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The EC's summary paper on legally privileged information in competition proceedings

Thomas Wilson (Kirkland & Ellis, Belgium) · Thursday, December 6th, 2018

On 26 November 2018, the European Commission (EC) submitted an overview of its policy on the treatment of legally privileged information in competition proceedings in the context of this year's OECD roundtable discussions. The EC's note is helpful as its legal privilege best practices in antitrust proceedings date from 2011 and no official guidance exist with regard to merger proceedings (only occasionally the EC refers to legal privilege in its merger decisions, e.g. in Dow/DuPont). Some aspects of legal privilege that have given rise to disputes between case teams and the parties are however not addressed in the paper.

Points worth mentioning

The EC's note largely refers to the established EU court case law. However, points worth mentioning are:

- As far as can be seen, the EC states for the first time that the principles for legal privilege case law for cartels are to be applied also to merger control proceedings (para 14). Features that are specific for merger control proceedings (e.g. statutory review deadlines, involvement of economists in complex cases) are therefore not taken into account by the EC when defining the scope of legal privilege in merger cases.
- The EC clarifies that legal privilege can be claimed for patent attorneys if it can be established that there is a link between the advice provided or sought in the assessment of future litigation under competition law (para 17).
- The note mentions that evidence which has been legally obtained can be exchanged between the EC and national competition authorities within the European Competition Network (para 22). This means that documents which are not protected under EU legal privilege but would be under national rules can be disclosed to the national authority in these circumstances which effectively undermines the privilege standard in certain EU Member States (as the national standard may be broader than at EU level). The same applies if EU legal privilege is broader than the legal privilege rules of a Member State.
- The EC elaborates on how it deals with the issue of legal privilege when making electronic copies of digital materials found during antitrust inspections (paras 26 et seq.).
- In the context of information requests, the EC mentions its practice to issue formal requests under Reg. 1/2003 or the EU Merger Regulation (EUMR) when requesting documents located in the US that are protected under US privilege rules. That way, according to the EC, it can be prevented that US privilege is lost when disclosing such documents to the EC (para 29).

- The EC note also mentions that in complex merger cases the parties typically have to provide detailed privilege logs in order to justify privilege claims. If the privilege claims are insufficient the EC may suspend the merger proceedings until the internal document RFI has been complied with. More detailed guidance will be given in the "Best Practices on requests for internal documents under the EU Merger Regulation" which the EC intends to issue early next year (paras 30-33).

What does the summary paper not deal with?

- In some cases, EC case teams have argued that legal privilege is "relative", i.e. any correspondence between external lawyer and client dating from before the initiation of proceedings has to relate to those proceedings in order to be protected (reference is made to the AM&S judgment of the EU Court of Justice). The consequence of this position would be that legal advice given with regard to a potential cartel infringement is not be privileged when requested in the context of a merger-related information request. This would however be an overly restrictive interpretation of the AM&S jurisprudence and the fundamental right of legal privilege more generally.
- Case teams have also argued that external legal advice is not protected if forwarded within the company organization when such advice includes commentary, e.g. from the in-house legal counsel. It seems however too far-reaching to assume no privilege at all in this case.
- The note also does not make reference to the EC's Perindopril cartel decision which dealt with the lack of protection of external lawyers' correspondence from different law firms in a contentious situation.
- The EC mentions the Hearing Officer and his role with regard to legal privilege but does not address the issue that he is not competent for disputes between the case team and the parties during the "normal" merger proceedings (only in cartels and EUMR fining procedures).
- Finally, the note does not discuss how to proceed in case privileged materials are inadvertently disclosed to the EC (which can easily occur given the amount of documents requested in competition proceedings). Different from the US no official "claw back" mechanism exists. Given his impartial role the Hearing Officer would be best placed to oversee the return of inadvertently disclosed privileged materials.

The EC submission to the OECD is available here:

https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)46/en/pdf

The OECD background note as well as submissions from other countries (including from Member States) can be found here:

http://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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