading the content is in itself a breach of the right to defence, because the undertaking may suffer a harm which 'cannot be made good or can only be made good with great difficulty', and simply not using the documents in the investigation would not be sufficient to eliminate said damage⁶⁷. It is stressed that pending judicial review, the Commission has the possibility to correct the undertaking making requests for LPP just to delay the investigation by imposing fines and other penalties⁶⁸.

⁶¹ Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6 ('Best Practices')

⁶² For another description of the procedure, see MICHAŁEK, Marta: Right to Defence (...) supra, n.56, 2015, p.267-269

⁶³ Ibid., para 52.

⁶⁴ Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals & Akcros Chemicals v Commission* [2007], para. 81 and 82

⁶⁵ Ibid., para. 83

⁶⁶ Ibid., para. 84 and 85

⁶⁷ Ibid., para. 86 and 87

⁶⁸ Ibid., para. 89.

The Commission, however, decided on a unique approach in order to tackle this latter imbalance. Third, the Best Practices state that, should evidence be provided, in cases where Commission representatives establish that the reasons invoked by the undertaking (i) do not exist, (ii) do not justify protection, or (iii) are manifestly erroneous, instead of using the sealed envelope procedure, they have the right to immediately read the content of the document and make a copy of it⁶⁹. This amounts to an implicit, tacit decision to reject the LPP claim, which can be challenged through an annulment action, and it was rightfully pointed out that there may be a conflict between the *Akzo* case and the Best Practices⁷⁰. Only in cases where they cannot exclude the possibility that the document is indeed confidential, a sealed copy will be made, and the Commission will have to expressly reject the undertaking's claim regarding LPP, giving another possibility of formulating a request for interim measures which will have as its object the suspension of the Commission's decision. These documents will be destroyed or opened only after the ECJ's ruling on the matter or after the expiration of the deadline for exercising the specific action⁷¹. In parallel, there is the possibility for the undertaking to request the Commission's Hearing Officer, an independent guarantor of the effective exercise of procedural rights in competition investigations⁷², to examine the content of the allegedly confidential communication and propose an agreeable solution for both parties and, if this approach fails, to issue a non-binding recommendation to the Commission, without revealing the potentially confidential content of the communication. In his assessment, he is bound by 'the applicable case-law of the Court of Justice'⁷³ so recommendations that in the past would have been mostly predictable⁷⁴ could change as a result of recent jurisprudence. However, the fact that the Hearing Officer is attached to the Competition Commissioner may discourage parties from using such a remedy. The main conflict to take note of in this case concerns the right of the Commission to read the document right away, should the reasons provided by the undertaking be provided as unfounded.

⁶⁹ Best Practices, para. 54

⁷⁰ ORTIZ BLANCO, Luis: *EU Competition Procedure*. Oxford: Oxford University Press 3rd edn., 2013, p. 350, fn. 199.

⁷¹ *Ibid.*, para. 57

⁷² For further detail on the role of the Hearing Officer in such investigations, see WILS, Wouter P. J.: *The Role of the Hearing Officer in Competition Proceedings before the European Commission*. In: *World Competition*, Vol. 35, Issue 2 (2012), p. 22-24.

⁷³ Recital 11 of 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 L275, 20 October 2011, pp. 29-37.

⁷⁴ ORTIZ BLANCO, Luis: *EU Competition Procedure*, 2013, p. 351, fn. 206.

The possibility of reading an undertaking's documents based solely on a unilateral assessment by Commission representatives, in circumstances where their exclusion was requested by the undertaking through invoking LPP, raises significant problems regarding the consequences that reading documents by competition inspectors would have⁷⁵.

Firstly, in order to effectively ensure protection, the person reading the document should be an impartial body. Adversely, frequently in practice, the case handlers carrying out field investigation and collecting the documents during dawn raids are the very persons to whom the justifications are presented, and LPP protects against. If there are reasonable indications that the document would be privileged, the procedure states that it is sealed and can be read only upon expiration of the deadline provided for appeal or in case of rejection of the request for interim measures, precisely because the danger of examining the document prior to this moment is recognized. However, if the assessment of Commission representatives is that the reasons are unfounded, the content will be read immediately, and the protection of LPP disappears, as confirmed by the ECJ in *Akzo*, even if the communication could be, at least theoretically, privileged. Secondly, the case handlers that collect documents cannot unlearn the information they read in those documents, and the harm is caused even if the information is not used in a subsequent infringement decision⁷⁶. While the main objective is still to efficiently prove illegal conduct and not to find the content of a document covered by LPP⁷⁷, in solving the request for LPP, they are in principle biased towards rejection. Therefore, in two out of the three situations that justify rejection of the request, inspection bodies are extremely subjective, either 'invoking reasons which, according to jurisprudence, cannot justify such protection' or stating the reasons that 'are based on factual assertions that are manifestly erroneous', without the undertaking having access to the EU Courts⁷⁸. While inspections have to be authorised by a judge, in precisely this matter there is no *ex ante* judicial control existing to protect the right to defence, since even the tacit rejection decision of the Commission produces the harm of reading the document immediately. In circumstances where legal advice of any kind is privileged, as a fundamental part of the right to defence, with the subjective criterion of connection with communications with the investigation being eliminated, differences in

⁷⁵ VAN DE GRONDEN, Johan W. – RUSU, Catalin S.: *Competition Law in the EU. Principles, Substance, Enforcement*. Cheltenham: Edward Elgar Publishing Limited, Northampton: Edward Elgar Publishing Inc., 2024, p. 204-205.

⁷⁶ STEENE, Adam: *Nexans, Deutsche Bahn, and the ECJ's Refusal to Follow ECHR Case Law on Dawn Raids*. In: *Journal of European Competition Law & Practice*, Vol. 7, No. 3, (2016), p. 186.

⁷⁷ KAMEOKA, Etsuko: *Proposals for (...)*, 2022, p. 34.

⁷⁸ RATING, Stefan – MARTÍNEZ MATA, Yolanda. *Dawn raids of the European Commission: limits to document seizure*. In: *ERA Forum*. Berlin/Heidelberg: Springer-Verlag, 2013. p. 13.

jurisprudence interpretation between Commission representatives and the undertaking can be increasingly greater, further on leaving room for abuses.

Secondly, the risk that reading documents on the spot by Commission representatives entails is that, given the inherent lack of impartiality of the case handlers analysing the document, they will be tempted to obtain the information contained therein by other means, even if a subsequent decision prevents him from using it as evidence. Especially in circumstances where the success of an investigation is associated with taking a sanctioning decision, the interest that the investigator would have in finding out as much information as possible, even if it will be subsequently declared privileged, clearly shows the prejudice that would be produced.

At the same time, although legal privilege protects communications between lawyer and client and not the information contained in those communications *per se*, once the respective information is taken into account, the authority may be tempted to organize the investigation around that fact proven by the evidence falling under the LPP, which will be perceived as much more important than others, within the investigation. Confirmation bias as well as other psychological implication in the person investigating represent a real concern, that is unlikely to be corrected by judicial review. In these situations, the case handlers have already obtained a summary view of the respective act, which can be refused in the situation where the communication is privileged. An additional wrinkle concerns the digital nature of seizures and copying of entire mailboxes, excluding issues related to the scope of investigations, because documents that could be protected by LPP may already be read by the time LPP is raised, because it would already be in the possession of the Commission. Even if the recently revised Explanatory note in this matter⁷⁹ gives the right to the undertaking to review the data sets, a general search using keywords that also looks within the document may yield results from files within folders labelled as 'Privileged', and the cursory look that the case handler may not be entitled to is already taken, and the implications could be massive.

In any case, it seems that, contrary to ECJ jurisprudence and maybe the right to privacy, the balance between the rights of the investigated party and the safety of the investigation is tipped towards the latter scale, the contrast being even more glaring in the context of recent jurisprudence which aligns with the generous approach to protection of the LPP embraced by the ECHR. As an example, when the Government tried to implement this rule in Romania⁸⁰, owing to the necessity of

⁷⁹ Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation (EC) No 1/2003, revised in March 2024, para. 17

⁸⁰ Emergency Government Ordinance no. 108/2023 for amending and supplementing Competition Law no. 21/1996 as well as other normative acts, published Official Monitor of Romania no. 1100 of 6 December 2023.

protecting against unfounded LPP claims, the provision was struck down by the Parliament⁸¹, even though judicial review of procedural claims is sparsely accepted⁸². It could be argued that the difference in treatment between Romanian Competition Council's and the European Commission inspection powers is due to the nature of the instruments that they are set down in, a binding, fully fledged-law, compared to a Guidance from the investigating party itself. There are also considerations to be made about the relatively lower trust society of the country and of the judicial and investigative systems, as opposed to the European Union. It is striking, however, that there seems to be little attention paid to this very important lack of procedural safeguard, which can have pervasive and permanent effects that are difficult to correct.

Conclusion

There is no question that LPP is part of fundamental human rights, and has been the object of protection under multiple arguments, pertaining to both the administration of justice, as well as the right to privacy of the parties involved. The broad scope given by ECHR Case-law seems to be recently mirrored by the ECJ, which only recently has seemed to expand the protection of LPP to include some forms of legal advice, tipping the scales in the direction of protection of fundamental rights, as many scholars have proposed over the years. Irrespective of the affiliation of the counsel and the scope of the documents covered by LPP, when talking about Commission competition investigations, it seems that there is a procedural shortcoming on the side of fundamental rights, to which not enough attention is paid and that can greatly influence both the approach and the outcome of the investigation. Justice may be blind, but it should be able to previously and accurately assess whether the scales are equitable or not.

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⁸² ALMĂȘAN, Adriana – BOGREA, Ștefan: Romania Report. In: Judicial Review of Competition Law Enforcement in the EU Member States and the UK. Alphen aan den Rijn: Kluwer Law International B.V., 2024, p.730

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