

Kluwer Competition Law Blog

Document disclosure in international antitrust investigations

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The **approach to access to file** and who can receive what information can **deviate by jurisdiction** which can be particularly relevant in international antitrust cases. The ongoing Qualcomm case is a good example for that.

Qualcomm is currently under investigation by several competition authorities, allegedly refusing to licence standard essential cellular patents to competitors on fair, reasonable and non-discriminatory terms (FRAND).

At the beginning of 2017, the US Federal Trade Commission lodged a complaint against Qualcomm before the US District Court of the Northern District of California, arguing such FRAND antitrust violation. As part of the discovery process, **Qualcomm requested access to the confidential versions of certain third party responses** to requests for information issued by the EU Commission (RFI Responses) in the context of the Commission's antitrust investigations against Qualcomm. In the EU, in line with the Commission's practice, Qualcomm had only obtained access to the non-confidential version of the RFI Responses.

The documents in question had not only been submitted by the third parties to the EU Commission (and the Korean Fair Trade Commission), but were also turned over by those third parties to the FTC.

Qualcomm's disclosure request led the Commission to write two amicus curie letters arguing that:

- the third parties had submitted the RFI Responses to the EU Commission in the expectation that their **legitimate confidentiality claims would be safeguarded**; and
- the disclosure of such **confidential information would likely harm the Commission's law enforcement capabilities**.

In August 2017, the US District Court sided with Qualcomm and ordered that the FTC had to produce the RFI Responses to Qualcomm via discovery. The court held that:

- a party may in principle obtain discovery regarding any non-privileged matter that is relevant for its defence under federal civil procedural rules. Discovery may be limited on several grounds, including for reasons of international comity. **But in this case it was already doubtful whether comity played a factor** since the documents in question were also provided to the FTC, a US government entity.
- in any event, the doctrine of international comity did not apply here as Qualcomm's request

would have had to undermine important, sovereign interests of the EU. **This was not the case as no foreign laws or privileges would be violated by the production of the relevant documents.**

The court recognised the Commission's concerns that the disclosure of the RFI responses may harm the Commission's enforcement antitrust efforts as valid, **but ultimately found them not to be legally persuasive.**

This case shows that **third parties need to be aware that confidential information may have to be disclosed** to the defendant in **international antitrust investigations** via US discovery even if the confidentiality claim is found to be valid from a European perspective.

See below the link to the US District Court order and DG COMP's (second) amicus curie letter of 16 August 2017:

<https://ia601902.us.archive.org/28/items/gov.uscourts.cand.306945/gov.uscourts.cand.306945.176.0.pdf>

http://www.mlex.com//Attachments/2017-08-16_781IS9S494485XQ7/EU_letter_II.pdf

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