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Multijurisdictional Privilege Issues in Internal Investigations

Evidence in Competition Law Proceedings
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Three privilege issues in cartel enforcement

- What are the current issues?
 - Waiver of privileged internal investigation records as a condition for leniency
 - “Whose” privilege in internal investigations
 - “Which” privilege applies to internal investigations
- Why does it matter?
 - Disincentives to compliance and self-investigation?
 - Disincentives to seeking immunity and leniency?
 - Disclosure requirements may determine leniency forum choice

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Waiver of LPP – Internal investigation records

- What cooperation is required from leniency applicant?
 - Providing evidence and facts; making available witnesses
 - Until recently, no jurisdiction required leniency applicant to turn over privileged records of internal investigation
- UK criminal enforcement procedure
 - Duty to disclose “unused material” to defendant that might assist its case or undermine the OFT’s case (*BA/Virgin; Condor Review*)
 - OFT seeks interview records from leniency applicant for transmission to defendant (“assisting case of the accused”; Sect. 3 CPIA 1996)
 - Is it “witness account material” or privileged
- Practice caused significant concern
 - Inconsistent with practice of other global authorities; So far UK is on its own
 - DOJ, EU, ACCC & Bureau against disclosure of internal investigation results
 - Incompatible with “corporate statement” based enforcement systems
 - Disincentive to cooperate: Waiver of privilege leads is complete (subject-matter waiver in US) and evidence discoverable in US class actions

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Solution to UK waiver requirement?

- Considerable debate over the past three years
 - In international cases, there is friction with other authorities
 - Waiver risk operates as disincentive to cooperating with OFT
 - Two consultations to seek solutions
- What solutions?
 - Problem arose out of two party case; “he said, she said” and credibility
 - Solutions should be proportionate to real issues
 - What has been proposed?
 - Waiver when case is before court or pre-charge investigative state (waiver)
 - Disclosure of unused material to Independent Counsel (waiver in US law)
 - Limited waiver (but subject matter waiver under US LPP doctrine)
 - Very limited investigation by applicant (is that practical w. EU and DOJ?)
 - Applicant proffers on “no exculpatory evidence” in their possession
 - Obtaining court order (in camera review and protective orders; *Permian* on voluntary waiver)

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“Whose” privilege in internal investigations

- Internal investigations in competition case:
 - A company seeking to determine competition law violation through interviews with employees
 - Who is the client and what privilege applies?
- US practice – *Upjohn* warning
 - Bias in favor of corporation’s privilege; broad interpretation of the client to include the employees
- UK situation
 - Owen J in *R v. George* (citing *Three Rivers* No. 5) – narrow definition of the client (excludes the employees)
 - Fall back on litigation privilege? But is it adversarial at that stage? (*Tesco*)

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“Which” privilege in internal investigations

- Privilege means different things to different people
- US : Attorney-Client v. Attorney Work Product Privilege
 - Attorney-client privilege is an absolute privilege unless waived
 - Elements include advice sought and given; in confidence
 - Work product doctrine in anticipation of litigation
 - Judged on balance of interests when asserted
 - No other source for information without undue hardship
 - Waivers re some communications, waives all (subject matter)
- UK : Legal advice privilege v. litigation privilege
 - Legal advice privilege can be narrow (*Three Rivers*)
 - Litigation privilege only where adversarial (*Tesco*)
- Australia: Litigation privilege may kick in late
 - Litigation “contemplated” just before court proceeding (*ACCC v Prysmian*)
- Compare AM&S: “earlier written communications” (recital 23)

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What is the net outcome?

- **Legal privilege should be treated with care**
 - Break it and it cannot be put back together
- **Leniency relies predictable cost/benefit analyses and perceptions as to how procedures operate**
 - Upset the perception, and incentives to cooperate may dry up
- **Corporate internal investigations are the motor of any corporate leniency policy**
 - Facilitate them; There are other ways to protect the rights of defence – such as exhaustive investigations by enforcers

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Further information on this:

- Challenges to International Cartel Enforcement and Multi-Jurisdictional Leniency Applications (Vancouver DOJ/ABA/IBA, Jan 2012; OECD 11th Global Forum on Competition, Feb 2012)
 - <http://www.lw.com/presentations/challenges-to-international-cartel-enforcement>
- Procedural and Substantive Conflicts in Multi-Jurisdictional Cartel Investigations
 - <http://www.lw.com/presentations/multi-jurisdictional-cartel-investigations>
- Latham & Watkins Response to the OFT's Supplementary Consultation on Applications for Leniency and No-action in Cartel Cases
 - <http://www.lw.com/thoughtLeadership/applications-leniency-no-action-cartel-cases>

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