Attorney-Client Privilege in Competition Law Proceedings: Primed for Convergence? An Example from Mexico

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Attorney-client, or legal professional privilege, is a critical aspect of due process in competition proceedings. It is recognized by the legal systems of the United States and most common law countries. However, many other jurisdictions either do not recognize the privilege or do so only partially. The United States Federal Trade Commission (FTC) is a strong advocate for the adoption of a robust privilege, both bilaterally with countries and agencies that consider reforming their rules, and in multilateral bodies that promote best practice standards for competition investigations. We were pleased to see the recent reforms that Mexico has adopted to introduce the privilege specifically into its competition law, even though the privilege is severely constrained within its broader legal system. In this article, we discuss the privilege as it applies in most countries and how it applies in Mexico; The FTC work that helped lead to recognition of a robust privilege in multilateral competition institutions, including the ICN and OECD; the incorporation of the privilege in the US-Mexico-Canada Agreement (USMCA); and the successful Mexican initiative to strengthen this privilege.

I. The Attorney Client Privilege

The purpose of the attorney-client privilege is to encourage open communication between lawyers and clients in order to promote broader public interests, especially compliance with the law and the ability of counsel to present a fully informed defense. In the United States, as in other countries that recognize it, the attorney-client privilege shields certain communications between a client and his/her attorney from discovery or other compelled disclosure. As the United States Supreme Court has noted, [t]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer [2] In the context of antitrust, the privilege encourages compliance with the law as it creates conditions where attorneys, both in-house and external, can encourage clients to discuss their plans in a way that allows the attorney to provide guidance about what is permitted and what is not, or how to mitigate the harm if the line has been crossed. For firms that seek to comply with the law, the freedom to talk openly with counsel gives them a meaningful opportunity to be counseled to comply.

While treatises can be and have been written about the scope of the attorney-client privilege,[3] the general rules in the United States and elsewhere are that oral or written communications between attorney and client for the purpose of obtaining legal counsel are privileged, along with attorney records of communications with the client. The underlying facts themselves are not privileged, nor are communications where the client is seeking anything other than legal advice, such as business advice. Communications with third parties are not privileged, nor is advice that aids in the commission of illegal and fraudulent activity.

Mexican law has long contained a limited attorney-client privilege, but it has never been as robust as in the United States or in many other jurisdictions that recognize the privilege. Mexican law prohibits attorneys, as well as other professionals, from disclosing client secrets.[4]

attorney.[5] However, the privilege only restricts the ability of the government to listen in, not privileged communications when they fall into its hands. (COFECE) has increasingly been using dawn raids in cartel cases.[6] During raids, COFECE officials typically download files from the n technology system, which may contain privileged communications between attorneys and their clients. Thus, where COFECE obtained attorney-client materials in the course of a dawn raid, there were few legal constraints on its ability to use them.

II. Enter the FTC and the Multilateral Competition Community

The attorney-client privilege has been the subject of increasing attention in multilateral competition policy fora such as the OECD and the ICN. Both organizations strive to facilitate experience sharing, identify best practices, and promote convergence across all aspects of competition law and policy, with areas of divergence receiving particular attention. As one such area, it is little surprise that the attorney-client privilege has gained international attention.[7]

A. Prospects for Convergence

The prospects for convergence in legal privilege are both promising and challenging. As a starting point, an OECD Competition Committee Secretariat report stated
is almost universally reco [8] An OECD member survey revealed near-universal recognition of legal privilege for communications between clients and their external lawyers (from the same jurisdiction).[9] Further, there is broad agreement on several basic principles for the application of legal privilege. There is consensus that only legal not business advice is privileged and that the privilege does not apply to protected information if the client waives the privilege, for example by disclosing the information to another party. The OECD report also noted the common principle that competition investigations and proceedings should exclude privileged material unless the privilege is waived and that there needs to be effective independent review of legal privilege claims to prevent abusive claims.[10]

However, there are fundamental differences on the scope and coverage of legal privilege. The most striking divergence is on whether the protection extends to communication between clients and their in-house lawyers. The OECD survey results identified a hard split: 19 of 34 jurisdictions surveyed extend this recognition to communication with in-house lawyers.[11] Further divergence differentiates between the qualifications of attorneys, e.g. whether they are licensed in the jurisdiction or elsewhere. After noting further distinctions between whether the privilege extends to communications with domestically qualified and non-qualified attorneys, the OECD

provocative step further toward prompting consideration in cross-border merger matters that could facilitate convergence. For cross-border requests, the ICN RPs urge competition agencies licable in those jurisdictions unless such consideration is precluded by applicable laws in the requesting [16] The recommendation stops short of calling for harmonization, setting

[21] OECD, supra note 8.

[22] OECD, supra note 8, at 2.

[23] OECD, supra note 8, at 4.

[24] OECD, supra note 9, at 4.

[25] OECD, supra note 9, at 30.

[26] OFF. OF THE U.S. TRADE REP., Summary of Objectives for the NAFTA Renegotiation (2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf.

[27] United States-Mexico-Canada Agreement art. 21.2(2)(c)(ii) (Nov. 30, 2018).

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