

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Treatment of legally privileged information in competition proceedings – Note by
Hungary****26 November 2018**

This document reproduces a written contribution from Hungary submitted for Item 2 of the 128th Working Party 3 meeting on 26 November 2018.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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Hungary

1. Scope of privilege

1. The Hungarian competition rules protect communications between client and attorney and the documents produced in connection with legal advice from forced disclosure to third parties and public bodies.

2. This protection is stipulated by Paragraph (1) of Article 65/C of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (hereinafter referred to as: Competition Act) as follows: *“Any document prepared for the purpose of defence may not be admissible as evidence in competition control proceedings and – except for cases provided for in this Article – may not be taken possession of (may not be examined, seized, sequestered, and/or may not be copied), and searching for surrendering such document, and allowing access to it may be refused.”*

3. In Hungarian legal terminology legal professional privilege (hereinafter referred to as: LPP) refers to a document prepared for the purpose of defence and is defined by Paragraph (2) of Article 65/C as follows: *“Document prepared for the purpose of defence means a document, or a part thereof, that was created in the interest or in the process of the client exercising its fundamental right to defence in proceedings of a public authority, during or for the purpose of communications between an attorney engaged in legal practice and his/her client, or that is a record of the contents of such communications, provided in all cases that the nature of these documents is readily apparent from the document itself. Any document that is not in the possession of the client or the client’s attorney engaged in legal practice shall not be recognized as a document prepared for the purpose of defence, unless they are able to prove that they were deprived of possession of the document in question illegally, or within the framework of criminal proceedings.”*

4. Accordingly the above legal definition requires the conjunctive fulfillment of the three following key-conditions:

1. *“for the purpose of defence in proceedings of a public authority”*
 - The document can only be qualified as LPP if it was created in connection with a proceeding of a public authority.
 - Moreover, according to a previous relevant court ruling, the document must be relevant from a competition law point of view.
 - Thus, in the practice of the Hungarian Competition Authority this privilege does not cover all of the documents prepared in connection with the proceedings of a public authority; the scope of the protection is limited to competition law related matters.
2. *“during or for the purpose of communications between an attorney engaged in legal practice and his/her client”*
 - This condition means that the privilege does not merely cover the actual communications themselves, but extends beyond these to cover additional documents. Accordingly, the preparatory documents that are necessary for the client to properly inform its appointed attorney and the in-house memorandums that

are created based upon the legal advice of the appointed attorney can also benefit from the privilege.

- With regard to the scope of this privilege, the court emphasized that the communications concerned have to take place between the client concerned and the attorney appointed by the client itself. Accordingly, communications taking place between the client concerned and an attorney appointed by someone else cannot benefit from this privilege.
 - As a result of the entering into force of the new Attorneys Act, the rules relating to the scope of LPP have changed since 1 January 2018.
 - Before this date the scope of the privilege only covered communications between the client concerned and its appointed attorney.
 - Since 1 January 2018 the scope of the privilege has been defined in a broader manner. According to the new rules, the privilege covers communications between an attorney engaged in legal practice and his/her client. As a new element, the privilege now extends to communications between a client and its in-house counsel if the in-house counsel is registered with the Bar Association.
 - As regards to the practical implications of this change, no concrete experiences or judicial practice yet exists.
3. *“in possession of the client or the client’s attorney engaged in legal practice”*
- Generally the Hungarian Competition Authority acquires possession of the concerned documents during a dawn raid conducted on the premises of the client; therefore this condition is usually met.

2. Competition investigation and assertion of privilege

5. Generally items that are subject to LPP cannot be seized by the investigating authority, however, the seizure of devices and items suspected of containing LPP material is authorized where it is not reasonably practicable and feasible to separate the LPP material from the non-LPP material contained on the device.

6. If the investigation resulted in the acquisition of physical possession of the concerned document in the course of a dawn raid, the document itself or the medium containing a digital copy of the data of the person concerned (“research copy”) is placed in a storage device with facilities to prevent access to the data and to ensure that they cannot be subsequently manipulated. The sealing of the storage device is witnessed and signed by the person concerned and the investigator, with the seal affixed to prevent the storage device from being opened without the seal being tampered with.

7. In this case the client concerned is requested to make a statement if any of the documents and items of which physical possession has been acquired is recognized as a document prepared for the purpose of defence.

8. If according to the statement made by the client concerned, the documents and items taken into possession include any document prepared for the purpose of defence; such documents are examined during a joint session of the client concerned and the investigator. During this joint session, the investigator – without prejudice to the right of defence, to an extent strictly necessary – is entitled to inspect the document to ascertain

whether relying upon the protection afforded to documents prepared for the purpose of defence is manifestly unfounded or not (cursory look). The paper-based documents prepared for the purpose of defence are handed over to the client concerned, while in case of electronic items the authority is obliged to irrevocably delete them from the working database. In this latter case a list of the deleted items is handed over to the client concerned.

9. If for whatever reason the investigator contests, during the above-mentioned investigative measure, the protection of the document prepared for the purpose of defence, the dispute is determined by mutual negotiation between the client concerned and the investigator. However, if an agreement cannot be reached between the client and the investigator as to the exact nature of the document concerned, this will result in a non-contentious administrative proceeding before the Budapest Metropolitan Court.

3. Judicial review

10. Accordingly, if a disagreement occurs between the standpoint of the client concerned and the investigator as to the qualification of the document concerned, the court is authorized to determine the dispute after hearing of the client concerned. In this situation the Hungarian Competition Authority initiates the proceeding of the court by filing an official request. The Hungarian Competition Authority shall make available the document or the sealed container holding the document in question with the request.

11. If the court rules that the protection afforded to documents prepared for the purpose of defence does not apply to the document or a section thereof, the non-privileged material shall be released to the Hungarian Competition Authority. If the court's decision is in the client's favor the privileged document or a section thereof shall be released to the client concerned. The client has the right to appeal. In this case, the Supreme Court of Hungary (Curia) shall review the decision of the court.

12. Any kind of claim for breach of privilege can be subject to judicial review. Such claim has to be presented along with the request for judicial review of the final decision on the case concerned of the Hungarian Competition Authority.