

PRIVILEGED INFORMATION IN DAWN RAIDS

CLAUDIA LUYO RODRÍGUEZ¹

“It is a pleasant world we live in, sir, a very pleasant world. There are bad people in it, Mr. Richard, but if there were no bad people, there would be no good lawyers.”

– Charles Dickens, *The Old Curiosity Shop*

Abstract

This essay explores the necessity of taking into account the information related to professional secrecy and incorporating this category of information into the regulation of dawn raids. We will propose some formulas to balance both purposes. These will be supported by an analysis of European experience in the field.

Keywords: Dawn raids, Professional Secrecy, Right of defense, Due process, Deterrence, Investigation

I. INTRODUCTION

The Manual for Inquisitors for Spain and Portugal dated 1821 states “The defendant is not allowed to have an attorney if he does not deny the crimes alleged against him, and this, after admonishing him three times to tell the truth”.

Nowadays, this rule may appear an act of injustice, but 200 years ago it was a normal way to proceed in courts. We changed from an inquisitorial system to a due process system which involves the recognition of the defendant’s rights such as the right of defense, the right to remain in silence and the right against self-incrimination, among others. The advantage of this system is that it limits the arbitrary use of public power. On the other hand, the disadvantage is that it reduces the intensity of the investigatory powers of the public administration.

For instance, one of the current measures to guarantee the correct exercise of the right of defense is the juridical institution called Professional Secrecy (hereafter, PS).

PS is an obligation of certain professionals who have access to information of their clients. For example, it is applied to journalists in relation to their sources of information,

¹ Lawyer graduated from the Pontifical Catholic University of Peru. She is currently a Specialist in the Defense of Free Competition Commission at INDECOPI and Assistant Professor of the Administrative Law and Telecommunications Law courses in the Catholic University of Peru Law School.

doctors to their patients and lawyers to their clients. Under PS provisions, professionals are prohibited from disclosing information to third parties.

The Peruvian Penal Code establishes up to two years of imprisonment for any professional who violates PS. Likewise, the Lawyer's Ethical Code establishes that PS is a duty and a right, empowering lawyers to refuse to provide information protected under PS to any third party.

In a scenario like this, problems appear when lawyers act as an enabler of the commission of crimes or illicit acts.

In the antitrust arena, agents may strategically use their lawyers to facilitate the implementation of cartels, on the understanding that the information held by them will not be subject to investigation under PS. Therefore although the antitrust authority has the capacity, established by law, to carry out on-site inspections, this may not be efficient in cases where the information is held by the lawyers.

Despite the regulation of PS by Peruvian Law, the Public Administration has not yet categorized it as a different kind of information nor determined in what circumstances it should be applied.

This essay explores the necessity of taking into account PS and incorporating it into the regulation of dawn raids as a form of investigation. For this matter, we will first determine the basis of protecting PS and the regulation that could be applied. Then we will explore the goals of administrative investigation. This will be supported by an analysis of European experience in this field and will also account for Peruvian cases where dawn raids could have involved treating this information.

Finally, we will propose a legal category for distinguishing this information, a procedure for granting or removing protection during the dawn raids, and concrete measures that could be applied in view of the existing legislation, as well as raise awareness of the need of its protection.

II. WHAT IS PROFESSIONAL SECRECY?

The Code of Conduct for Lawyers in the European Union defines PS as a right and a duty that makes possible the trust between the client and the lawyer². The Model Rules of

² Code of Conduct for Lawyers in European Union

"2.3. Professional Secret

It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of the information on a basis of confidence. Without the certainty of confidentiality

Professional Conduct of the American Bar Association establish that lawyers must keep confidential the information relating to the representation of a client, and distinguish some exceptional circumstances in which a lawyer may reveal such information³.

The Peruvian Political Constitution establishes the following:

“Article 2

Everyone has the right:

18. To maintain secrecy about their political, philosophical, religious beliefs or other stances, as well as to professional secrecy”.

PS in Peru is established as a right at the same level as the protection of religious and cultural beliefs that people keep to themselves. In the case of lawyers, this ensures independence of the criteria that may be used in the defense of cases and also helps to preserve the confidence that citizens have in their lawyers.

The Peruvian Lawyers’ Ethics Code (hereafter, the Ethics Code) provides that keeping PS constitutes a duty towards clients, even after the professional relationship ends, and a right of the lawyer that enables him or her to prevent disclosures to third parties.

there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

2.3.1 The lawyer’s obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

2.3.2 A lawyer shall respect the confidentiality of all information that becomes known to him in the course of his professional activity

2.3.3 The obligation of confidentiality is not limited in time.

2.3.4 A lawyer shall require his associates and staff and anyone engaged by him in the course of providing professional services to observe the same obligation of confidentiality”.

³ **Model Rules of Professional Conduct of the American Bar Association**

“Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules”;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

(6) to comply with other law or a court order”.

However, why is PS so important? What would happen if people can't trust their lawyers to ask them for advice? One possibility is that, even though we are forced to have a duty counsel, a lot of people would conduct their own defense in courts because they would fear that lawyers may reveal their secrets or use the information against them. Consequently, a lot of people would be deprived of professional legal assistance. As Canon 4 of the New York Bar Association Code points out, "a client must feel free to discuss anything with his or her lawyer and a lawyer must be equally free to obtain information beyond that volunteered by the client".

Because of that reason, lawyers have to keep confidential all the declarations, facts and information that their clients, or potential clients, give to them, including the information that lawyers have access to by any other means as a result of being in a professional relationship.

2.1. Opposition to reveal PS to authorities

According to the Ethics Code, lawyers have the right to oppose revealing information to third parties, including public authorities. However, lawyers must attend any citation mandated by Courts and express refusal to declare and/or answer questions that lead them to violate PS.

2.2. The scope of the secret

"We forget our guilt when we have confessed it to another, but usually the other person never forgets it", said Friedrich Nietzsche in his 568th aphorism of *Human, all too Human* in a section called "Man alone with himself". PS does not require that the *teller* specifies *what* must be treated as a secret. All the information that the lawyer obtains in the relationship with the client must be kept as a secret, even the information that can be inferred or guessed from the client's declarations or actions. In regard to what is contained in PS, the Constitutional Court of Peru held:

*"although it is difficult to be abstractly determined, in general, it can be established that a secret is any news, information, or even factual situation, deduction or projection that may be based on professional expertise and knowledge, and which has been obtained or known as a result of the exercise of a given profession, art, science, or art"*⁴.

People obligated to keep a professional secret are "not only professionals who have been directly entrusted but also collaborators, assistants and even professional service personnel who had direct access to such secrets"⁵.

⁴ Constitutional Court judgment held in the File 781 I-2005-PA/TC

⁵ Ibidem.

For this reason, the lawyer must take the necessary measures to guarantee the protection of confidential information and do whatever is appropriate to keep PS. In addition, it is not appropriate to provide any information to third parties when consulting with colleagues unless the client's identity can be protected and/or any file or communication that could involve the disclosure of information can be erased. The duty of the lawyer includes ensuring protection from unauthorized access.

III. "MAKE THE CRIME PAY. BECOME A LAWYER."

Surely with this phrase, Will Rogers, an American humorist, was making fun of the absolute incapacity that a lawyer has to really act as a judge. Indeed, the work of lawyers implies giving the best defense as possible to his client, drawing on the legal resources available. The profession came under widespread criticism regarding the defense of "well-known criminals". In these cases, sometimes lawyers are treated as criminals because of the "help" they provide to "public enemies".

At this point, it is convenient to remember that the judiciary system we have chosen is one of due process. This system establishes that every person must have legal assistance in court. This implies not only having a lawyer but also being capable of trusting this professional and being confident that he or she will make his or her best effort with the defense as possible.

This approach does not distinguish between an in-house counsel and the external lawyer. The in-house counsel is the one that permanently works in the undertaking, for example in the legal department. On the other hand, the external lawyer is only consulted about some concrete matters. In some jurisdictions, PS is not applied to information held by in-house counsel because it is understood that this person is part of the undertaking⁶. In the vision we propose, both kinds of lawyers have the right and the duty to keep PS.

IV. THE RIGHT OF DEFENSE

How many times we have heard in movies "You have the right to remain silent, anything you say can be used against you in the court of law."

The right of defense, as we mentioned in the preamble, plays a leading role in the due process system. The right of defense, in the context of the administrative procedure, is established as a guarantee for the rights that may be affected by the exercise of granting administrative powers. The Peruvian Constitutional Court mentions that this right "guarantees that a person subject to an investigation of judicial or administrative

⁶ This vision looks after avoiding the use of lawyers as intellectual planners of cartels.

order, where his or her rights and interests are being discussed, has the opportunity to contradict and argue in defense of those rights and interests⁷”.

Thus, the right of defense is violated when rights holders and people with legitimate interests are unable to exercise the sufficient legal means to defend themselves accordingly. This implies a positive situation where courts must consider what the defendant brings to attention, but also a negative situation where the authority has the duty to abstain from hearing certain information, according to legal prohibitions.

Therefore, the authority must deviate, abstain and refrain from accessing information that can unfairly influence the final decision. This information, of course, includes PS. In tracing the limits of the scope of the PS, it is very important to consider the relation between the aims of PS, the correct exercise of the right of defense, and the concept of self-incrimination.

As the lawyer is supposed to keep the secret, the client can be confident telling every circumstance, secret, fact, event or any other information without fear of its disclosure. In that sense, exposing PS, forcing to reveal PS or accepting information covered by PS in the evaluation of a case by the authority would condemn the client, on merit of his involuntary confession, to declare against himself in court.

Basing a decision on PS information, as well as knowing the existence of such information, would distort any judgment. The following example illustrates such a situation: imagine all Peruvian food could be accessible to you if you could only count up to three, without thinking of the color “red”.

Of course, nobody could win this bet. It is impossible. As soon as we think of the rules of the game, we lose. Once information has gained access to our minds, it cannot be easily deleted. It is not possible to put it aside, and therefore it interferes with our proceeding judgments.

Section G from Article 8.2 of the American Convention on Human Rights “Pact of San Jose” establishes that:

“Every person has the right to not be compelled to act as a witness against himself or to plead guilty (...) confessions of culpability by the accused shall be valid only if it is made without coercion of any kind.”

Coercion definitely includes the involuntary action of giving information and not only physically forcing the person to make a declaration.

⁷ Constitutional Court judgment held in File 5514-2005-PA/TC.

V. PROTECTION OF PS IN THE EUROPEAN UNION

In September 2010 the European Court of Justice made a polemic judgment in *Akzo Nobel Chemicals and Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* (hereafter, the *Akso Case*). The Court based its judgment on a decision that had been previously made in *Australia Mining & Smelting Europe Ltd v. Commission* where it was held that communications between a lawyer and his client must be protected at the EU level if those communications (i) were made for the purposes, and in the interest of, the client's right of defense, and (ii) provided by a lawyer who structurally, hierarchically and functionally is a third party in relation to the undertaking receiving that advice and, therefore, provides independent legal advice.

In that sense, the Court also considered that enrolment in a Bar or Law Society did not sufficiently guarantee the independence of the lawyer. In fact, the Court rejected *Akso's* argument that their in-house counsel was sufficiently independent because of his enrolment in the Netherlands National Bar Association, which requires members to perform their duties with independence. The Court stated the following:

"(...) an enrolled in-house lawyer, despite his membership of a Bar or Law Society and the professional ethical obligations associated with such membership, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm in relation to his clients. Consequently, an enrolled in-house lawyer is less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of his client than an external lawyer."⁸

The Court's view differs from ours in considering that the primary role of the lawyer is to contribute to the proper administration of justice rather than seek to safeguard the interests of his client. It is true that lawyers have an important role in the administration of justice, but it is undeniable that they cannot be judged and participate at the same time. Indeed, precisely if an in-house lawyer is involved with the undertaking, the information that he or she manages may contain secrets that other employees wouldn't have access to.

We think that this judgment narrows the protection of PS or legal professional privilege because what PS aims to protect is the correct defense of the defendant without any concern for any specific method of obtaining professional advice. This undermines, or at least affects, not only the choice of people who can be considered adequate as an in-house or external lawyer, but also the possibility to have a correct defense when the information someone gives in a trust relationship is disclosed. In these cases, the access to information must be decided by an impartial party, different from the investigator (usually examining body) and the owner of the information.

⁸ *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* (Case C-550/07 P).

VI. THE PURPOSE OF DAWN RAIDS

“You must pursue this investigation of Watergate even if it leads to the president. I’m innocent. You’ve got to believe I’m innocent. If you don’t, take my job”.

Surely we remember this phrase from Richard Nixon in the Watergate scandal and the *Smoking Guns*. Probably no one will keep evidence like Nixon. On the contrary, agents that get involved in committing antitrust conduct (most of the time a cartel) disappear, destroy or modify the information, so that no one can gain access to it. For that reason, the element of surprise is the main ingredient of a dawn raid. The capacity to access the undertaking’s premises and examine all files diminishes the risk of disappearance or concealment.

Therefore, an investigation is the cornerstone in deterring infringements because it increases the probability of detection. The fact that the authority can appear at any time makes it more expensive to supervise or implement a cartel and also creates the need to use sophisticated means of communication.

In conclusion, due to the possibility of destruction or concealment of incriminating information, the capacity to carry out dawn raids can be the most effective way to obtain information that otherwise (using other means like requesting the Administration) would be impossible.

VII. BALANCING PRIORITIES

When interpreting the Law, we propose the following way to proceed. First, accurately identify the practice that is to be interpreted: in our case, the PS scope in dawn raids. Second, we have to consider the rules and principles that are more open to interpretation than others, without denaturing the practice or superimposing ostensibly contradictory meanings on the normative mandates⁹.

In the present case, it is important to recognize the powers of the Administration to detect infringements that can cause damage to the market and, therefore, to society. However, this power also reaches a limit where the right of defense and due process are affected. The infringement of this right would be a serious offense to the established justice system which, moreover, is constitutionally protected.

Dawn raids can be carried out in a way that protects the information considered under the lawyer-client relationship, whenever this information constitutes a secret and it is kept as such by the professional. But what should the procedure be?

⁹ For more information: Alonso, Gabriela L. (1999) In: Ackerman Bruce. La política del diálogo liberal. Gedisa: Barcelona. p. 28.

As we mentioned before, the mandate to protect PS is aimed not only at the public authority in charge of making a decision but also at the investigators: all the members of the investigation team.

The Commission of Defense of Free Competition is an organ within INDECOPI¹⁰ (hereafter, The Commission of Free Competition), the Antitrust Authority in Peru. The Technical Secretariat is an instructive organ within the Commission. The Technical Secretariat is in charge of supervising markets, elaborating opinions on antitrust cases, and deciding when it is necessary to start a formal investigation case.

It should be mentioned that the Technical Secretariat also gives opinions on whether an undertaking must be sanctioned or not. In that sense, it has enormous power and influence via its recommendation for the final decision and it is an important agent in the procedure. In view of these circumstances, undertakings take very seriously the preliminary investigations because an infringement procedure implies the assumption of certain expenses: for example, contracts with lawyers, time spent monitoring the processes, time spent participating in it, professionals to design strategies, and, of course, the cost of preventing eventual damage to the image of the undertaking.

Therefore, keeping the undertaking from initial investigation proceedings means tremendous savings for them given that the expenses for their defense against the Authority are charged from the very first steps of the investigation in accordance to the PS. In this sense, although the Technical Secretariat does not have the power to issue a final decision¹¹, its performance must take into account PS rules.

In Peru, the inspection capacities are supported by the following regulations:

- Article 15 of the Competition Law¹².
- Article 2 of the Law of Attributions and Faculties, Rules and Organization of INDECOPI¹³.

¹⁰ INDECOPI is the Spanish acronym of National Institute of Defense of Competition and Protection of Intellectual Property.

¹¹ It is true that the evidence found by the Technical Secretariat is not always the same that the decision authority that files the final decision. Usually the information that goes in the file is the one that the Technical Secretariat considers important, but then again, this party has a discretionary power that has some limitation.

¹² **Legislative Decree N° 1034, Repression of Anticompetitive Behavior Law**
Article 15.- The Technical Secretariat

15.3. For the development of its investigations, the Technical Secretariat is empowered to:

(a) Demand the natural or legal persons, the non-regulated societies or the trusts, to exhibit all kind of documents, including accounting and corporate books, payment vouchers, internal and external correspondence and magnetic records including, in this case, the needed programs for its reading; as well as to request information regarding the organization, its businesses, the shareholders and the ownership structure of the firm.

¹³ **Legislative Decree N° 807, Law of Attributions and Faculties, rules and organization of INDECOPI**

- Article 44 of the Law on Organization and Functions of INDECOPI¹⁴.
- Article 66 of the Regulation on Organization and Functions of INDECOPI¹⁵.

Note that this protection may also be invoked with respect to queries that have been made to lawyers abroad but are held by an investigation during the dawn raid in Peru.

Article 15 of the Competition Law establishes that the Technical Secretariat has the power to collect private documents whenever it is authorized by a judicial order. Otherwise, third parties can deny access to such information. In particular, the Commission of Free Competition can have problems in coordinating the issuing of an order to look into the undertaking's private documentation with the legal Authorities. The main problem is that, in our legal system, there are several rules that protect various categories of sensitive information, such as private information, secret of telecommunication, confidential information, banking information, personal information, among others.

This situation makes the process of obtaining a judicial order a lot more complex because judges are afraid of being accused afterwards of violating the right to preserve a certain private sphere or exposing the Administrative Authorities to information that should remain private. For example, the proceeding of wiretapping communications¹⁶ (including

Article 2.- Without being restricted to the following alternatives, each Commission, Office or Courtroom of INDECOPI is empowered to:

c) Carry out dawn raids with or without previous notifications to the natural or legal persons, the non-regulated societies or the trust's legal residences and access the books, registers, documentation and goods, being able to verify developing production processes and take depositions from people on site. During the dawn raid, physical or virtual files can be copied, as well as from any other document considered relevant; videos or photography can be taken whenever they are considered appropriate. In order to gain access, the help of law enforcement authorities might be requested. In case any of the legal residences are closed and locks have to be forced, it will be necessary to obtain a search warrant within 24 hours.

¹⁴ **Legislative Decree 1033, Law on Organization and Functions of the National Institute for the Defense of Competition and Protection of Intellectual Property Rights – INDECOPI**

Article 44. - Functions of the Technical Secretariats

44.1 The following functions are the responsibility of the Technical Secretariats:

b) Instruct and handle the valid processes of the Commissions, exercising its right to do research and respond to evidence, with the goal of providing the Commissions with enough tools in order to solve the subjects under their power of capacity.

¹⁵ **Supreme Decree 009-2009-PCM, Regulation on Organization and Functions of the National Institute for the Defense of Competition and Protection of Intellectual Property Rights – INDECOPI**

Article 60. - Functions of the Technical Secretariats

Apart from the functions stated in the Law on Organization and Functions INDECOPI, approved by Legislative Decree N° 1033 and what has been established by the complementary regulation, the Technical Secretariats are in charge of the following actions:

c) Do the required investigations, inspections and verifications in order to provide the Commissions or Courtrooms with enough elements of judgment to agree and/or announce a verdict according to the subjects under their power of capacity according to the legal standards that regulate their functioning.

¹⁶ **Peruvian Penal Code**

“Article 226 Authorization

1. The letters, parcels, values, telegrams and other postal items and postal, offices or companies-public or private, postal or telegraph, directed the accused and sent by him, even under an assumed name, or those of which because of special

letters, parcels, values, telegrams and other postal items addressed to the accused or sent to him) is only allowed in a criminal procedure and when it is proposed by the prosecutor and accepted by a judge. Needless to say, there are serious consequences for those who violate these procedures.

Currently, according to the Competition Law, the information managed by the public Authority is divided into three categories: public, restricted and confidential. The first one refers to information anyone can consult and it is usually about closed cases. The second is information available only to the interested parties and third parties with legitimate interest in a proceeding. Finally, confidential information protects information related to commercial or industrial secrecy. Only the person that provides such information can gain access to it. Confidential information, in this case, is understood as hearsays that could affect the privacy, personal data, bank secrecy, tax secrecy, and all type of reports expressly excluded by a legal regulation made by the Congress.

As it can be seen, the legal system has not created any category of information beyond the authority's reach, such as PS, at least, at the administrative level. Likewise, it is not established what constitutes private information versus commercial information in power of undertakings. It should be remembered that any kind of information can be treated as a communication, but not all types of communication deserve to be treated under the right of privacy because it can be commercial information subject to investigation.

In the same way that the secrecy of telecommunications is criminally protected, the law protects PS but does not provide any guarantee regarding its protection from the knowledge of the authority. It is also worth reiterating that a confidentiality obligation would not be enough to protect the right of defense because the confidentiality of some information has to be first declared so by the Commission, which at the same time is aware of the existence of such information, contrary to the measure that PS protects.

Regarding the defense of the right to PS, it is valid to base the opposition of revealing information on the mandate of the Constitution, Penal Code or the Code of Ethics. However, it would be very difficult to keep this information from the authorities if the category is still nonexistent in the administrative order. In that sense, it is necessary to have a legal institution of PS with scopes and limits. This will not only help to protect the person subject to inspection but will also promote the legality of the inspection. First, of course, the capacities to do inspections must be made precise.

We proposed considering the information protected under PS as *privileged information* in the same way it is considered in other countries and, consequently, permitting a

circumstances, presume to emanate from him or of which he is able to be the recipient, may be subject, at the request of the Prosecutor Judge of the preliminary investigation, interception, seizure and further opening. (...)

refusal to reveal this information to the Authorities. On the other hand, we consider that the unauthorized access to PS information must be made illegal and administratively sanctioned.

In cases where it is difficult to determine the applicability of this rule, it would be important to establish a mechanism for conflict resolution. We propose an arbitration mechanism in which the parties can 1) clearly specify the information protected by PS and 2) clarify why the information should not be known to the Authorities. The Authorities can act as an arbitral tribunal or a judge. This procedure must establish sufficient safeguards to maintain secrecy and also must be effective in order to avoid the obstruction of the antitrust investigation or procedure. In other countries, it is used to withhold information under debate.

Regarding the guarantees of confidentiality, we reiterate that it would be more appropriate if the conflict is solved by a third party that may preserve the object of the dispute. In other words, the object must be kept unrevealed until the conflict is resolved. Likewise, it is necessary to have some standards for sanctioning the decision-making organ that authorizes access to the information.

The establishment of what should be understood as private information, intimate information and information protected by the telecommunication secret, among others, is still pending.

We are conscious that PS is at the very boundary between law and ethics. However, protecting information access guarantees the proper use of defense and freedom rights. This is a fundamental regulation if an appropriate legal process is pursued.

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