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# Proposals for Legal Professional Privilege in EU Competition Investigations*

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ABSTRACT: The main reasons why the importance of Legal Professional Privilege ('LPP') has been emphasised in present times are as follows: protection of confidentiality is considered to be closely related to the rights of defence of the undertaking and administrative due process. The protection of LPP is also beneficial not only to a privilege holder but also to the general public and the competition authorities.

LPP in EU competition investigations has to evolve, because EU competition enforcement has been affected by the rapidly changing world. Even the European Courts have been forced towards the gradual broadening of the scope of LPP accordingly. However, even these efforts do not keep pace with the developments in the modern society.

The general trend has been towards a gradual harmonisation of competition laws and the treatment of LPP in competition law should not be excluded. In some jurisdictions, it is protected as a fundamental right, but in others, a client's right legitimately protecting confidentiality over communications with a lawyer does not exist. The protection of LPP is actually dependent on the laws or customs of each country and culture.

However, I believe that gradual global harmonisation of LPP is not impossible, and that LPP in EU investigations is capable of becoming a global standard with substantial amendments to the current scope. In particular, it is necessary to broaden the current scope, taking into consideration various problems actually found in and outside the EU. In my contribution, I would like to make specific proposals for these amendments.

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## *Introduction*

The current scope of legal professional privilege ("LPP") in EU competition investigations applies to communications between client and independent external lawyer made for the exclusive purpose of exercising the rights of defence in the context of EU competition investigations, and any advice relating to the subject matter of the investigation.[1] LPP, *i.e.*, the right to object to the disclosure of lawyer-client communications, encourages open communication between them so that undertakings can obtain appropriate advice allowing them to adequately prepare for proceedings in every jurisdiction where LPP is granted.[2] The scope of LPP has increasingly been a subject for discussion, because its current form created by the EU courts is rather ambiguous and does not appear to be sufficiently broad to protect the rights of an undertaking. The author believes that it is necessary to broaden the current scope, taking into consideration various problems which are actually found in and outside the EU. I will explain the evolution of its rationales and the reasons why the current scope should be modified, and then make various proposals to revise it.

## *A. Evolving rationales requiring the reformulation of LPP*

The circumstances surrounding LPP have been changing.[3] The European Courts have tried to keep up with these evolutions. In *AM & S*, it was held that LPP only covered communications with external lawyers,[4] whilst in *Hilti* the summary of an outside lawyer's advice that an in-house counsel prepared was protected.[5] In *Akzo Nobel*, the General Court confirmed that internal preparatory documents may also be privileged when drawn

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[1] Judgment of 18 May 1982, *Australian Mining and Smelting Europe Ltd. v. Commission*, Case 155/79, ECLI:EU:C:1982:157.

[2] Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford University Press, 2014): 21.

[3] Judgment of 14 September 2010, *Akzo Nobel Chemicals Ltd. v. Commission*, Case C-550/07P, ECLI:EU:C:2010:512, paragraphs 73-74.

[4] Judgment of 18 May 1982, *Australian Mining and Smelting Europe Ltd. v. Commission*, Case 155/79, ECLI:EU:C:1982:157.

[5] Judgment of 12 December 1991, *Hilti Aktiengesellschaft v. Commission*, Case T-30/89, ECLI:EU:T:1990:27.

up exclusively or for the purpose of seeking legal advice from an external counsel in exercise of the rights of defence, and held that an undertaking is entitled to refuse to allow the Commission even a cursory look at specific documents allegedly protected, provided that it would inevitably amount to the disclosure of the contents.[6] Further, it stated that such preparatory documents might be privileged even if they were not actually exchanged with an external lawyer or were not created for the purpose of being sent to him. However, the author does not believe matters have advanced sufficiently fast.

The recognition of LPP in EU competition investigations did not come out of nowhere. LPP is the oldest of the common law privileges for confidential communications.[7] Although the common law privilege and LPP in EU competition investigations share the same fundamental reason, which is the protection of honest communication between lawyer and client, their requirements are different. Compared to the Common law privilege, LPP in EU competition investigations is too narrow and too vague. As we will see below, it does not meet the requirements of the rights of defence and is thus in breach of both EU law and the European Convention on Human Rights.[8] Also, LPP should have a clearly defined scope reflecting the world as it exists today.[9] The modern world as exists today particularly requires the below-mentioned consideration. We face being challenged on LPP because we fail to take current competing values at stake into account. For instance, as explained below, the use of advanced information technologies in the course of an inspection raises various fundamental questions related to the undertakings' procedural rights and rights of defence, including LPP.[10] Accordingly, the author contends that the below-mentioned developments should be sufficiently taken into consideration by modern competition enforcers and lawmakers, and reform LPP.

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[6] Judgment of 17 September 2007, *Akzo Nobel Chemicals Ltd. v. Commission*, Joined Cases T-125/03 and T-253/03, ECLI:EU:T:2007:287.

[7] Judgment of 13 January 1981, *Upjohn Co. v. United States*, 449 US 383, 389 (1981).

[8] See Judgment of 27 September 2005, ECtHR, *Petri Sallinen v. Finland*, 50882/99, [2005] ECHR 643. The ECtHR held that the Finnish law was illegal because it did not specify the circumstances in which confidential documents were subject to search and did not provide proper judicial guarantees.

[9] In relation to the different approaches, see Andrew Paizes, "Towards a Broader Balancing of Interests: Exploring the theoretical foundations of legal professional privilege", *South African Law Journal* 106, no. 1 (1989): 128.

[10] Van Bael & Bellis, *Competition Law of the European Union*, 6th ed. (Wolters Kluwer, 2021): 1022-1023.

***1. More complicated balance between effectiveness of enforcement and LPP***

EU competition investigations are mainly conducted by the Commission, which possesses increasingly strong investigative powers. To collect the evidence to assist in fact-finding, it organises vast inspections, which increases the risk of privileged documents being seized. It exercises its power to impose severe sanctions to make undertakings submit required documents and answer their Request for Information. The question remains as to the extent to which one should strike a balance between the demands of efficient detection of infringements and LPP.[11] Upholding LPP may lead to a loss of evidence and a reduction in the levels of transparency and efficiency in enforcement, which in turn can damage accountability.[12] However, as the Commission's investigative power has substantially increased since the period of the *AM & S* judgement, the principle of "equality of arms" requires that the scope of LPP be also broadened. Balancing competing interests has become more complicated in modern society than in former times. As we will see, for instance, the number of global investigations increases, its narrow scope – without global harmonisation – can no longer sufficiently promote the encouraging of open communication, because it is related to the global impacts of the increase of the Commission's investigative power. Further, the balance between the rights of defence and the authority's fact-finding powers is not static, partly because the competition authorities are constantly amending their practices.[13] In order to face these challenges, the notion of LPP should be sufficiently flexible.

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[11] Eric Gippini-Fournier, "Legal professional privilege in competition proceedings before the European Commission: Beyond the cursory glance", *Fordham International Law Journal* 28, no. 4: 970. https://ir.lawnet.fordham.edu/ilj/vol28/iss4/5. According to Gippini-Fournier, striking the right balance between the rights of defence and the authority's fact-finding powers and in many other respects, *AM & S* is consistent with or may even exceed the requirements of the rights of defence as defined in EU law.

[12] Andrew Higgins: 7.

[13] For example, the ECN Plus Directive does not appear to correctly balance the enforcer's investigative powers with the undertaking's rights of defence, because it strengthens the enforcers' powers, but does not promote the protection of LPP. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, 3-33.

***2. Encouragement of compliance with EU competition law***

In EU competition law, public interest is a significant factor, as compliance with EU competition law is of huge benefit to society. Although an infringement can be mainly cured through the efforts of both an undertaking and the relevant agencies, it is the undertaking that is better positioned to avoid it. Efficient compliance at an undertaking's initiative enables the Commission to save its workforce and focus on the investigation of serious infringements that cannot be prevented by an undertaking's efforts.[14] Having LPP that is broader in scope would further encourage candid communications with lawyers, which would enhance EU competition compliance of an undertaking. As LPP is also instrumental in creating important public benefits for the competition enforcer, it is in the interests not only of a privilege holder but also of the Commission for LPP to have a broad scope.

Therefore, the author would contend that LPP should extend to advice that is not related to a specific investigation but rather to general advice from lawyers, since this encourages voluntary competition compliance.[15]

***3. Freedom to establish and provide legal services in the EU***

The current scope does not promote the EU's objectives, such as the freedom of lawyers to establish and provide legal services in different countries.[16] Competition investigations nowadays often involve a number of foreign lawyers who work together on an investigation being conducted by the Commission as well as by the national authorities, and work on the interface between them. Thus, separation of advice for each regime is not practical and does not allow lawyers to defend their clients efficiently. The following may be an example of such a case. In 2008, easyJet submitted its complaints with the Dutch competition authority against Schipol Airport in relation to charges related to security and passenger services. As it rejected the complaints, easyJet lodged another with the Commission submitting that the charges set by Schipol Airport were discriminatory, excessive and amounted to an infringement of Article 102 TFEU. Subsequently, the Commission adopted its decision rejecting its complaint, *inter alia*,

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[14] Andrew Higgins: 4.

[15] See OECD, Working Party No. 3 on co-operation and enforcement, hearing on enhanced enforcement co-operation – Paper by John Temple Lang, 17 June 2014, DAF/COMP/WP3(2014)7: 4.

[16] *AM & S Europe v. Commission*, Case 155/79, paragraph 25.

stating that the Dutch authority had already dealt with it.[17] Regulation No. 1/2003 provides that the Commission may reject a complaint on the grounds that a national competition authority ('NCA') is dealing or has dealt with the case.[18] In addition, the Commission found that, in any event, the complaint could also be rejected because the EU lacked a legal interest, given that, in the light of the Dutch authority's findings, there was very little likelihood of it being able to establish an infringement of Article 102 TFEU. This decision was appealed before the General Court by easyJet, arguing that the Commission erred in law in finding that the Dutch Authority had dealt with its complaint and that the Commission made a manifest error in basing itself on a decision of the Dutch authority in relation to a complaint which was not subject to an investigation conducted under EU competition law, but rather the national air navigation law. However, the Court upheld the Commission's decision, stating that the Commission is responsible for implementing EU competition policy and, for that purpose, has discretion as to how to deal with complaints.[19]

The Court, in *AM & S*, insisted on the value of a lawyer's freedom of establishment, and of providing services across Europe, to avoid potential judicial protectionism (unfair local measures against freedom of establishment and providing legal service) caused by the lack of a harmonised LPP in the EU. It stated that LPP has to apply without distinction to any lawyer entitled to practice, regardless of the EU country in which the client resides.[20] In order to achieve the objective of the free movement of a lawyer, LPP is essential, because it enables clients to obtain necessary legal services even if the lawyer is located in another Member State, and without the fear of privileged communications being disclosed.[21] For instance, correspondence regarding

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[17] Decision of 3 May 2013, Case COMP/39.869 – easyJet/Schiphol, C (2013) 2727 final.

[18] 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 L 1, 4.1.2003: 1-25, Art. 13 (2) (Suspension or termination of proceedings): "Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it".

[19] Judgment of 13 February 2015, T-355/13 *easyJet v. Commission*, ECLI:EU:T:2015:36. The judgment was not appealed before the EUCJ.

[20] Case 155/79, *AM & S Europe*, paragraph 25. Julian Joshua: 1.

[21] Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78, 26.3.1977: 17-18. Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, 36-43.

a national competition investigation and internal compliance audit which is potentially relevant to EU competition law should be privileged.

### *4. The increasing importance of LPP as a fundamental right*

LPP is a fundamental right that is so fundamental to the rule of law that it is not negotiable.[22] According to the Court, "The protection of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence".[23] Thus, contractual arrangements, such as confidentiality agreements, cannot replace LPP. The current rationale is that LPP is a fundamental right that protects the right to confidentiality, regardless of the status of the privilege holder.

The importance of fundamental rights cannot be overstated and, indeed, it has increasingly been emphasised in the EU competition enforcement.[24] The EU Courts and the EU Charter acknowledge that fundamental rights form an integral part of the general principles of EU law.[25] For the purposes of EU competition law, Regulation No. 1/2003 confirms the respect of fundamental rights and the principles recognised by the EU Charter.[26] Fair process in competition proceedings will bring about outcomes of investigations that are less arbitrary and more coherent. LPP is protected as a right of defence, and various judgments rendered by the ECtHR have acknowledged a right to the confidentiality of communications,[27, 28] although there is no basis in

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[22] Judgment of 26 June 2007, Case C-305/05, *Ordre des barreaux francophones and germanophones*, EU:C:2006:788, paragraph 41, Judgment of 21 February 1975, ECtHR, *Golder* v. *United Kingdom*, paragraphs 26-40.

[23] *AM & S Europe*, paragraphs 18-23.

[24] See 15 February 2016, Case C601/15, *PPU-N*, EU:C:2016:84. See also Denis Waelbroeck and Catherine Smits, "Le droit de la concurrence et les droits fondamentaux", in *Les Droits de l'Homme dans les Politiques de l'Union Européenne* (Larcier, 2006): 135 et seq.

[25] 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 4. See also Opinion 2/13 of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, paragraph 37. The ECJ has confirmed that "[a]ccording to well-established case law of the Court of Justice, fundamental rights form an integral part of the general principles of EU law".

[26] 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 L 1, 4.1.2003, 1-25, Recital 37.

[27] See judgement of 27 September 2011, ECtHR, *A Menarini Diagnostics S.R.L v. Italy*, Application No. 43509/08. The Italian competition authority imposed a fine on Menarini for its participation in a cartel and Menarini appealed the authority's decision to the Italian Administrative Court, to the Conseil d'État and then to the Cour de Cassation. See also Eric Gippini-Fournier: 996-997.

[28] The scope of the protection set forth by the ECtHR is much broader than that in the case law established by the EU Courts in relation to LPP in EU competition law investigations, in particular

EU law compelling the expansion of LPP beyond the needs of the rights of defence.[29] I therefore suggest that, considering the importance of LPP as a fundamental right, the scope of LPP should be broadened to offer sufficient protection. For instance, it should cover a communication without anticipation of a specific investigation with an in-house counsel.

The principle of legal certainty is also a fundamental principle of the rule of law and recognised by both EU law and the ECHR. It requires that rules involving negative consequences for individuals should be clear and precise, and their application should be predictable for those subject to them.[30, 31] Clarification of the nature and scope of LPP is important, not least because its characterisation as a right results in a different outcome, for instance, when a conflict of laws issue arises.[32] At present, it is not clear how LPP would be treated in such a case, because they could be characterised as a procedural right, a substantive right, or both.[33]

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because the ECtHR has held that any correspondence between a lawyer and his client is protected regardless of the nature of the exchange.

[29] Wigmore considered that because the privilege is an obstacle to finding the truth; it should therefore be strictly confined within the narrowest possible scope as far as is consistent with the logic of the principle. John Henry Wigmore, *8 Wigmore on Evidence* §§ 2191-992, 2285 (McNaughton rev. 1961).

[30] See Judgment of 14 April 2005, Case C-110/03, *Kingdom of Belgium v. Commission*, EU:C:2005:223, paragraph 30.

[31] According to Gerber, in the context of EU law, legal certainty has "additional functions and dimensions" compared to the role of "predictability" in other jurisdictions, not only because "(l)aw *is* the basic tool for the European integration process, and thus the predictability and stability of its content are central to that process and to the confidence of EU stakeholders and citizens in the operation of EU institutions and governance structures, but also because EU citizens require reasonable predictability "so that they can assess their own rights and obligations within the European Union as well as the obligations of others". David J. Gerber, "Searching for a modernized voice: Economics, institutions, and predictability in European competition law", *Fordham International Law Journal* 37, no. 5 (2014): 1424.

[32] James McComish, "Foreign legal professional privilege: A new problem for Australian private international law", *Sydney Law Review* 297 (2006): 313, http://classic.austlii.edu.au/au/journals/SydLawRw/2006/15.html. See also Andrew Higgins: 243.

[33] *Ibidem*, 309 and 312, footnote 121. The classic and orthodox approach to resolve conflict of law issues is to follow the rule under which the domestic law of the forum will govern, if it concerns procedural matters, and the issue in relation to LPP is governed by the law of the forum. However, in relation to LPP over a communication with a foreign lawyer, the relevant foreign law regarding the relationship between a lawyer and his client should govern such problems rather than the law of the forum. McComish even argues that the best option will be to apply the law of the lawyer's place of admission.

### *5. Globalised enforcement of competition policy*

The impact of anti-competitive conduct in one jurisdiction may have significant repercussions in another given the ever-increasing interdependence of economies due to globalisation, and resulting in an increased incidence of competition cooperation involving EU and non-EU enforcement authorities. As each country applies its own LPP, divergent outcomes of a similar investigation can happen, which in the interests of efficiency and public trust towards competition enforcers,is not desirable.[34] The competition authorities' increased investigative powers and in particular broad discovery procedures in the U.S. create tension between foreign competition agencies. For instance, in *FTC v. Qualcomm Inc*., in which the U.S. Federal Trade Commission ('FTC') sued Qualcomm due to allegedly monopolistic conduct in semiconductor patents, the disclosure of the information submitted to foreign authorities was discussed.[35] A U.S. judge held that the FTC must disclose to Qualcomm the documents that the authority had received from third parties.[36] Those included the documents produced to the FTC and foreign competition agencies, including the European Commission, because Qualcomm had also been under investigations in other countries, namely in the EU. In order to challenge Qualcomm's request for disclosure, the FTC argued that comity prevented it from producing documents when a foreign government objected to its doing so. The European Commission expressed concern about the disclosure in the U.S., because of the impact it could have on their investigatory and enforcement efforts. As multi-jurisdictional investigations expand exponentially, failure to adapt the rules to allow undertakings to obtain confidential advice without fear that the competition authorities are looking over their shoulders could seriously undermine the rights of defence.[37] This example also demonstrates that the diverse levels of protection among jurisdictions cause challenges not only regarding undertakings' global legal strategy, but also regarding competition agencies' efficient public

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[34] In Japan, LPP in competition law, which is even narrower than the EU's protection, was finally acknowledged in 2020. In addition, in Article 94 of the Japanese Antimonopoly Act, failing to submit documents or obstructing an inspection can be subject to penalties of up to one-year imprisonment or a fine of up to 3 million yen (approximately 23,000 euro).

[35] Federal injunctions of 25 November 2019, District Court, N.D. California *Federal Trade Commission v. Qualcomm Incorporated* (5:17-cv-00220).

[36] Order on discovery dispute of 24 August 2017, *Federal Trade Commission v. Qualcomm Incorporated*, Re: Dkt. No. 152. Signed by Judge Nathanael Cousins.

[37] Julian Joshua: 1.

enforcement. Foreign legislation can also have an impact on LPP.[38, 39] Also, if an undertaking discloses privileged documents by providing them to the competition authority, depending on the jurisdiction, this may be considered a waiver of confidentiality to any third party and, thus, may not allow for LPP to be claimed anymore, because their confidentiality is deemed to be lost. Further, due to the difference of LPP, evidence which is available to the European Commission may not be disclosed in a private damages action in a foreign (*i.e.*, non-EU) jurisdiction.

Furthermore, disproportionately strict LPP rules only applicable to EU competition enforcement may weaken the international competitiveness of European undertakings. While LPP with a narrow scope could facilitate the Commission's competition enforcement, with more evidence being disclosed, that could however put the undertakings active in the EU market at a disadvantage due to their less protection of confidentiality there. If the EU's LPP were adopted globally, it could imbue undertakings with the confidence to know that their communications were being afforded the same protection in other jurisdictions as in the EU. Thus, the increasing importance of the protection of confidentiality in global competition enforcement is another reason behind the suggested changes to the EU's LPP. Specifically, the EU should cover more correspondence that is actually excluded from the protection.

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[38] The U.S. Securities and Exchange Commission (SEC)'s legislative proposal under Section 307 of the Sarbanes-Oxley Act envisaged to control potential overseas legal interest. This proposal required all lawyers who dealt with the SEC, including foreign lawyers, to make a "noisy withdrawal", which means ostentatious resignation in order to draw attention to corporate wrongdoing, if their corporate clients acted improperly under U.S. law. However, finally, this proposal was dismissed from the final version of the proposed rule, largely due to the objection of foreign lawyers who believed that the "noisy withdrawal" would breach their obligations imposed by their home jurisdiction's rules regarding LPP or professional secrets. Public Company Reform and Investor Protection Act, 15 USC 7245-7256 (the Sarbanes-Oxley Act, 2002).

[39] The Council of Bars and Law Societies of the European Union issued its opinion expressing serious concerns over extraterritorial application of professional regulation of foreign lawyers. CCBE response to SEC proposed rule: "Implementation of standards of professional conduct for attorneys" (File Nos. S7-45-02; 33-8150.wp), http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Postion_Papers/EN_DEON_20021216_CCBE_response_to_SEC.pdf.

***6. Technological developments***

The review of LPP is necessary in order to protect an expanding range of potentially privileged communications. Privileged information is not necessarily found in a hard copy document anymore. While the deluge of electronically stored information, electronic document search, data sharing and pooling, and cloud computing may be useful for both the Commission and undertakings, they may have negatively impacted LPP due to the increased risk of inadvertent disclosure of confidential information.

This issue also concerns globalisation, because the Commission's inspections extend to electronic document searches of communications located outside the EU. Privileged communication regarding an undertaking's global competition strategy may be accessible, including those created in the legitimate expectation of the protection in the jurisdiction for the purposes of which they were made.[40] Therefore, balance between LPP and the efficient enforcement has been altered due to the existence of globalised investigations, together with the emergence of rapidly changing technological developments, and LPP should be reviewed accordingly.

***7. The Commission's policy of encouraging private damages actions***

The Commission has been encouraging private damages actions for the purposes of strengthening deterrent effects and compensating victims. The number of such actions, particularly those based on EU cartel cases, is gradually increasing, which is in line with the Commission's intention. Privilege issues concern not only administrative investigations conducted by a competition agency but also private actions seeking damages, because when a party prevents privileged communications from being disclosed to a court, it may significantly change the other party's legal strategy and eventually the court's judgment.

The current LPP has been applied to the Commission's investigations and do not necessarily govern those undertaken even by the EU's NCAs.[41] The NCAs' decisions applying different rules could ultimately be invoked before various national courts, including the national rules governing LPP. The NCAs and the courts in Member States should be subject to the same rules, because without such harmonisation, judgments regarding

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[40] Julian Joshua: 2.

[41] Rules of Procedure of the Court of Justice of 25 September 2012, OJ L 265, 29.9.2012: 1-42, Article 43(2). In the proceedings before the European Courts, the narrowly defined privilege in the Procedural Rules of the European Courts is granted.

damages actions and the Commission's decision in relation to the same infringement may be incoherent. In this regard, Directive 2014/104/EU, whose adoption and transposition is a significant step forward in establishing a more varied enforcement mechanism,[42] attempts to address LPP and obliges Member States to ensure that national courts give full effect to any applicable LPP under EU or national law when ordering the disclosure of evidence.[43] Although this does not advance the convergence of LPP, it demonstrates the problematic situation caused by the lack of harmonised LPP in the EU and offers the choice between the EU and national rules.[44]

Therefore, tendency for more active damages claims also brings the increasing risk of the disclosure of information. If information is not properly protected in the EU, it may be disclosed and could then be used in other jurisdictions, where private damages actions may be even more popular. Although it is favourable in light of increasing the "deterrent effect" by the risk of possible damages actions even outside the EU, the unforeseeable and disproportionately serious burden may rather damage efficient public enforcement, because it may prevent an undertaking from cooperating with the agencies. Thus, harmonisation of LPP between EU competition proceedings and private antitrust lawsuits could be useful not only to reach a more coherent outcome in private and public competition law enforcement in the EU, but also to provide predictability.

### *B. How could LPP in EU competition investigations be reformulated?*

EU LPP rules should be formed in a manner that is consistent with its rationale and flexible enough to cover the developments of modern society.[45] In order to achieve LPP as a fundamental right providing predictability and consistency, its scope must be clear. The author believes that the following proposals will be useful to achieve such goals.

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[42] Pieter Van Cleynenbreugel, "Private damages actions in EU competition law and restorative justice: Towards a more streamlined institutional framework? ", *Market and Competition Law Review* 3, no. 2 (2019): 18.

[43] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1, 5.12.2014, Articles 5(4) and 5(6).

[44] See Valeria Falce, "Private enforcement and legal privilege versus convergency", *Market and Competition Law Review* 4, no. 1 (2020): 71.

[45] Eric Gippini-Fournier: 986.

### *1. LPP in EU merger investigations*

If a document is requested by the Commission within the context of an inspection, investigatory measure or request for information pursuant to either Regulation No. 1/2003 or Regulation No. 139/2004, an undertaking may claim that such a document is privileged.[46] Although the EU case law concerning LPP is related to the EU antitrust cases – namely *AM & S* and *Akzo* (cartel investigations) and *Hilti* (abuse of dominance) –, it applies to both antitrust and merger control investigations.[47] However, specific characteristics of merger proceedings (such as requests to submit voluminous documents within strict deadlines, increasing global merger cases and the frequent involvement of economists) were not taken into consideration when the ECJ acknowledged LPP. Thus, the specific nature of merger investigations may require separate treatment.[48] This is especially the case for multi-jurisdictional merger investigations, which generally require the protection over highly sensitive communications with non-EU lawyers, which is not privileged in the EU.

Unlike in the U.S., the Commission does not rely on "clawback" rules allowing undertakings to withdraw inadvertently disclosed privileged material produced in EU merger investigations.[49] Instead, in the EU, disputes over LPP are considered by the officials and then may be examined by the Hearing Officer, which may cause the merger proceedings to be delayed. The Hearing Officer may review the document and communicate his preliminary opinion on appropriate steps to foster a mutually acceptable solution. If no agreement is achieved, the Hearing Officer will send a reasoned but non-binding recommendation to the Commission. The "clawback" rules in EU competition law investigations, in particular in merger control proceedings, is useful to reduce the risk of privileged communications being used.[50] Thus, such rules should be provided and the

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[46] Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and the Terms of Reference of the hearing officer in certain competition proceedings, OJ 2011 L 275, 20.10.2011, Article 4(2)(a).

[47] OECD, Working Party No. 3 on co-operation and enforcement, treatment of legally privileged information in competition proceedings – Note by the European Union (26 November 2018), DAF/COMP/WP3/WD (2018)46, paragraph 14.

[48] Frederic Depoortere and Giorgio Motta, "Legal professional privilege under the EU Merger Regulation: State of play", ICLG TO: Merger Control 2018: 10, http://awa2018.concurrences.com/IMG/pdf/2_legal_professional_privilege_under_the_eu_merger_regulation_state_of_.pdf.

[49] Fed. R. Civ. P. 26(b)(5)(B).

[50] See Nicolas Levy and Vassilena Karadakova, "The EC's increasing reliance on internal documents under the EU Merger Regulation: Issues and implications", *E.C.L.R.* 39, no. 1 (2018): 21.

Hearing Officer's mandate should be expanded accordingly. Also, in order to increase his capacity to examine LPP in voluminous documents, any necessary means may be taken.[51] It may be worth considering appointing a panel of experienced legal experts to assist the Hearing Officer.

Currently, correspondence created before the start of the proceedings is privileged only if there is a relationship with "the subject matter of that procedure" and "the subject matter of the procedure" is interpreted to be limited to EU competition law proceedings. Advice on potentially relevant future action without anticipation of the procedure will not be privileged, nor communications regarding due diligence prior to an envisaged merger. The strict limitations on LPP contradicts their fundamental rationale in that everyone needs to be able to consult a lawyer without any constraint.

Further, although the current interpretation does not extend LPP to other professional advisers such as accountants or economists, its expansion to correspondence with economists that work particularly on a specific merger case would be worth consideration, because these professionals' involvement is often necessary in order for a lawyer to provide appropriate legal advice. It is normally possible to separate both advice, but without the extended protection, correspondence with economists could risk disclosing its related legal opinion. In addition, the following are some of the points that we could consider particularly in EU merger control. Imposing strict conditions of "client-own" legal counsel and not providing LPP to cross-party communications in the context of a merger control "would be tantamount to denying the parties' effective exercise of the rights of defense",[52] as undertakings and their external lawyers who deal with a transaction often enter into a joint defence and common interest agreement to allow for the exchange of relevant information in merger investigations.[53] Thus, the arguments in favour of defining a separate LPP for EU merger control is well worth considering.

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[51] See Thomas Wilson, "Legal professional privilege in EU merger control", http://competitionlawblog.kluwercompetitionlaw.com/2017/05/30/legal-professional-privilege-eu-merger-control/. See also Thomas Wilson, "The EC's summary paper on legally privileged information in competition proceedings", http://competitionlawblog.kluwercompetitionlaw.com/2018/12/06/the-ecs-summary-paper-on-legally-privileged-information-in-competition-proceedings/.

[52] Frederic Depoortere and Giorgio Motta: 11.

[53] *Ibidem*, 12.

***2. Communications with an in-house lawyer***

LPP in EU competition law has two interrelated rationales, namely benefits both to the client (protecting the confidentiality of disclosed information) and to the competition authorities and society in general (protecting public confidence in efficient administrative proceedings). These rationales would be reinforced if the remit of LPP were extended to in-house lawyers. The fact that a lawyer is employed by a company does not necessarily negate his independent role as a collaborator in the administration of justice and public service. In general, an employee who communicates with an in-house lawyer generally expects the same level of confidentiality as when he communicates with an external counsel. Compared to when *A.M. & S.* was rendered, the external lawyer nowadays tends to need more assistance from the legal staff of a corporate client and the role of an in-house counsel has become closer to an external lawyer. Further, the number of in-house lawyers is increasing because companies need such a function and the lack of the LPP protection may become more and more problematic. Furthermore, the service performed by an in-house and an outside lawyer is often not sufficiently different, and the main distinction is that the in-house lawyer provides advice to a single regular client, which is his company, while the external counsel provides such advice to several clients.[54] When an external lawyer works for a large corporate client for a long period, there may be no substantial difference. The strict distinction causes unfair situations, because undertakings may be forced to rely on the costly external law firms.[55] In practice, even if an undertaking could handle only with its own in-house counsel, it still has to outsource at least part of legal matters due to the lack of LPP. Therefore, as a narrow scope excluding a communication with an in-house counsel places a burden particularly on small and medium-sized enterprises ('SMEs') whose legal budget is often more limited than a large multinational company.[56] In order to eliminate such a discriminatory burden, the scope should be broader.

The ECJ stated in *Akzo* that the legal situation in the Member States had not sufficiently developed since *AM & S* to an extent which could justify a change in the direction of the case law towards the protection of a

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[54] *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1950).

[55] Jean-François Bellis, "Legal professional privilege: An overview of EU and national case law", *e-Competitions*, no. 39467 (2011): 11.

[56] In the EU, SMEs represent 99% of all businesses. European Commission, "SME definition", https://ec.europa.eu/growth/smes/sme-definition_en.

communication with an in-house counsel in the EU, as there was no uniform or clear majority support in Member States' LPP rules.[57] However, developments in Member States now indicate that they are ready to change the current awkward situation. Various Member States have recognised the protection of confidentiality over communications with an in-house lawyer, and one can expect that other jurisdictions will follow and emulate this development.[58]

In the U.S., in its important precedent *Upjohn*, the Supreme Court held that internal communications between an employee and an in-house counsel regarding an internal audit are privileged.[59] The EU and U.S. concluded a positive comity agreement regarding competition law in 1998, under which one party may request the other party to remedy anti-competitive behaviour that originates in its jurisdiction but affects the requesting party as well.[60] The Commission might be deemed to breach the comity principle by interfering with fundamental rights such as LPP afforded by the laws of another jurisdiction, in particular, by declining to recognise LPP over advice provided by in-house counsel, and compelling the disclosure in other countries.[61]

In relation to merger control, the U.S. approach of recognising LPP with in-house counsel ensures that advice provided in the context of competition investigations "is treated more consistently, and gives the parties greater comfort and certainty on the question of the privileged status of the advice" than the EU approach.[62] In another U.S. case, *Renfield v. Remy-Martin*, in relation to the applicability of the communication with a French in-house lawyer who was not a member of a U.S. bar, after the Court examined diverse organisations of foreign legal professions and the structure of the French legal system, it stated that since the French in-house counsel performed services similar to those performed by the U.S. counsel, the

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[57] Judgment of 26 February 2007, Joined Cases T-125/03 and T-253/03, *Akzo Nobel*, paragraph 170.

[58] *E.g.*, Bernard Nyssen, "Confidentialité des avis et secret professionnel du juriste d'entreprise: une jurisprudence récente éclairante", *Cahier du Juriste*, no. 2 (2015): 28.

[59] *Upjohn Co. v. United States*, 449 US 383, 389 (1981).

[60] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, OJ L 95, 27.4.1995: 47-52.

[61] Nicolas Levy and Vassilena Karadakova, "The EC's increasing reliance on internal documents under the EU Merger Regulation": 21. See also *supra* note, Frederic Depoortere and Giorgio Motta: 10.

[62] Vanessa Turner and Max Kaufman, "Convergence and divergence in the EU and U.S. Approaches to document requests in complex mergers", *Antitrust* 31, no. 1 (2016):78.

absence of the French lawyer's bar qualification should not be a test for the determination of whether privilege should be granted.[63] In this regard, the EU and the U.S. competition agencies adopted the EU-US Merger Best Practices, referring to LPP over a communication between an in-house lawyer and his client.[64] It provides that as the rules governing LPP are different in both jurisdictions, both authorities should accept a stipulation in the parties' waivers of confidentiality that excludes from the scope of the waivers evidence that is properly identified by the parties as privileged under U.S. law. Thus, in the context of the EU-US Merger Best Practices, despite the parties' waivers, a communication with an in-house lawyer that is protected in the U.S. can be protected in the EU as well. In order to avoid complicated situations and adapt LPP to the reality of the function of an in-house counsel, such communications should be privileged in the EU.

### *3. Communication with a lawyer qualified in at least one of the EU Member States*

The EU Courts have clarified that privileged communications should be between a client and a lawyer qualified in at least one of the Member States. According to Advocate General Kokott's opinion in *Akzo*, LPP does not cover communications with a non-EEA qualified lawyer because of the lack of an "adequate basis for the mutual recognition of legal qualifications and the professional ethical obligations" of lawyers.[65] However, the *Akzo* judgment itself did not examine this controversial issue. The UK Law Society has summarised the situation as a long-standing source of grievance for non-EU lawyers based in Europe and admitted that there had been concerns over whether such a position is compatible with the ECHR, and its detrimental impact on EU-US trade.[66] It has even officially indicated that the EU may be prepared to extend LPP to independent lawyers from outside the EU by way of bilateral agreements on the basis of reciprocity.[67]

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[63] Judgment of 13 December 1982, U.S. District Court for the District for Delaware, *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442.

[64] US-EU Merger Working Group, US-EU Best Practices on Cooperation in Merger Investigations, https://ec.europa.eu/competition/international/bilateral/eu_us.pdf

[65] Opinion of Advocate General Kokott, *Akzo Nobel*, Case C-550/07 P, EU:C:2010:229, paragraph 190.

[66] The Law Society, https://www.lawsociety.org.uk/en/topics/brexit/end-of-transition-period-guidance-eu-llp.

[67] European Commission, *Thirteenth Report on Competition Policy* (1996): 65-66, point 78.

LPP should protect any communication for the purpose of obtaining advice regardless of whether the lawyer is registered in the EU, since otherwise it is discriminatory and such distinction cannot be sufficiently justified. An Australian Federal Court Judge suggested that exclusion of foreign advice is detrimental and not practical to promote the administration of justice.[68] In practice, claims relating to a non-EU lawyer's advice arise in many instances.[69] In practice, the Commission allows an undertaking not to disclose communications with independent lawyers qualified in jurisdictions other than the EU upon its request without specific written guidelines confirming this practice.[70] For instance, in certain merger cases, the Commission has accepted that LPP applies to communications involving non-EU qualified lawyers.[71] However, without formal rules in place, one cannot entirely rule out the risk that such communications may be disclosed. Therefore, the revised LPP should clarify the protection of a communication with a non-EU lawyer.

***4. Clients***

The notion of a "client", whose communication is privileged, has not been clearly defined by the EU Courts, and it is not harmonised at the Member State level, either.[72] A clarification of the definition will encourage a client to be mindful about who is included in communications.

A privilege holder should be a particular client, his successor and his agent, because legal advice is a service provided by a lawyer primarily in their interests. In order to fully protect the confidentiality of correspondence, all clients, irrespective of their title, nationality or the place where they live, should be covered. In EU competition investigations, a privilege holder is often an undertaking. Although the definition of the term "undertaking" is critical to EU competition law, and the EU Treaties do not provide any guidance in this regard, this term has been extensively

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[68] Court of Federal Court of Australia, *Kennedy v. Wallace* [2004] FCAFC 337; 142 FCR 185; 213 ALR 108 213 ALR 108.

[69] James Mccomish: 297.

[70] OECD Working Party No. 3, Treatment of legally privileged information in competition proceedings – Note by the European Union, 26 November 2018, paragraph 18.

[71] Frederic Depoortere and Giorgio Motta: 10.

[72] See Denis Waelbroeck, "Part I: towards a higher standard of procedural rights? Issues relating to investigations (legal privilege, dawn raids, requests for information…)": 51-74, in *10 Years of Regulation 1/2003: Challenges and Reform*. (Bruxelles: Bruylant): 61.

examined by the EU Courts and the Commission.[73] For instance, the ECJ held in its preliminary ruling that "the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed".[74] Thus, an undertaking includes even an independent professional who can be identified as a privilege holder. Further, the definition of the corporate client plays a particularly important role in setting out the scope,[75] because a company is targeted in competition investigations in most cases and its internal organisation is often complex. The "client" should be interpreted to refer to only those employees authorised to seek and receive legal advice from the lawyer. For the avoidance of any misunderstanding, some guidance regarding the Commission's general approach should be provided.

***5. Written and oral communications***

In *AM & S*, the ECJ held that the confidentiality of *written* communications is protected.[76] Thus, the current protection extends to written communications in every form, including those that are electronically stored. However, this is not sufficient in practice and the protection of oral communications should be considered as well. In *AM & S*, the ECJ limited the protection to written communications, simply because the case concerned written communications, and the Commission's proceedings relied heavily on the analysis of documents rather than oral statements. The method of communications alone should not affect the client's intent to maintain confidentiality, because the privilege is not a mere question of property rights, and protects not the document itself, but rather the information contained in a document.[77] In practice, oral advice by a lawyer is often made at the client's request, although the Commission's procedure is predominantly written rather than oral in nature.[78] Further oral communications

[73] For a detailed analysis of the term "undertaking", see Van Bael & Bellis: 25-29.

[74] Judgment of the Court of 23 April 1991, Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, EU:C:1991:161, paragraph 21.

[75] Andrew Higgins: 77.

[76] *E.g.*, judgment of 18 May 1982, C-155/79, *AM & S Europe*, paragraph 21.

[77] John W. Gergacz, *Attorney – Corporate Client Privilege* (Thomson Reuters, 2020): 354.

[78] Albers and Williams correctly argue as follows: "Certain evidence can exclusively or best be presented orally to underpin, defend, or rebut a particular position. This is particularly important for defendants who wish to deliver exonerating evidence or rebut incriminating evidence and intend to produce for that purpose(s) witness testimony and expert statements. Even for a procedure heavily reliant on documentary evidence and written exchanges, oral interventions may prove to be essential. Such presentations may give insight into the credibility of the authors of contempo-

are privileged in certain Member States including Lithuania, Malta, and Portugal.

***6. Procedures in relation to LPP claims***

The current procedure established does not have any specific deadlines for resolving the LPP issue. It may take several months to settle a dispute on a LPP claim. In order to proceed the procedure in an efficient manner, cooperation between the Commission and a privilege holder is important.[79] As the public enforcer's ultimate objective is not to know about the content of a privileged document but to establish illegal conduct in an efficient manner, it is not reasonable to spend much time on a dispute over a privileged document. Considering the technical nature of EU competition law, the current method involving the Hearing Officer is efficient and appropriate. However, in order to make this procedure fully functional, it might be necessary to clarify the Hearing Officer's mandate and procedure, including the deadlines.

***7. Communications with professionals other than lawyers***

According to the Commission, LPP does not apply to communications with professional advisers other than a lawyer, because these communications are not related to an undertaking's exercise of its rights of defence in competition investigations.[80] An interpretation that completely excludes such advice is not always practical and is not in accordance with the rationales of LPP.[81] Thus, it is worth examining whether LPP should cover communications with professionals other than lawyers, including an economist and a patent counsel, if a client were to obtain professional advice necessary to defend himself in an EU competition investigation or to comply with EU competition law. Although the Commission notes that external advice

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raneous documentary evidence". Michael Albers and Karen Williams, "Oral hearings – neither a trial nor a state of play meeting" (2010): 4. https://ec.europa.eu/competition/hearing_officers/albers_williams_article.pdf.

[79] Veronica Pinotti, "*Janssen Cilag S.A.S. v. France*: Antitrust dawn raids do not violate human rights law in case of effective judicial review", *Journal of European Competition Law & Practice* 9, no. 1 (2018): 30.

[80] OECD, Working Party No. 3 on co-operation and enforcement, treatment of legally privileged information in competition proceedings – Note by the European Union, paragraph 17.

[81] See Ingrid Vandenborre & Thorsten Goetz, "EU competition law procedure issues", *Journal of European Competition Law & Practice* 4, no. 6 (2013): 513. file:///C:/Users/kameoka/Downloads/EU%20Competition%20Law%20Procedural%20Issues.pdf.

on patent validity, infringement and prospects in patent litigation are not privileged,[82] in practice, an undertaking may require such advice to further its argument. For instance, advice by a patent counsel on patent litigation which is ongoing in parallel with the EU competition proceeding can be necessary for an undertaking involved in a competition investigation such as abusive refusal to license. If such advice is not protected, a client may hesitate to ask for appropriate legal assistance, because it may be difficult for it to distinguish both advice. Thus, a communication with an IP counsel without a qualification as a lawyer should be protected, provided that the undertaking can demonstrate a close link between the advice provided or sought and a potential/pending EU competition law investigation or EU competition compliance exercise.

### *8. Communication exclusively for the purpose of seeking legal advice in competition law proceedings*

As mentioned, LPP applies to communications made for the exclusive purpose of exercising the rights of defence in the context of EU competition investigations and any advice relating to the subject matter of the investigation. The CFI has held that communications with a lawyer in the context of competition law compliance are not privileged, because most of these would cover information that goes beyond the exercise of the client's rights of defence.[83] However, it is not always easy to separate communications only for internal compliance/audits from those in preparation for seeking advice in anticipation of competition investigations.[84]

Although the Commission requires a "relationship with EU competition proceedings", it is far from clear whether the European Courts intended to restrict the principle's scope in this regard. In practice, a need for the protection of communications created by lawyers from several jurisdictions to develop a global strategy in a multi-jurisdictional investigation including parallel administrative, criminal and civil actions is high, and such advice

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[82] See Pat Treacy, Sophie Lawrance and Stephen Smith, "A question of privilege: An insight into EU privilege for UK lawyers post-Brexit" (Bristows, 7 July 2018): 2. https://www.bristows.com/viewpoint/articles/a-question-of-privilege-an-insight-into-eu-privilege-for-uk-lawyers-post-brexit/.

[83] Judgment of the Court of First Instance of 17 September 2007, Joined Cases T125/03 and T253/03, *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission*, paragraph 127.

[84] It is suggested that LPP should be interpreted in such a way that it covers incident reports. ICC, "The ICC Antitrust Compliance Toolkit: Practical antitrust compliance tools for SMEs and larger companies", https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf.

should be considered "advice".[85] Private damages actions can be brought before or after the Commission initiates its administrative investigation. A lawyer who provides advice in the context of an EU cartel may have to bear in mind a potential or actual damages action. Accordingly, the term "relationship" should be interpreted more broadly to include advice directly or indirectly relating to the case under investigation by the Commission.

Further, according to *Hilti*, a communication is protected even if it is not actually exchanged with an outside lawyer or is not created for the purpose of being communicated physically to him, provided that it was drawn up exclusively for the purpose of seeking advice from him.[86] However, this test is subjective and unclear.[87] In this regard, the test should not be based on an "exclusive purpose of seeking advice", but rather on a test similar to "the dominant purpose test", which has been broadly used in Common law jurisdictions because it seems pragmatic and practical.[88] According to the "dominant purpose test", a communication will be privileged if the dominant purpose of the communication or document's creation is obtaining advice in preparation for litigation.[89] Determining whether a communication is sought predominantly for the purpose of obtaining advice should be assessed on a case-by-case factual analysis such as the status of the lawyer and the context in which the advice was provided. Thus, in so far as communications are created for the predominant purpose of exercising the rights of defence and complying with EU competition law, any advice should be privileged, if other conditions are met.

***9. Timing of the creation of a privileged communication***

The current EU rules of LPP protect written communications between client and lawyer after the competition procedure has been initiated and, in exceptional circumstances, earlier communications, if they are closely linked to the subject matter of the EU competition law procedure. However, when a client communicates with a lawyer, he may not be aware of the Commission's specific investigation, or it may turn out that the Commission doesnot investigate the matter against theclient's

[85] Julian Joshua: 14-16.

[86] Case T-30/89, *Hilti Aktiengesellschaft v. Commission*.

[87] Jean-François Bellis, "Legal professional privilege: An overview of EU and national case law", *e-Competitions*, no. 39467 (2011).

[88] Judgment of 5 September 2005, Federal Court of Australia, *Pratt Holdings Pty Ltd. v. Commissioner of Taxation* (2004) 136 FCR 357 at 366.

[89] Andrew Higgins: 107.

expectations. Further, the undertaking's compliance efforts may be made much earlier than the Commission's anticipated investigation or even without its investigation at all. As the undertaking's honest communication and compliance initiative would be to the benefit of both the undertaking and the Commission, the conditions regarding timing should not be strictly imposed.[90] This corresponds to the actual practice. For instance, in *AM & S*, the documents were protected, even though they were created some nine years prior to any investigation. Thus, this condition is not interpreted strictly, because the stricter interpretation will damage the rationale for LPP.

***10. Waiver***

LPP is an absolute right, unless the privilege holder fails to claim it or the legitimate interest for the communication's confidentiality was lost for some reason. In *Akzo*, the ECJ clarified that because LPP belongs to the client, it could be waived voluntarily by the privilege holder, if they find it to be in their interest. Therefore, a limited and qualified waiver *vis-à-vis* the Commission based upon the careful consideration of a privilege holder should not be prohibited, because a privilege holder should be allowed to selectively disclose privileged materials so that the authority can have access to at least a part of the information.[91] The selection of the material to be disclosed should be made by a privilege holder rather than the Commission.

The unjustifiable failure to assert LPP when a holder is aware of the disclosure of privileged information should lead to its waiver, because an undertaking must be diligent in its efforts to prevent inadvertent disclosure.[92] Failing to attempt to stop disclosure within a reasonable time period should be considered a waiver of any objections, because such failure risks being a serious detriment to public enforcement.[93]

Also common interest privilege and joint defence privilege operate to restrict the scope of a waiver. "Common interest privilege" recognises that a privilege holder can legitimately let others share their confidentiality

[90] Case 155/79, *AM & S*. See also Gaetano Tony Pagone, "Legal professional privilege in the European Communities: The AM & S case and Australian law", *International and Comparative Law Quarterly* 33, no. 3 (1984): 670.

[91] Andrew Higgins: 184.

[92] See *Am. Home Assurance Co. v. Fremont Indem. Co.*, No. 88 CIV. 3394 (RPP), 1993 WL 426984 (S.D.N.Y. Oct. 18 1993).

[93] Case 155/79, *AM & S*, paragraph 28. Case T410/09, *Almamet*, EU:T:2012:676, paragraph 43.

when they have a common interest, so that they can secure confidentiality without waiving privilege against the rest of the world.[94] However, it does not confer rights on third parties in relation to another's communications. Also, disclosure to a joint defence party does not destroy the communication's confidentiality when a disclosing undertaking and its joint defence party are acting jointly to further their interests against the Commission.[95]

In addition, the interpretation of a waiver may cause problems in global competition investigations, because if an undertaking submits privileged documents to a competition authority, depending on the jurisdiction this may be considered a waiver of confidentiality. One of the ways to avoid this problem is that the Commission may issue a decision rather than a simple request for information to show that disclosure of the documents is compulsory. These issues concerning a waiver should be clarified.

***11. Safeguard against an inadvertent waiver***

It will be against public policy if a privilege holder's oversight were to trigger the automatic waiver against the privilege holder's will. In EU competition proceedings, what happens is that the Commission returns potentially privileged documents that it has seized.[96] In the U.S., it is the policy of antitrust agencies to either sequester or return any privileged material inadvertently disclosed by a party.[97] As discussed, recent technological developments should be taken into account because they facilitate inadvertent disclosure. The increasing number of tools making information publicly available and the risk of inadvertent disclosure through newly developed modern devises require stronger LPP and a more careful assessment of a waiver.[98] It would be recommended to enhance the protection by

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[94] Andrew Higgins: 151.

[95] *Ibidem*.

[96] Vanessa Turner and Max Kaufman: 79.

[97] Federal Rule of Civil Procedure 26(5)(B), Federal Trade Commission, Statement of the FTC's Bureau of Competition on Guidelines for Merger Investigations (22 December 2002), https://www.ftc.gov/system/files/documents/public_events/114015/ftc_statement_on_guidelines_for_merger_investigations_12-22-02_2.pdf.

[98] For example, there is a case in Singapore in which due to the hacking of a plaintiff's computer systems, privileged email communications with his lawyers were uploaded onto the "Wikileaks" website. In relation to the question as to when LPP might be lost, the Court held that merely technically allowing limited public access to confidential information is not considered to automatically destroy its confidentiality and that public media, including the internet, must not be considered the gateway through which all confidentiality is destroyed. Court of Appeal of Singapore, *Wee Shuo Woon v. HT S.R.L.* [2017] SGCA 23.

providing strict conditions for a waiver and clear guidance to undertakings in this regard.[99]

***12. Safeguard against abuse of LPP claims***

In *Akzo*, the CFI recognised the risk of an undertaking's abuse by making clearly unfounded requests as mere delaying tactics, or by opposing, without objective justification, any cursory look at the documents during an investigation. Once the broader scope of LPP is acknowledged in the future, the Commission's enforcement will have to be safeguarded against abuse in the form of unmeritorious LPP claims.[100] According to the Commission, undertakings making clearly unfounded claims may be subject to fines and such actions may be taken into consideration as aggravating circumstances.[101] For instance, authorities face a negative impact on their investigation by an undertaking designating too many documents as privileged by marking them with "legal professional privilege", and such excessive marking should be severely sanctioned.[102] According to the U.S. Antitrust Division's experience, competition authorities can effectively manage such situation.[103] Thus, the Commission can efficiently prevent an abuse of LPP claims whose scope is broader than the current one.

***13. Use of evidence in breach of LPP***

There is no judgment in which the European Courts have analysed the outcome of the illegal use of privileged information by the competition authorities in EU competition investigations. A decision finding an infringement could be considered to be void due to breach of an essential procedural requirement only where it is established that without the

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[99] For instance, in *Niche*, the Commission gave a warning and an opportunity to reconsider its withdrawal of the LPP claim. Judgment of the General Court of 12 December 2018, *Niche Generics Ltd. v. European Commission*, Case T701/14, EU:T:2018:921.

[100] Wigmore, 8 Wigmore on Evidence (McNaughton Rev. Ed. 1961) § 2291.

[101] European Commission, Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, 6-32.

[102] In the UK investigation in which 444 documents were designated as privileged, the undertaking was sanctioned. Case ME/6806/19, Anticipated acquisition by Sabre Corporation of Farelogix Inc., Notice of a penalty pursuant to section 112 of the Enterprise Act 2002.

[103] Scott D. Hammond, "Dispelling the perception that legal privilege impedes antitrust enforcement – The US experience, introducing legal privilege in Japan", *Competition Law International* 11, no. 2 (2015): 121.

breach of LPP the decision might have been made in a different way.[104] However, a breach of LPP should lead to the annulment of the decision irrespective of whether the decision would have been different due to the importance of LPP as a fundamental right and the future impacts of the illegal disclose of a privileged communication, which is difficult to be assessed. As accountability leads to trust towards the EU's enforcement of competition law, this proposal has benefits not only for a privilege holder but also for the Commission.

### *14. Seizure of privileged communications at a lawyer's professional premises*

The current practice does not limit the Commission's powers to inspect a lawyer's professional premises, his private domicile or ancillary offices in another country.[105] Although it is not common for the Commission to send a request for information to a lawyer or to come to their premises for an inspection, a request for information and search/seizure at a lawyer's premises is not prohibited. There is no dedicated provision clarifying inspections at a lawyer's office in light of LPP. Again, the EU Member States' laws on this subject differ.[106, 107]

However, search and seizure at law firms aimed at obtaining communications between a lawyer and his client should not be allowed. Most of the documents kept at a lawyer's office are privileged, due to the nature of the profession. Allowing the seizure of documents at such a place particularly damages the fundamental rationale of LPP, in view of the protection of the client's trust in his lawyer. The ECHR clarifies that LPP is a fundamental substantive right in the context of the protection of private life concerning the search of business premises, including a lawyer's office.[108]

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[104] See Judgment of the Court of 29 October 1980, Joined Cases C-209 to C-215 and C-218/78, *Heintz van Landewyck SARL and Others v. Commission*, EU:C:1980:248.

[105] Elena Eva, "Lawyers' legal professional privilege in Europe", *SEA, Practical Application of Science* III, no. 1 (7) (2005): 37.

[106] Bundesverfassungsgericht, "Constitutional complaints relating to the search of a law firm in connection with the 'diesel emissions scandal' unsuccessful", Press Release No. 57/2018 of 06 July 2018, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-057.html.

[107] Judgment of 19 September 2002, ECtHR, *Tamosius v. United Kingdom*, Application No. 62002/00, [2002] ECHR 403.

[108] *E.g.*, judgment of 16 December 1992, *Niemietz v. Germany*, no. 113710/88 [*1992*] *16 EHRR 97*, Application No. 13710/88, [1992] ECHR 80.

Also, interference from the public authority is not reasonable under the proportionality principle.

***15. The harmonisation of LPP***

As explained above, in a globalised world, it is difficult to respect a privilege holder's expectation and LPP's rationale without harmonisation of LPP in the EU and globally. Although the current LPP should be revised, as we saw, a new concept may be suitable to become the harmonised model of LPP, partly because of its mixed nature. It embraces aspects of both attorney-client privilege and work product doctrine.[109] I will discuss below potential methods of harmonising LPP.

*(1) EU-wide harmonisation of LPP*

The core problem concerning EU-wide harmonisation is that the NCAs enforce EU competition law through different national procedural rules.[110] The European Court has stated that as the investigative powers of the Commission and NCAs are different, the LPP rules can vary accordingly.[111] LPP applies to all EU competition proceedings, not only those conducted by the Commission, but also those conducted together with NCAs. Through the principle of supremacy of EU law, the LPP rules established by the EU courts have become part of the domestic legal order of Member States. However, where an investigation is conducted only by NCA alone without the Commission under EU and/or national competition law(s), the investigation proceeding is subject to the relevant national rules. Also, national court proceedings are subject to national law. In such proceedings, the EU privilege rules are not applicable, even if an infringement of EU competition law is disputed.[112] Although one NCA could also request another NCA to conduct an inspection on its behalf, the LPP rules followed by the requested NCA may be different from those of the requesting agency.

The Commission works in cooperation with NCAs for the efficient functioning of the European Competition Network ('ECN').[113] Evidence is

[109] Julian Joshua: 2.

[110] Denis Waelbroeck, "Part I: Towards a high standard of procedural rights? Issues relating to investigations": 57.

[111] Case C-550/07 P, *Akzo Nobel*, paragraph 102.

[112] Gippini-Fournier: 972.

[113] European Commission DG COMP, *Antitrust Manual of Procedures*, 1. Introduction, point (1). The ECN consists of the Commission and NCAs for the purpose of enforcement cooperation

lawfully circulated among them, provided that the NCA which gathered it has complied with its national rules.[114] Therefore, the documents legally obtained by the Commission can be used as evidence by the NCA and *vice versa*. Further, such cooperation is not limited to evidence collected in competition investigations by the ECN members.[115] Thus, the risk and the consequences of inadvertent, erroneous and illegal disclosure of privileged information is serious.

Although the immediate and full legal harmonisation does not seem possible, we can explore several techniques for the approximation of the national laws such as mutual recognition. It may be also attained by bringing an action involving LPP before the EU or national courts. The European Courts could establish a higher standard by changing their case law. However, the disadvantage of this method is that it requires the existence of a specific case with LPP as an issue. Thus, as regards the harmonisation in the EU and Member States, soft law instruments may be realistic. The Commission regularly issues such laws to explain its practice and it is rare for the Commission to divert from them,[116] and these can be followed by Member States through the ECN, using its Recommendation or Model programme. Such guidance should cover the conditions, a procedure for settling a dispute over LPP, and guidance on how to create confidential documents.

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among them to ensure consistency in the application of EU law by NCAs. Article 22 of Council Regulation (EC) No. 1/2003 set up a legal framework of cooperation for the NCAs to conduct inspections in their territories and other fact-finding inquiries, as well as investigations on behalf of another competition authority and the Commission.

[114] OECD, Working Party No. 3 on co-operation and enforcement, treatment of legally privileged information in competition proceedings – Note by the European Union, paragraph 22. Arianna Andreangeli, "Competition law and fundamental rights", *Journal of European Competition Law and Practice* 8, no. 8 (2017): 526.

[115] Judgment of the General Court of 16 June 2015, Case T-655/11, *FSL Holdings and Others v. European Commission,* EU:T:2015:383. This judgment was confirmed by the ECJ in 2015: Judgment of 27 April 2017, Case C-469/15 P, *FSL Holdings and Others v. European Commission*, EU:C:2017:308.

[116] See Judgment of the General Court of 13 December 2016, Case T-95/15, *Printeos, SA and Others v. European Commission*, EU:T:2016:722. In relation to one of the Commission's Guidelines, the Court has stated that if the Commission does not follow the general rule indicated in the Guidelines, it is important to clearly explain the reason. See Judgment of the General Court of 13 December 2016, Case T-95/15, *Printeos, SA and Others v. European Commission*, EU:T:2016:722.

*(2) Global harmonisation of LPP*

At present, LPP is not harmonised at a global level. The current distinct norms create a patchwork of legal obligations that vary in scope and cause confusion, misunderstanding and unpredictability.[117] Thus, the global harmonisation of LPP is strongly recommended, although immediate action appears unrealistic. The forum for the discussion regarding such harmonisation could be gradually achieved through international instruments and organisation.

For instance, the Hague Convention could be used as an instrument to identify an applicable LPP and promote global harmonisation.[118] When a party involved in legal proceedings in Member States needs to collect evidence abroad, this legal instrument may be available depending on the party's location. One of the antitrust litigations under the Convention demonstrates that it serves to resolve the problems caused by the lack of the LPP harmonisation that arise in the context of commercial civil litigation.[119] In this case, the U.S. federal courts confirmed that the Convention applied to the discovery of documents located in a foreign jurisdiction. With some important amendments to the current Convention, this instrument could be a tool towards the global harmonisation of LPP in competition investigations.

Considering the expertise that it has accumulated, the nature and the members of the organisation, the International Competition Network ('ICN'), the only known global body exclusively dedicated to public enforcement, may be one of the best forums in which to discuss the multilateral harmonisation of LPP. Although in general its instruments are not legally binding, its members aim to build convergence towards sound competition policy principles across the global antitrust community. In a move to encourage better corporate compliance through enhanced procedural fairness, in April 2019, its members adopted a new multilateral framework, "ICN Framework on Competition Agency Procedures ('CAP')", which is open to all competition authorities.[120] The signatories are committed to

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[117] Susan D. Franck, "International arbitration and attorney-client privilege – A conflict of laws approach", *Arizona State Law Journal* 51 (2019): 940-941.

[118] Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters, https://www.hcch.net/en/instruments/conventions/full-text/?cid=82.

[119] Judgment of 13 December 1982, U.S. District Court for the District for Delaware, *Renfield Corp. v. E. Remy Martin Co.*, 98 F.R.D. 442.

[120] ICN, New ICN-led framework to promote fair and effective agency process (Press release) (April 2019), https://www.internationalcompetitionnetwork.org/featured/framework-for-competition-agency-procedures/.

observing the fundamental procedural norms that most of them have already recognised, bridging the gaps between civil and common law jurisdictions, between administrative and prosecutorial approaches, and between newly emerged and traditional agencies in small and large markets. If all 140 competition authorities sign the framework,[121] it will be a step forward in the global harmonisation of competition procedures, because the CAP sets common principles for due process commitments, including confidentiality, and identifies values that are mutually respected by most competition authorities, including LPP.[122] If the ICN adopts a common model for LPP, it will become an important step forward.

Also, the OECD supports creating a standard LPP, which it states would facilitate cooperation between competition agencies.[123] Further, the United Nations Conference on Trade and Development (UNCTAD) also remains a potential forum for the exchange of information on competition policy developments, because it might be a suitable organisation to facilitate procedural harmonisation, especially with developing countries.

The problems concerning LPP in global competition investigations could be also resolved through international comity,[124] because the public international rule of comity provides certain guidance to determine which jurisdictions' laws will apply to the question of whether a communication is privileged.[125] Normally, comity is effective only if foreign laws do not directly conflict with the forum country's public policy. An example is found in U.S. cases concerning communications between client and patent agent who is located in a foreign country.[126, 127] In conclusion, its global

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[121] Assistant Attorney General Makan Delrahim delivers remarks on global antitrust enforcement at the Council on Foreign Relations, Washington, DC (1 June 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement.

[122] ICN, Framework on competition agency procedures (CAP), Annex: Principles a), Representation by legal counsel and privilege. https://www.internationalcompetitionnetwork.org/featured/framework-for-competition-agency-procedures/.

[123] OECD, Working Party No. 3 on co-operation and enforcement, hearing on enhanced enforcement co-operation, Paper by John Temple Lang, 17 June 2014, DAF/COMP/WP3(2014)7: 4. https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2014)7&doclanguage=en.

[124] Julian Joshua: 2.

[125] Nina McPherson and Theodore Stevenson III, "Attorney-client privilege in an interconnected world", *Antitrust* 29, no. 2 (2015): 28.

[126] John W. Gergacz: 236.

[127] Judgment of 8 November 1982, U.S. District Court, W.D. New Yor, *Detection Sys., Inc. v. Pittway Corp.*, 96 F.R.D. 152, where the court held that if privilege is granted for communications with a

harmonisation will certainly offer significant advantages to privilege holders and competition agencies.

### *Conclusion*

The points raised here reflect actual and potential issues surrounding LPP, but there is no way to be exhaustive within the confines of this contribution. I hope that my suggestions can contribute to encouraging further discussion on LPP in EU competition investigations.

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patent agent in a foreign jurisdiction, the U.S. courts should respect that foreign law, unless to do so would be contrary to public policy.

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