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Legal professional privilege in EU merger control

Thomas Wilson (Kirkland & Ellis) · Tuesday, May 30th, 2017

The European Commission increasingly issues large document requests in complex merger cases. The number of requested documents has increased significantly in recent years, from a few hundred to **several hundred thousand**, in particular in Phase I or Phase II cases that raise substantial issues. If the document request is issued during the formal proceedings, the documents have to be submitted within a few weeks or, in some cases, even within a few days.

At the same time, internal documents are often **key evidence** in the Commission's assessment of the case. In several recent Phase II decisions reference to internal documents is made on more than 50 pages and in the recent Hutchison 3G Italy / WIND / JV decision internal documents are even referred to on **almost 300 pages**.

This development raises questions relating to **due process**, the parties' **rights of defence** and **procedural fairness**. One aspect concerns legal professional privilege (LPP).

In my view, large document requests and tight procedural deadlines must **not undermine** the concept of LPP in merger cases. This is also as LPP has been recognized as a "general principle in the nature of a fundamental right" in EU case law. Rather, defining the exact scope of LPP in merger control needs to **take into account the specific characteristics of the merger control procedure** ("need for speed", large document volumes, regular involvement of economists in complex cases etc.).

So far the Commission interprets the EU case law narrowly in merger cases which does not (sufficiently) take account of the specific features of merger control. I will give a few examples of the Commission's current approach below.

In several instances Commission case teams have taken the view that legal advice from external counsel that is not related to competition proceedings is not protected by LPP. Such interpretation means that LPP cannot be claimed for preliminary advice in relation to alternative transactions (e.g. the contemplated acquisition of a competitor active in the same market) that have not (yet) been notified. The Commission bases the necessity of a "relationship" with the proceedings on the ECJ's judgment in the AM&S case. It is however far from clear from the judgment whether the ECJ intended to restrict the scope of LPP in that respect. Legal commentators

interpret the term "relationship" mostly broad in relation to cartel proceedings and take the view that any pre-emptive legal advice in relation to a possible cartel infringement should be covered by LPP. The same approach should in my view be taken in the area of merger control: the purpose of a document request is to ask for market, competition and strategy related documents, but not to obtain insights into the parties' confidential correspondence with their legal advisers. If there were a risk that confidential legal advice may have to be disclosed, the client would maybe not consult a lawyer, in particular in sensitive matters. This contradicts the ECJ's AM&S judgment according to which everyone needs to be able to consult a lawyer "without constraint". It can also be argued that the Commission itself creates a "relationship" to the proceedings by requesting the relevant documents in its document request.

Additionally, according to the Commission, the legal advice must be related to "competition proceedings" in order to fall within the scope of LPP. This means that tax, employment or corporate legal advice is not covered by LPP. It does however not seem mandatory to interpret the relevant EU court decisions in such a way (which only speak of "proceedings" without any express limitations). In any event, lawyers' correspondence relating to other fields of law will normally not be relevant for the Commission's merger assessment and should therefore not have to be disclosed.

Another example relates to company documents reflecting legal advice from external counsel. According to the General Court's order in the Hilti case such documents are covered by LPP. The Commission case teams occasionally interpret Hilti as meaning that documents are only protected by LPP if they exclusively contain legal advice. This means that there is no LPP protection at all if the document also deals with other non-legal topics. Such interpretation means that, for instance, legal advice contained in a project memorandum to the board is not covered by LPP. The same applies for board minutes containing legal recommendations. However, many company documents normally deal with different topics and do not only contain legal advice – it is not realistic that legal advice would be communicated in isolation within the company in all instances. Even if one convinces the case team that such documents do not have to be disclosed redactions have to be applied to the parts that are not legally privileged, i.e. the documents cannot be withheld in their entirety. This can create a significant work burden for the parties, in particular in light of increasingly large document volumes.

A third example relates to legal advice from non-EU qualified lawyers – the Commission limits LPP in its merger-related document requests to legal advice from EU-qualified lawyers. However, the characteristics of the merger control procedure have to be taken into account: in international cases competition authorities from different world regions routinely cooperate closely. Regularly confidentiality waivers are requested which allow the authorities to freely exchange information with each other. At the same time legal privilege standards vary in different jurisdictions, e.g. EU – US. There is a risk that disclosure of legal advice provided by a US qualified lawyer vis-à-vis the European Commission means that US legal privilege is waived. The Commission's model waiver text requires the parties to identify foreign legal privilege protection – as a consequence, the parties have to justify their privilege claims in great detail in a US privilege log (in addition to submitting an extensive EU privilege log) which is however not always possible in light of high document volumes

and short deadlines. The US agency may also question US Second Request compliance in case there are, for instance, different views between the parties and the agency on whether documents received via the Commission are in fact covered by US legal privilege. In the interest of procedural fairness and "equity of arms" between the competition authorities and the parties / their advisers the Commission should generally waive the requirement to disclose documents protected by legal privilege for those countries for which it requires a confidentiality waiver.

There are also procedural aspects to consider in relation to LPP:

The Hearing Officer is not competent under his current mandate to examine whether a document is covered by LPP in merger cases (only in cartel cases or Article 14 proceedings). In light of the increased significance of LPP in merger cases (and frequent disputes between the case teams and the parties) the Hearing Officer's mandate should, in my view, be expanded accordingly.

No "claw back" mechanism exists for inadvertently disclosed privileged material. Such inadvertent disclosure can easily occur if the Commission requests several thousand documents within a few days (which can happen in complex cases). Different from the US, there is no official "claw back" procedure in the EU. The parties have to negotiate any claw back with the competent case team. Given his independent role the Hearing Officer seems better suited to decide whether materials can be returned to the parties.

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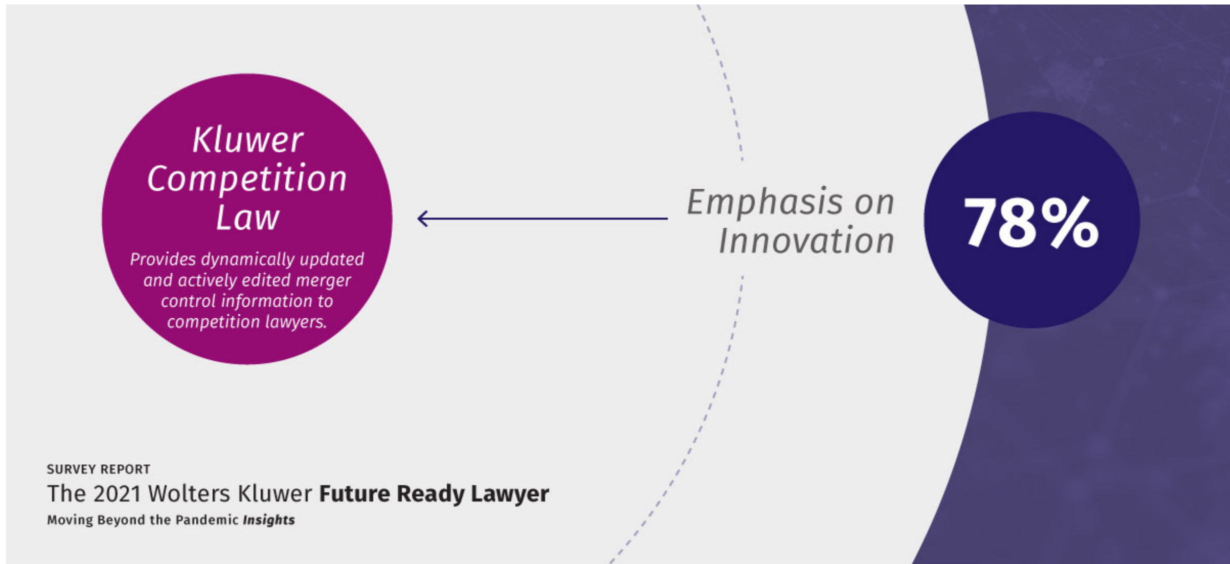

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“>Mergers
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