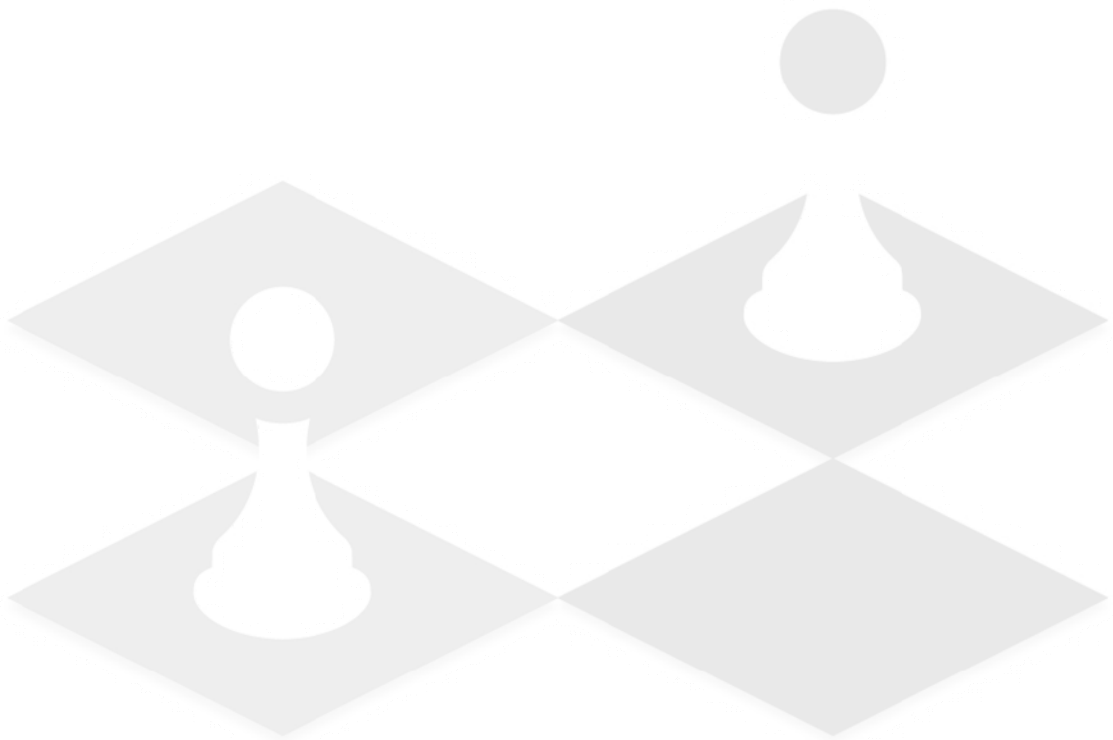


# Investigation Powers of the Competition Commission and Legal Professional Privilege



## 1. Introduction

- 1.1 The Competition Commission (the “Commission”) has powers (“Investigation Powers”) under Part 3 of the Competition Ordinance (the “Ordinance”) to:
- (a) require a person to produce any document or copy of any document or provide the Commission with specified information relating to any matter the Commission reasonably believes to be relevant to an investigation (section 41 of the Ordinance);
  - (b) require a person to attend before the Commission to answer questions relating to any matter the Commission reasonably believes to be relevant to an investigation (section 42 of the Ordinance); and
  - (c) enter and search premises where authorised by warrant issued under section 48 of the Ordinance (“Section 48 Warrant”).
- 1.2 The Commission’s proposed use of these Investigation Powers is explained in its *Guideline on Investigations*.<sup>1</sup>
- 1.3 Section 58(1) of the Ordinance provides that the Commission’s powers under Part 3 of the Ordinance do not affect any claims, rights or entitlements that would, but for Part 3 of the Ordinance, arise on the ground of legal professional privilege (“LPP”).<sup>2</sup>
- 1.4 In accordance with section 58(1) of the Ordinance but subject to section 58(2),<sup>3</sup> persons are not required to provide information to the Commission under sections 41 or 42 of the Ordinance where that information is protected by a valid claim to LPP.

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<sup>1</sup> Available on the Commission website at [www.compcomm.hk](http://www.compcomm.hk).

<sup>2</sup> Section 58(2) of the Ordinance provides that section 58(1) does not, however, affect any requirement under the Ordinance to disclose the name and address of a client of a counsel or solicitor.

<sup>3</sup> See footnote 2 above.

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## **2. Handling claims to LPP when conducting a search under a Section 48 Warrant**

- 2.1 Where the Commission enters and searches premises under a Section 48 Warrant, disputes may arise as to whether documents or information which Commission staff might wish to seize or copy contain information subject to LPP. Similarly, the investigated parties may assert that computers, other electronic devices or digital material which Commission staff might wish to inspect or take possession of contain privileged information.
- 2.2 It is the Commission's policy to ensure that LPP issues arising in the context of a search will be dealt with as fairly and as expeditiously as possible. The Commission will achieve this by:
- (a) minimising the risk of privileged material being inadvertently read by Commission staff involved in the investigation (the "Case Team");
  - (b) ensuring that any disputed material seized during a search is properly identified, isolated and securely stored pending resolution of the dispute;
  - (c) endeavouring to ensure that disputes relating to LPP are resolved by agreement between the Commission and the investigated parties to the extent possible; and
  - (d) ensuring the prompt return of any material or information to its rightful owner as soon as it is determined that the material or information is protected by LPP.
- 2.3 While the steps set out below are intended to be of general application, the procedure described may need to be adapted to the circumstances of the case and/or to comply with any conditions imposed by the Section 48 Warrant. The procedure may also be revisited from time to time in light of changes to the applicable law.

### 3. Conducting the search at the target premises

3.1 If during the course of a search an authorized officer<sup>4</sup> forms the view that any document is subject to LPP and that document can be readily separated from any non-privileged material that appears to be relevant, the document will not be copied or seized by the Commission.

3.2 Where, however:

- (a) an authorized officer forms the view that only a part of a document or other material is subject to LPP and that part cannot be readily separated from non-privileged material that appears to be relevant;
- (b) an authorized officer disputes an assertion by the investigated party (“LPP Claimant”<sup>5</sup>) that a document that appears to be relevant is subject to LPP and an agreement cannot be readily reached at the premises; or
- (c) the LPP Claimant asserts that only a part of a document or other material is subject to LPP and that part cannot be readily separated from non-privileged material that appears to be relevant,

the document or material (as a whole) will be placed in an opaque bag or container (“LPP Container”) and sealed.

3.3 The Case Team will remove the LPP Container from the target premises in accordance with the powers conferred by the Section 48 Warrant.

### 4. Substantiation and resolution of LPP claims

4.1 Within seven days after the search the LPP Claimant shall:

- (a) if it has not already done so during the search, inspect and index the materials held by the Commission that it considers may be subject to an LPP claim;
- (b) with respect to each item identified in the index, state whether the LPP claimed is based on legal advice privilege, litigation privilege or both; and

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<sup>4</sup> Appointed pursuant to section 47 of the Ordinance.

<sup>5</sup> In some cases the party making a claim to LPP may not be the investigated party. This policy document is also intended to apply to such parties.

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(c) support its LPP claims by a statement (“Supporting Statement”) setting out the special basis or bases and the full factual context upon which LPP is claimed in respect of each item in the index (including, as appropriate, by providing information on the author of the material, the addressee(s), the positions and responsibilities of these individuals, the purpose of the document/electronic data concerned and the context in which it was drawn up or generated). In appropriate cases, the Commission may require the truth of the Supporting Statement to be verified by a statutory declaration under section 43 of the Ordinance.

- 4.2 An extension to the seven-day timeframe mentioned above will be considered in cases where voluminous materials are seized. The LPP Claimant must explain to the Commission the reasons for requiring an extension of time and the steps it will take to expeditiously complete the process set out in paragraph 4.1 above.
- 4.3 If inspection of documents is necessary to resolve the claims, the Commission will discuss with the LPP Claimant how access to the documents may be facilitated for that purpose.
- 4.4 After considering the index and the Supporting Statement, the Commission will inform the LPP Claimant in writing which of its LPP claims are accepted and which, if any, remain in dispute. Where LPP claims have been accepted, the privileged material will be returned to the LPP Claimant or, if it cannot be separated from non-privileged materials, the document will not be examined until the privileged information has been redacted by way of a procedure to be agreed with the LPP Claimant.
- 4.5 Subject to part 6 below, any material which remains subject to a disputed LPP claim will continue to be kept under seal.

## **5. Third party or judicial determination of any outstanding LPP claims**

- 5.1 If a dispute remains as to whether material is subject to LPP, the Commission will confer with the LPP Claimant on the best approach to dealing with the matter with a view to resolving all outstanding LPP claims expeditiously. In this context, a process involving an independent third party LPP Lawyer may be agreed.
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- 5.2 Where the Commission and the investigated party fail to agree on resolving an LPP dispute, the parties may apply to the court for determination of the matter.

## **6. Timeliness in resolving disputes about LPP**

- 6.1 The steps set out in parts 4 and 5 above are designed to narrow and expedite the resolution of any disputes over LPP. However, for operational reasons, the Commission will not tolerate undue delays in resolving disputes over LPP.
- 6.2 In the event that an LPP Claimant does not substantiate its LPP claim under the procedure set out in part 4 of this policy (or in any other manner that may have been agreed with the Commission under paragraph 5.1 of this policy) in a timely manner, the Commission reserves the right to give the LPP Claimant 7 days' written notice of its intention to inspect the materials that are subject to the LPP claim.
- 6.3 If, upon the expiry of the 7 days' notice, the LPP Claimant has still not substantiated its LPP claim pursuant to part 4 of this policy (or in any other manner that may have been agreed with the Commission under paragraph 5.1 of this policy), the LPP claim will be deemed waived and the Commission will proceed to inspect the materials.