

Protection of Legal Professional Privilege in the European Union, Turkey and Ukraine

by

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CONTENTS

- I. Introduction
- II. Legal privilege under EU competition law
 - 1. Powers of the European Commission and their limitations
 - 2. Factors determining the scope of legal privilege
 - 2.1. Independent v. in-house lawyer
 - 2.2. Nationality of the lawyer
 - 2.3. Nature of documents and purpose of the communications
 - 2.4. Authority conducting the investigation
 - 2.5. Ability to supply enough evidence that legal privilege applies
- III. Protection of confidential information in Turkey
- IV. Scope of legal privilege under Ukrainian law
- V. Concluding remarks

I. Introduction

When investigating suspected violations of competition law, competition authorities have wide powers to inspect an investigated company's business premises, as well as home residences, private property and vehicles belonging to the management and employees of the company. Moreover, competition authorities can make copies of documents that may help them to complete

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their investigation. Any written correspondence including letters, faxes, e-mails, notes of meetings, notes of calls, diary entries, hand-written comments about proposed deals, business activities etc. produced by any member of the company could be seized by competition authorities during dawn raids, especially given that much company information is now stored electronically.

The only documents that fall outside the scrutiny of competition authorities are those protected by legal professional privilege (hereafter: legal privilege). Normally, confidential (not disclosed to third parties) communications with lawyers made in relation to and in the interest of a client's right of defence, are protected by legal privilege. The scope of legal privilege varies from one jurisdiction to another. For instance, in common law countries legal privilege also covers communications between in-house lawyers and their clients, provided such communications relate to the clients' legal position. Civil law jurisdictions tend to limit legal privilege to communications with independent external counsel only and, in most cases, it is justified by the general confidentiality duty binding the legal profession (either by statute or professional rules) which prevents lawyers from disclosing client information.

This paper addresses the peculiarities of legal privilege-related rules in a number of jurisdictions and analyses the main similarities and differences between them. It focuses, in particular, on the legal privilege regime in the EU, Turkey and Ukraine. It is suggested in conclusion that some form of convergence in legal privilege rules worldwide would be beneficial for both competition authorities and for the undertakings concerned.

II. Legal privilege under EU competition law

1. Powers of the European Commission and their limitations

The European Commission (hereafter, EC or Commission) has wide investigatory powers in competition law cases. According to Article 20 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty (hereafter, Regulation 1/2003), the EC is empowered to conduct inspections at the business premises of the company, take copies of or extracts from books/business records, ask for oral explanations on the spot, and undertake other investigations with the view to obtaining information necessary to bring to light infringements

of Article 101 and 102 of the Treaty on Functioning of the European Union.

The Commission's powers in dawn raids are subject to constant revisions in order for them to keep up with technological progress. For instance, the EC revised in March 2013 its Explanatory Note on the conduct of dawn raid inspections at business premises of companies suspected of anti-competitive behaviour¹.

The revised Note highlights that a company's obligation to cooperate with EC officials carrying out a dawn raid inspection extends to providing access to all electronically stored data. It is now also specifically provided that a company may be required to provide members of staff in order to assist the inspectors with IT-related tasks such as: temporary blocking of individual email accounts, or removing and re-installing hard drives from computers. In addition, the Note warns companies that when such actions are taken, the inspected company must not interfere in any way with these measures and must inform their affected employees accordingly.

In such circumstances, all documents can potentially be discovered and seized by competition authorities in the EU, especially given the fact that most company information is now stored electronically. Thanks to forensic IT techniques, documents can be obtained from servers even if they were modified or deleted. Forensics makes it possible to make a full copy of a company's server – including all documents, all emails and all other correspondence, whether saved or deleted – in a matter of moments and from anywhere around the globe.

At the same time, the investigatory powers of the Commission are subject to various limitations and conditions. For instance, pursuant to Articles 20(3) and 20(4) Regulation 1/2003, the EC has to communicate to the representatives of the undertaking concerned the subject matter and purpose of the inspection prior to actually entering its business premises. The investigatory powers of the Commission are also limited by the need to protect confidentiality. Legal privilege prevents the EC from examining certain written communications between the company and its lawyer(s). However, legal privilege does not prevent an undertaking (client) from disclosing written communications between itself and its lawyer(s) provided the undertaking (client) considers such approach to be in its best interest².

¹ Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003 (2013), available at: http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf > (accessed 20 June 2014).

² Case 155/79 AM & S Europe Limited [1982] ECR 1575, para.28.

2. Factors determining the scope of legal privilege

The right of confidentiality of communication between lawyer and client is recognized as a fundamental, constitutional or human right, ‘accessory or complementary to other such rights which are expressly recognised’³. The principle of legal protection of written communications between a lawyer and his client is recognized as such in various countries of the EU, even though it is not covered by a single, harmonized legal concept⁴. Hence, the approaches in various EU Member States differ. In some EU Member States, legal privilege is based primarily on the recognition of the very nature of the legal profession; in others, it is justified by the right of defence. There are no uniform principles on legal privilege governing the enforcement of competition law – a fact that ‘adds to the enforcement discrepancies throughout the EU’⁵. Several EU Member States ‘have chosen to maintain a protection of the legal privilege that is different and at times wider in scope than at the EU level’⁶.

The following factors determine the nature and scope of legal privilege in various jurisdictions: (i) whether the lawyer is external, independent or an in-house counsel; (ii) nationality of the lawyer and whether he is a member of a national bar association; (iii) nature of the document and purpose of the communications; (iv) which authority conducts the investigation; and (v) ability to provide the investigating authority with enough evidence proving that legal privilege applies to the documents concerned.

2.1. Independent v. in-house lawyer

According to the 1979 judgement of the European Court of Justice (hereafter, ECJ) in the *AM&S*⁷ case, confidentiality of written communications between lawyers and clients should be protected under two cumulative conditions:

- (i) the information exchange with the lawyers must be connected to the right of defence of the client concerned, and

³ The view taken by the Consultative Committee of the Bars and Law Societies of the European Community in Case 155/79 *AM & S Europe Limited* [1982].

⁴ The view taken by United Kingdom in Case 155/79 *AM & S Europe Limited* [1982].

⁵ M. Frese, ‘The Development of General Principles for EU Competition Law Enforcement – The Protection of Legal Professional Privilege’ (2001) 3 *Amsterdam Center for Law & Economics, Working Paper* 20.

⁶ C. Swaak, ‘Legal Privilege: An overview of EU and national case law’ (2013) No. 65144 *e-Competitions* (available at: www.concurrences.com, accessed 20 June 2014).

⁷ Case 155/79 *AM & S Europe Limited* [1982] ECR 1575.

- (ii) such information exchange must emanate from an independent lawyer which is not bound to the client by any employment relationship.

In the more recent *Akzo Nobel*⁸ judgement of 2007, the ECJ followed and re-confirmed the requirements for legal privilege established in *AM&S*. As a result, it concluded that legal privilege does not cover communications between a client and his in-house lawyer because of the lawyer's employment relationship with the client which affects its ability to exercise his professional independence by taking into account the commercial strategies of his employer. Hence, in-house lawyers are less able to deal effectively with any conflicts that might arise between their professional obligations and the goals pursued by their client.

Contrary to the Court's statement that the above two conditions are common⁹ in the national legal systems of EU Member States, there are a number of jurisdictions which deviate from these criteria. While France, Finland, Lithuania and the Czech Republic follow the EU approach in terms of limiting legal privilege to external lawyers only; Romania, Bulgaria, Greece and Denmark do not distinguish between in-house and external lawyers. By contrast, legal privilege applies to both external and in-house lawyers in the UK. In Germany, legal privilege may be applicable to in-house lawyers when it is sufficiently proven that a special relationship exists between the lawyer and the client in a given case that ensures that the lawyer enjoys a certain degree of independence¹⁰. Moreover, since 2013, communications between companies and in-house lawyers are also protected by legal privilege under Dutch and Belgian laws.

The Dutch Supreme Court held in 2013 that 'in view of the Dutch practice and the guarantees that exist with regard to the practice of lawyers registered at the Dutch bar with an employment relationship, there is no ground to deprive such lawyer of the legal privilege due to the mere fact that he is in an employment relationship with the client'¹¹. Similarly, the Brussels Court of Appeal delivered in 2013 a landmark judgement (case 2011/MR/3 *Belgacom*) recognising that legal privilege extends to communications with in-house lawyers, including internal emails containing advice given by such lawyers. In its assessment, the court took into consideration the provisions of the Belgian Criminal Code which state that 'any person whose status or function makes them the recipient of secrets is bound by professional secrecy, except when they have to testify before the courts or when they are bound by law to

⁸ Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR I-830.

⁹ Case 155/79 *AM & S Europe Limited* [1982] ECR 1575, para. 21.

¹⁰ See Regional Court of Bonn, Decision 10.09.2010, 27 Qs 21/10.

¹¹ C. Swaak, 'Legal Privilege...', p. 3.

disclose these secrets¹². In addition, the Belgian Court made also reference to the right of privacy envisaged in Article 8 of the European Convention on Human Rights, which gives a higher level of protection to ‘correspondence of individuals entrusted with a mission of general interest, where the success of that mission depends on confidentiality of their correspondence’¹³.

Considering these recent developments, it may be concluded that there is a trend towards extending the scope of legal privilege in EU Member States to also cover in-house lawyers¹⁴. Hence, the position expressed by the ECJ in *Akzo Nobel*, ‘the legal situation in the Member States of the EU has not evolved to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege’¹⁵, will potentially be reconsidered in the future. In the end, both in-house and external lawyers are expected to provide independent and objective legal advice; just as clients of both in-house and external lawyers have a right to obtain confidential, professional legal advice. Moreover, clients should be protected against any obligations to disclose such ‘confidences, as long as the lawyer is acting as a lawyer and not merely as a business adviser’¹⁶.

For the time being, communications with in-house counsel may however be seized and used as evidence for companies subject to scrutiny by the EC according to the jurisprudence of the Court of Justice.

2.2. Nationality of the lawyer

Legal privilege in the EU applies to any lawyer that is entitled to practice law in one of the EU Member States, regardless of where the client resides. Looking at the Member States however, their approach to this issue varies from one EU country to another. In the UK for example, legal protection

¹² V. Lefever, J. Van Acker, ‘The Brussels Court of Appeal recognises legal professional privilege to in-house lawyers (Belgacom)’ (2013) No. 51820 *e-Competitions* (available at: www.concurrences.com, accessed 20 June 2014), p.1.

¹³ *Ibidem*, p. 2.

¹⁴ Countries outside of the EU, but with close ties with the EU, also extend the scope of legal privilege. For instance, Switzerland adopted a new law in May 2013 which extends the scope of legal privilege protection to documents located outside lawyers’ premises and drafted before the initiation of proceedings (which were not privileged prior to this law). P. Kellezi, ‘A Swiss law enters into force extending the scope of protection of the legal professional privilege’ (2012) No. 61096 *e-Competitions* (available at: www.concurrences.com, accessed 20 June 2014).

¹⁵ Case C-550/07 P – *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR I-8301, para. 76.

¹⁶ *Competition law and legal privilege*, Commission on Competition, International Chamber of Commerce [2006] No. 225/630, p. 2.

covers communication with any lawyer, not just those that practice law in the EU.

The ECJ implied in the AM&S judgment that the EU does not recognize legal privilege for attorneys from outside EU Member States by stating that legal privilege is only ensured for a lawyer ‘entitled to practice his profession in one of the Member States’ but that ‘such protection may not be extended beyond these limits’. This means that documents may not be legally privileged if they are created, for instance, by an American in-house lawyer, then sent to a client in the EU, after which they are seized by the Commission in an EU antitrust investigation. Generally speaking therefore, non-EU in-house or external lawyers would not be afforded legal privilege in the course of EU proceedings.

In international disputes, where alleged privileged communications took place in a foreign country or involved foreign lawyers or proceedings, courts defer to the law of the country that has the ‘predominant’ or the ‘most direct and compelling interest’¹⁷ in the case. The laws of the country in which the privileged communication took place will normally be applied by the courts.

2.3. Nature of documents and the purpose of communications

As mentioned above, one of the conditions for a communication to be protected by legal privilege in the EU is that such information exchange with the lawyers (document that contains it) must be connected to the right of defence of the client concerned. Again, however, legal privilege covers a wider range of legal advice in a number of EU Member States, such as the UK for example.

Legal privilege at the EU level applies to all written communications exchanged after the initiation of administrative procedures in an antitrust investigation. Still, it is possible to extend legal privilege to earlier written communications as well, provided they have a relationship with the subject matter of such procedures¹⁸.

Legal privilege applies also to preparatory documents drafted exclusively for the purpose of seeking legal advice from external lawyers in the exercise of a client’s right to defence¹⁹. If such a preparatory document was drafted

¹⁷ *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 522 (S.D.N.Y. 1992)// Cross-border Attorney, available at: http://www.acc.com/chapters/stlouis/upload/Session3_CrossBorderAttorneyClientPrivilegeIssues.pdf, accessed 20 June 2014.

¹⁸ Case 155/79 *AM & S Europe Limited* [1982] ECR 1575, para. 23.

¹⁹ Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR I-8301, para. 128.

for this purpose, this fact should be unambiguously clear from the content of the document itself, or from the context in which the document was prepared.

In addition, legal privilege may also apply to internal company documents (i.e. memoranda) reporting legal advice received from external counsel. The General Court clarified in *Hilti v European Commission*²⁰ that ‘the principle of the protection of written communications between lawyer and client may not be frustrated on the sole ground that the content of those communications and of that legal advice was reported in documents internal to the undertaking’. Hence, any internal documents that report legal advice given by external counsel may benefit from the protection granted to legally privileged documents²¹.

2.4. Authority conducting the investigation

The privileged nature of a communication depends, to a large extent, on which competition authority conducts the investigation and its specific jurisdiction.

Many antitrust investigations in the EU are conducted by a national competition authority (hereafter, NRA) of a given member state. In such cases, the rights and obligations of the companies whose premises are being searched, and the powers of the NCA regarding the seizure of documents, are defined in the applicable national laws of the Member States concerned.

In investigations conducted by the Commission, specific national laws are applicable only to the extent that a given NCA provides its assistance in accordance with Article 20(6) Regulation 1/2003 (e.g. concerning the use of coercive measures when there is opposition from the undertaking concerned in conducting the inspections). However, the question of the scope and nature of the documents which the Commission may examine in such situations is determined in accordance with EU law.

In practice, ‘as various authorities apply Article 101 and 102 TFEU in close cooperation and may carry out inspections on behalf of their colleagues, circumvention of national safeguards is inherent in the system’²². NCAs have the power to exchange and use information collected for the purpose of competition law enforcement in the framework of the European Competition Network. Hence, a given NCA can obtain a contested document from an

²⁰ Case T-30/89 *Hilti v. Commission* [1990] ECR II, p. 163.

²¹ J. Bellis, ‘Legal professional privilege: An overview of EU and national case law’ (2011) No. 39467 *e-Competitions* (available at: <http://awa2012.concurrences.com/academic/article/legal-professional-privilege-an#nh14>, accessed on 28 October 2014).

²² M. Frese, ‘The Development...’, p. 21.

authority in another member state that has a more relaxed legal privilege protection regime.

2.5. Ability to supply enough evidence to prove that legal privilege applies

A company might refuse to produce a written lawyer-client communication to the Commission claiming that the document is legally privileged. Doing so, it must however provide the EC with relevant materials proving that the communication in question indeed fulfils the conditions of being protected by legal privilege. Disclosing the contents of the communication is not mandatory in such cases, although the Commission should be allowed a cursory look at the headings of the contested document(s).

When the EC is not satisfied with the evidences provided, it can order the investigated company to deliver the communication in question despite its objections. If necessary, the Commission may impose fines or periodic penalty payments on a company if the latter refuses either to supply whatever additional evidence the Commission considers necessary to resolve the issue, or to produce the communication itself (which is not protected by legal privilege according to the EC)²³.

Hence, it is the duty of the company claiming protection under legal privilege rules to provide enough evidence to persuade the Commission that the requested lawyer-client communication is in fact covered by legal privilege. The undertaking concerned, as well as its lawyers, can try to strengthen their position and protect themselves by clearly marking all documents sent between them as 'Privileged & Confidential'.

In the case of disputes over the applicability of legal privilege to a given document, the latter should be placed in an envelope and can be removed by the EC's inspectorate from the premises of the company. The inspected company's representative may ask the Hearing Officer to examine the document and communicate his preliminary opinion on its nature²⁴. In case of an objection and failure to reach an agreement on the issue, the Hearing Officer should deliver a reasoned recommendation to the Commission for its further examination. It will normally not look at the disputed document before

²³ Case 155/79 *AM & S Europe Limited*, para. 31.

²⁴ In the author's opinion, a better solution to this was suggested by United Kingdom in this case, i.e. if the Commission's inspector is not satisfied by the evidence supplied by the undertaking, an independent expert should be consulted, and then the European Court of Justice (Case 155/79 *AM & S Europe Limited*, para. 7). The Consultative Committee of the Bars and Law Societies also suggested that if the undertaking and the Commission cannot not agree as to whether a document is confidential or not, the most appropriate procedure would be to have recourse to an expert's report, or to arbitration (Case 155/79 *AM & S Europe Limited*, para. 8).

the deadline for appealing the decision to the Court of Justice has lapsed, or before the proceedings before the Court of Justice are closed²⁵.

III. Protection of confidential information in Turkey

There are no specific provisions regarding legal privilege under Turkish law. However, some guidance on the protection of clients' confidential information is given by the Lawyers Act (Article 36) and the Turkish Code of Criminal Procedure (Article 130)²⁶.

Accordingly, a lawyer is prohibited from disclosing information received from a client while performing his duties as a representative of this client and/or a member of the Turkish Bar Association. Lawyers breaching this obligation may be subject to criminal liability and related sanctions under Article 239 of the Turkish Criminal Code. They might also be subjected to disciplinary sanctions under the Lawyers Acts.

Just as in the EU, legal privilege only covers information exchanges between clients and independent, external lawyers.

On the other hand, legal privilege applies in Turkey to all information exchanges between a client and his lawyer regarding the client's right of defence, without any time limitations. Rules on legal privilege may be applicable to lawyers not qualified in Turkey itself, provided they carry out their business activities in Turkey pursuant to its Lawyers Act, since they are subject to the professional rules contained therein.

A lawyer is entitled not to permit the confiscation of a document that relates to his client by claiming that the document is covered by legal privilege. In such a situation, the document should be sealed in an envelope – it will then be for the Court to decide if the contested document is indeed protected by legal privilege. Importantly, legal privilege should be claimed directly by the lawyer.

Developments in relation to legal privilege at the EU level may well have an impact on the situation within Turkey, especially considering its customs union with the EU²⁷, the on-going harmonisation process between Turkey and the EU, and the position of Turkey as a EU candidate country. The case law of the Court of Justice of the EU has a significant impact of the application of legal privilege in Turkey already.

²⁵ J. Jimenez-Laiglesia, *Legal Privilege Handbook*, DLA Piper (2013), p. 5.

²⁶ *Ibidem*, p. 89-90.

²⁷ Article 32 and 33 of Decision 1/95 of the Association Council of 22.12.1995, OJ [1996] L 35.

IV. Scope of legal privilege under Ukrainian law

Similarly to the situation in Turkey, the legal basis for legal privilege in Ukraine derives from the confidential character of lawyer-client relations secured by the Law of Ukraine ‘On the Bar and Advocates’ Activity’ (Law on the Bar) and the Rules of Advocates’ Ethics²⁸.

Confidentiality is dealt with by Article 10 of the Rules of Advocates’ Ethics²⁹ whereby the ‘observance of the principle of confidentiality is a necessary and the most important precondition for the trust relationship between the advocate and the client, without which proper legal assistance, defence and representation are not possible’. Hence, advocates in Ukraine have the right to keep any information confidential that they receive from their clients, as well as about their clients or third parties in the process of pursuing their professional activities. Advocates are, at the same time, obliged to keep such information confidential with respect to third parties who might demand their disclosure.

Disclosure of information covered by advocates’ confidentiality is prohibited in all circumstances. This includes an authority’s unlawful attempts to gain access to such information and the questioning of an advocate in court about circumstances covered by **advocate’s confidentiality**. It is prohibited to demand that the advocate (or his assistant, trainee, employee) provides information covered by the advocate’s secrecy (Article 23 of the Law on the Bar), as well as to search, inspect and seize documents related to his activity. In the case of an inspection of the advocate’s house or other premises where he carries out his professional activity, the court has to indicate a list of items (documents) that are expected to be found there. The relevant regional council of advocates must be notified in advance about such inspection.

Ukraine’s principle of confidentiality is not limited in time. However, information and documents may lose the status of the advocates’ confidentiality upon the written request of the client in circumstances specified by the Law on the Bar.

²⁸ In the Ukraine, a lawyer who also passed an additional qualifying examination is known as an advocate. Passing such examination and becoming an advocate is optional and not required for legal practice. Advocates are members of the Union of Advocates of Ukraine. Other law graduates who practice law without any further qualifications are regarded as Legal Advisers. Legal Advisers can provide the same legal services as Advocates, and have the same rights to appear in court, but they are not subject to the same ethical rules of conduct and disciplinary procedures as Advocates.

²⁹ Rules of Advocate’s Ethings, Ukraine [2012], available at: http://www.unba.org.ua/about/For_foreign_advocates/2%20Rules%20of%20Advocates%20Ethics.pdf, accessed 20 June 2014.

Legal privilege protects legal advice emanating from Ukrainian-qualified lawyers as well as from foreign lawyers who practices law in Ukraine in accordance with its national laws. Ukrainian advocates recognize the professional status of foreign advocates who practice law in Ukraine pursuant to the Law on the Bar – they are treated with respect and admired (Article 51 of Rules on Ethics). Foreign lawyers must comply with the Rules of Advocates' Ethics if they practice law in the Ukraine.

There is no distinction between in-house or external lawyers in Ukraine since confidentiality is the professional obligation of any legal adviser/advocate. It covers any information that became known to the lawyer, his trainee, a person that he employs etc. The information covered regards the client and the issues covered by the legal advice sought, the content of such legal advice, the lawyer's comments and clarifications, documents prepared in that matter, information stored in an electronic format, and other documents and information received by the lawyer in the course of his professional activity (Article 22 of the Law on the Bar).

Following the entry into force of the EU Association Agreement, Ukrainian competition law will be subject to further harmonization. This process will impact the scope of legal privilege in Ukraine.

V. Concluding remarks

With the growing role of mass-media and technological progress, competition authorities around the globe are increasingly able to extract information from companies, and to initiate antitrust investigations based on such information.

To maximize the chance that important client-lawyer correspondence/documents are covered by legal privilege, clients should always mark their requests for legal advice as 'Privileged and confidential: Attorney – Client Communication'. They should also be kept in a safe place in order to prove that they are indeed confidential. It would also be useful to familiarize yourself with the rules on legal privilege in the applicable jurisdiction.

In the absence of harmonised EU rules governing legal privilege, it is for the national legal systems of each member state to decide on the specific aspects of the right to defence protection, including legal privilege.

Uniform interpretation and application of legal privilege in the EU would improve the efficiency of antitrust procedures and benefit equal treatment of the companies concerned. Legal privilege rules at the EU level are influenced and 'shaped' by the national laws and enforcement practice of EU Member States. It is possible that legal privilege at the EU level will, in the future,

also cover information exchanges with in-house lawyers, considering recent developments in the Netherlands and Belgium that support the trend of extending the scope of legal privilege protection to in-house lawyers also.

Currently, the scope of legal privilege protection in the EU can be circumvented thanks to information exchanges within the European Competition Network – information legally privileged in one EU member state may be extracted by the NCA of a member state with a less protective legal privilege regime.

If Turkey and Ukraine – jurisdictions with different levels of EU law integration – become members of the EU, their competition authorities will join the European Competition Network. Hence, there will be more exchanges of information collected for the purposes of antitrust enforcement between the EC and the competition authorities of Turkey and Ukraine. This will have an impact on the treatment of legal privilege in these jurisdictions.

To avoid confusion and commercial risks, as well as to ensure more legal certainty, some form of convergence in legal privilege rules worldwide would be beneficial both for competition authorities and for the undertakings concerned.

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