



# 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's 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 to enable him to give sound and informed advice.”<sup>2</sup> 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,<sup>3</sup> 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's 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.<sup>4</sup> It also recognizes a privilege for communications between a “detained” person and his or her attorney.<sup>5</sup> However, the privilege only restricts the ability of the government to listen in, not the government's ability to use privileged communications when they fall into its hands. Mexico's Federal Economic Competition Commission (COFECE) has increasingly been using dawn raids in cartel cases.<sup>6</sup> During raids, COFECE officials typically download files from the target's information 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.<sup>7</sup>

### *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 that “[l]egal privilege is almost universally recognized as a fundamental right grounded in public policy.”<sup>8</sup> An OECD member survey revealed near-universal recognition of legal privilege for communications between clients and their external lawyers (from the same jurisdiction).<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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 report noted a “fragmented legal landscape, difficult to navigate for companies.”<sup>12</sup>

This divergence has implications for how and whether information is privileged in one jurisdiction but not others. Different approaches to legal privilege mean that different privilege claims are made to different agencies, and therefore agencies have access to different information in the same, parallel, cross-border cases. For lawyers, different approaches in different jurisdictions can complicate how legal advice is given to or within a company and how to assess which information can be protected.

### *B. Arrival and Development at the International Competition Network*

One of the first notable appearances of legal privilege issues in the international competition policy dialogue was their inclusion in the ICN’s first set of Recommended Practices (“ICN RPs”), which address merger notification and review procedures.<sup>13</sup> The ICN RPs resulted from a project led by the U.S. FTC in the ICN’s Merger Working Group.

Adopted in 2004, the recommendation provides that “Merger investigations should be conducted with due regard for applicable legal privileges and related confidentiality doctrines.”<sup>14</sup> It goes on to set forth a standard of “in-accordance-with-applicable-laws” for respecting privilege: “parties should not be required to disclose materials and information that are subject to applicable legal privileges and related confidentiality doctrines (such as the attorney work-product doctrine) *in the requesting jurisdiction.*”<sup>15</sup> The ICN RPs went a

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 to “give due consideration to similar legal privileges and doctrines applicable in those jurisdictions unless such consideration is precluded by applicable laws in the requesting jurisdiction or by the competition agency’s responsibilities under those laws.”<sup>16</sup> The recommendation stops short of calling for harmonization, setting domestic rules (and their differences) as the default, but it introduced the possibility of thinking more openly about privileges – an extraordinary suggestion in 2004 in the face of widespread divergence of practices. Thus, for the first time, the concept and importance of respecting legal privileges was recognized in a consensus recommendation by the ICN’s member agencies.

Nearly a decade later, the ICN once again addressed legal privilege. It was included as a topic in the ICN’s Agency Effectiveness Working Group project on competition agency investigative processes, led by the U.S. FTC and the EC’s DG-Competition. In 2014-15, an ICN member agency survey on confidentiality practices included several questions on approach to legal privilege, confirming that nearly 80% of the responding agencies recognize the privilege, while there was a split on applying the privilege to communications from in-house lawyers.<sup>17</sup> The project produced Recommended Practices in 2019 that affirmed the importance of recognizing legal privileges. Echoing the ICN’s merger RPs of fifteen years earlier, the consensus recommendation provides that “[c]ompetition agencies should respect applicable legal privileges that are recognized in their jurisdiction during the course of their investigations . . .” and further affirms that agencies “should not require parties and third parties to disclose information that is subject to applicable legal privileges in the agency’s jurisdiction.”<sup>18</sup>

The FTC also led a follow-on ICN project that culminated in ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement. The Principles recognized attorney-client privilege as a core element of fundamental procedural fairness.<sup>19</sup> The 2019 ICN Framework for Competition Agency Procedures also borrows the earlier ICN standard that agencies should “recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice.”<sup>20</sup>

### *C. OECD Attention to Attorney Client Privilege*

A decade and a half of international discussion has confirmed 1) near-universal recognition of the importance of legal privilege as an aspect of fundamental fairness; and 2) a stalemate as to the scope of its coverage. The developments in Mexico, as well as at the OECD, may point to examples of new convergence.

In November 2018, the OECD Competition Committee held a roundtable on the treatment of legally privileged information in competition proceedings as part of a project on procedural fairness. The Executive Summary for the Roundtable first noted that legal privilege is “almost universally recognized as a fundamental right grounded in public policy.”<sup>21</sup> It also recognized the reality that “the personal and subject-matter scope of legal privilege varies among jurisdictions.”<sup>22</sup> Its final key point recommended the treatment of privileged information as a topic on which to pursue international convergence, noting that “[d]ifferent approaches to legal privileges among jurisdictions can make it difficult to assess which information companies are obliged to hand over or, conversely, can seek to protect from disclosure.”<sup>23</sup>

In the strongest terms yet from within the international competition enforcement community, the OECD Secretariat’s paper made the case that:

Given that the actions of a competition authority may affect firms outside its borders, some level of convergence of jurisdictions' approach to privilege may be desirable, both to ensure fairness to the investigated firms and maintain their ability to seek legal advice effectively, as well as to avoid frictions among enforcement systems.<sup>24</sup>

In exploring the prospects for convergence, the OECD background paper concludes that the “conceivably more mature area for considering convergence is that of the extension of legal privilege to communications between clients and their in-house lawyers. . . .”<sup>25</sup>

### ***III. The Mexican Initiative***

The impetus for the expansion of the attorney-client privilege in Mexico had its most immediate roots in the negotiation of a new U.S.-Mexico-Canada Agreement to replace the existing North American Free Trade Agreement, which was announced in 2017. One of the stated negotiating objectives of the United States was to “[e]stablish or affirm basic rules for procedural fairness on competition law enforcement.”<sup>26</sup> As part of the United States negotiating team, FTC attorneys advocated for provisions that would ensure recognition of attorney client privilege in competition proceedings. The resulting competition chapter now provides:

Each Party shall ensure that its national competition authorities . . . afford to a person a reasonable opportunity to be represented by legal counsel, including by . . . recognizing a privilege, as acknowledged by its law, if not waived, for lawful confidential communications between the counsel and the person if the communications concern the soliciting or rendering of legal advice.<sup>27</sup>

COFECE undertook an extensive process of consultation in order to bring the attorney client privilege to life. That included an all-day conference, held in Mexico City in May 2018, which itself exemplified multinational convergence in action. In particular, one of the conference's panels featured representatives from the U.S. FTC, the Canadian Department of Justice, the United Kingdom Competition and Markets Authority, the European Commission Directorate General for Competition, and Chile's Fiscalía Nacional Económica, all of whom addressed key issues concerning attorney client privilege. The issues included the scope of the privilege in various jurisdictions, identifying who holds the privilege, exceptions to and loss of the privilege, and differences between the privilege and the attorney work product doctrine. The FTC participant described, among other things, the elements of the privilege in the United States and the ethical obligations on lawyers in the United States to respect the privilege. The session also addressed practical issues such as the treatment of physical and electronic information in dawn raids, procedures for protecting the privilege, and procedures for determining whether a privilege claim is valid. Thereafter, COFECE developed a draft policy, received comments from the FTC as well as international and domestic stakeholders, and published a final regulation on September 30, 2019.<sup>28</sup>

The regulation defines privileged information as “the defense of privacy, defense, and confidentiality of communications between a lawyer and her client/company.” The regulations allow firms to identify privileged information, and require COFECE's Investigative Authority to establish measures for safeguarding, protecting, and qualifying such information. The company must make a request that the information be deemed qualified for the privilege within 20 days of COFECE obtaining the information. Failing a timely request, the privilege will be deemed waived. The privilege belongs to the client, not the attorney, and therefore the request

to recognize privilege must be made by the client. Presumably the attorney may make a request on behalf of the client, but the attorney may not do so to vindicate any of the attorney's own rights.

The regulations require the establishment of two committees to review requests for recognition of privilege. Members must be senior officials with law degrees, but may not be subordinate to the Investigative Authority, the official responsible for cartel investigations. One of the committees will be designated to review the evidence and determine whether the documents are entitled to such protection. If so, the committee may order exclusion of the information from the file, return physical evidence to the firm, and delete electronic evidence from the file. Otherwise, the evidence may be added to the file. While the procedures are similar to "taint teams" used in similar circumstances in the United States, it is possible that reviewing Mexican courts will consider the degree of separation insufficient to guarantee due process.<sup>29</sup>

While the regulations are long on procedure, there will inevitably be unanswered questions. For example, it offers little guidance as to how the committee is to distinguish the rendering of legal advice from the rendering of business advice. These distinctions have proven vexing in countries with a more extensive history of applying attorney-client privilege.

Significantly, the regulations note that any information deemed covered by the privilege must be protected and will "lack evidentiary value."<sup>30</sup> The latter point would represent a significant divergence from existing Mexican law, which placed no restrictions on the use of privileged information that found its way into official hands.

#### ***IV. Conclusion***

The FTC, with the international competition community, has identified the recognition of legal privilege and the treatment of privileged information as a key aspect of procedural fairness during competition law proceedings. Multilateral work has also identified that there are differences among jurisdictions in the application of legal privilege, and noted that these differences have an impact. Prompted by study and experience sharing, agencies such as COFECE now have the ability and encouragement to benchmark their own rules and practices. It remains to be seen if recent changes and discussions of legal privilege like those in Mexico are part of a trend, or how they will be carried out in practice, but they certainly highlight the potential for new developments and convergence. The experience with Mexico while uniquely successful is not unique. The FTC has worked with other major jurisdictions, including Japan,<sup>31</sup> Korea, and China, to share the benefits of recognizing the privilege. The FTC will continue to be a strong advocate for the adoption of a robust privilege, which will benefit agencies, parties seeking to obey the law, and the quest for convergence toward strong principles of procedural fairness.

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Upjohn v. U.S., 449 U.S. 383 (1981).

<sup>2</sup> Upjohn v. U.S., 449 U.S. 383 (1981).

<sup>3</sup> See generally, EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE* (5th ed. 2007); ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS*, at 876-84 (8th ed. 2017); PAUL R. RICE ET AL., *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* (2016-2017 ed. 2016); Geoffrey C. Hazard Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978).

<sup>4</sup> Article 5 of the Mexican Constitution requires each State to enact a Professions Law applicable to the legal profession as well as other professions. Article 36 of the Law of Professions of the Federal District, which includes Mexico City, requires all professionals to keep confidential all secrets revealed to them by their clients. Article 90 of the Federal Code of Civil Procedure establishes an exception to the general obligation to testify when asked to reveal confidential client information. In 2006, the Federal Code of Criminal Procedure was amended to exempt attorneys from having to testify in cases in which they are involved when they have information they wish to keep secret. Código Nacional de Procedimientos Penales art. 243-BIS, Diario Oficial de la Federación [DOF] 05-03-2014, últimas reformas DOF 12-01-2016 (Mex.).

<sup>5</sup> Constitución Política de los Estados Unidos Mexicanos, CP, art 16, DOF 05-02-1917, últimas reformas DOF 10-02-204 (Mex.).

<sup>6</sup> Organization for Economic Co-operation and Development [OECD], *Investigative Power in Practice – Contribution from Mexico (COFECE)*, DAF/COMP/GF/WD(2018)28 (Nov. 28, 2018), <https://www.cofece.mx/wp-content/uploads/2018/12/investigative-powers-in-practice.pdf>.

<sup>7</sup> In interest of space, the authors acknowledge a big caveat: the recognition of and approach to legal privilege is not limited to competition enforcement. It often is embedded across a jurisdiction's legal regime and depends on wider legal culture and history. This has a huge effect on the prospects for convergence in competition law enforcement, especially if a change would put it at odds with a jurisdiction's broader legal rules. For this update, we focus on developments and perspectives on the application of legal privilege in competition law enforcement. The impact of privilege as a broader legal concept is addressed in some of the cited work, notably the OECD Competition Committee's recent Roundtable report and its accompanying country submissions. OECD, *Investigative powers in practice* (2018), <https://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm>.

<sup>8</sup> OECD, *Executive Summary of the roundtable on the treatment of legally privileged information in competition proceedings*, at 2, DAF/COMP/WP3/M(2018)2/ANN2/FINAL (Oct. 31, 2019), [https://one.oecd.org/document/DAF/COMP/WP3/M\(2018\)2/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2018)2/ANN2/FINAL/en/pdf).

<sup>9</sup> OECD, *Treatment of Legally Privileged Information in Competition Proceedings*, DAF/COMP/WP3(2018)5 (Jan. 31, 2019), [https://one.oecd.org/document/DAF/COMP/WP3\(2018\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2018)5/en/pdf).

<sup>10</sup> OECD, *supra* note 8, at 3-4.

<sup>11</sup> OECD, *supra* note 9, at 11.

<sup>12</sup> OECD, *supra* note 9, at 14 (debate of including in-house at 13, para. 20).

<sup>13</sup> INT'L COMPETITION NETWORK, *Recommended Practices for Merger Notification and Review Procedures*, <https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices/>.

<sup>14</sup> INT'L COMPETITION NETWORK, *supra* note 14, at 21, ¶ VI.F.

<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> INT'L COMPETITION NETWORK, *supra* note 14, at 21-22.

<sup>17</sup> INT'L COMPETITION NETWORK, *Competition Agency Confidentiality Practices* (2014), <https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-confidentiality-practices-report/>.

<sup>18</sup> INT'L COMPETITION NETWORK, *Recommended Practices for Investigative Process*, at 10, § 12-12.2 (2019), <https://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-for-investigative-process/>.

<sup>19</sup> INT'L COMPETITION NETWORK, *Guiding Principles for Procedural Fairness in Competition Agency Enforcement* (2018), <https://www.internationalcompetitionnetwork.org/portfolio/guiding-principles-for-procedural-fairness/>.

<sup>20</sup> INT'L COMPETITION NETWORK, *Framework for Competition Agency Procedures*, at 7, Annex, i.iii. (2019), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN\\_CAP.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf).

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- <sup>21</sup> OECD, *supra* note 8.
- <sup>22</sup> OECD, *supra* note 8, at 2.
- <sup>23</sup> OECD, *supra* note 8, at 4.
- <sup>24</sup> OECD, *supra* note 9, at 4.
- <sup>25</sup> OECD, *supra* note 9, at 30.
- <sup>26</sup> 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>.
- <sup>27</sup> United States-Mexico-Canada Agreement art. 21.2(2)(c)(ii) (Nov. 30, 2018).
- <sup>28</sup> SECRETARÍA DE GOBERNACIÓN, ACUERDO No. CFCE-215-2019, Diario Oficial de la Federación, (2019); COFECE, *COFECE sets rules for the handling of attorney-client communications*, COFECE-039-2019 (2019), <https://www.cofece.mx/wp-content/uploads/2019/10/COFECE-039-2019-English.pdf>.
- <sup>29</sup> Charley Connor, *Mexico recognizes legal privilege in antitrust probe*, GLOBAL COMPETITION REVIEW (Oct. 4, 2019), <https://globalcompetitionreview.com/article/1209247/mexico-recognises-legal-privilege-in-antitrust-probes>.
- <sup>30</sup> SECRETARÍA DE GOBERNACIÓN, *supra* note 29, § 1, art. 2.
- <sup>31</sup> With Japan in particular these efforts have, after a number of years, helped to encourage more serious consideration of adoption of a system of privilege. Indeed, in recent years the JFTC has agreed to study, and then to adopt, a limited protection for attorney-client communications as part of a broader set of legal changes to the JFTC's authority.