EUROPEAN UNION

CONCEPT OF LEGAL PROFESSIONAL PRIVILEGE IN EUROPEAN UNION

The laws of legal professional privilege are not harmonised throughout the European Union, but are instead governed by the national law of individual EU Member States. However, EU rules on legal professional privilege do exist and these apply in the context of the enforcement by the European Commission of EU competition law.

EU legal professional privilege must therefore be considered in competition law matters involving, or possibly involving, the European Commission. The rules on EU legal professional privilege apply in that context, irrespective of any national rules on legal professional privilege.

EU legal professional privilege applies only where the investigation is carried out by the European Commission (including where the European Commission is assisted by a national competition authority of an EU Member State). An investigation by a national competition authority of an EU Member State is subject to the applicable national rules on legal professional privilege, including in cases where the national competition authority of an EU Member State investigates possible infringements of EU competition law.

EU legal professional privilege serves as an exception to the European Commission's investigatory powers. Documents covered by EU legal professional privilege are both protected against seizure during a dawn raid conducted by the European Commission and exempted from disclosure in response to a request for information by the European Commission.

There are no statutory provisions clearly establishing EU legal professional privilege. In the absence of these, the Court of Justice of the EU recognised EU legal professional privilege as a fundamental right in 1982, in the landmark case of AM & S v. European Commission (Case C-155/79). The Court of Justice of the EU held that EU legal professional privilege was necessary so that any person is able to consult a lawyer without constraints. EU legal professional privilege is an essential corollary to the full exercise of the rights of defence.

While the judgments of the Court of Justice recognising EU legal professional privilege relate to investigations by the European Commission into anti-competitive behaviour, EU legal professional privilege is presumed to apply also where the European Commission exercises its investigatory powers in relation to merger control and state aid matters.

SCOPE OF LEGAL PROFESSIONAL PRIVILEGE IN EUROPEAN UNION

There are two conditions that must be satisfied in order for a written communication to be protected by EU legal professional privilege:

1. The written communications must be made for the purposes and in the interests of the client's rights of defence.
2. The written communications must emanate from an independent lawyer qualified to practise in a jurisdiction of the European Economic Area (EEA), that is to say a lawyer who is not bound to the client by a relationship of employment.

Communications with in-house counsel are thus not protected by EU legal privilege, even where the in-house lawyer is a member of the relevant bar association or law society, and irrespective of in-house counsel's status under national law. The Court of Justice of the EU held that an in-house counsel's relationship as an employee of the company by its very nature does not allow him to ignore the commercial strategies pursued by his employer. Communications with lawyers qualified outside the EEA are not protected.

In applying the two conditions set out above, the Court of Justice of the EU has recognised three categories of documents protected by EU legal professional privilege:

1. Written communications emanating from an independent EEA-qualified lawyer to his client exchanged after the initiation of an administrative procedure by the European Commission. This category also covers earlier written communications which have a relationship with the subject matter of the administrative procedure.

2. Notes internal to the client which report or reproduce the advice given to him by an independent EEA-qualified lawyer. The advice needs to be given for the purposes and in the interests of the client's rights of defence (i.e. after the initiation of an administrative procedure by the European Commission, or having a relationship with the subject matter of the administrative procedure).

   The client should be cautious not to include in the internal notes his opinions on or amendments to the legal advice provided by the external EEA-qualified lawyer. These will not be protected by EU legal professional privilege.

3. Preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, provided they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of defence.

   Such preparatory documents may include, for example, working documents or summaries prepared as a means of gathering information which will be useful, or essential, to the external EEA-qualified external lawyer for understanding the context, nature or scope of the facts for which his assistance is sought.

   This category of documents is construed restrictively. EU legal professional privilege will apply to such preparatory documents only where they were drawn up exclusively for the purpose of seeking legal advice from an external EEA-qualified lawyer in exercise of the rights of defence. It is for the client relying on EU legal professional privilege to prove that the document in question was drawn up with the sole aim of seeking legal advice from a lawyer. This must be unambiguously clear from the content of the document itself or the context in which the document was prepared and found.

   As explained in the EU submission to the OECD paper on the "Treatment of legally privileged information in competition proceedings" from November 2018, the protection may even apply in cases where the documents were not exchanged with a lawyer at the time of the request by the Commission or were not created for the purpose of being sent physically to a lawyer.

Further, the EU's submission to the OECD paper adds that merely marking a document as "Legally privileged" does not mean that the document is actually protected by legal professional privilege. A justification as to why the document is protected will still be required.

EU legal professional privilege does not prevent a lawyer's client from disclosing the written communications between them if the client considers that it is in his interest to do so. Waiving EU legal professional privilege vis-à-vis the European Commission while reserving it vis-à-vis others is possible.
The protection of EU legal professional privilege may thus differ substantially from legal professional privilege protection under national laws. For example, EU legal professional privilege does not protect legal advice emanating from in-house counsel. This is in contrast to national rules on legal professional privilege protection in Belgium, Greece, the Netherlands, Norway, Portugal, England and Wales and other jurisdictions. EU legal professional privilege protects only correspondence made for the purposes and in the interests of the client's rights of defence. In some jurisdictions, the protection of legal professional privilege covers a wider range of legal advice. EU legal professional privilege protects communications with EEA-qualified lawyers only, while the national rules in England and Wales protect communications with any lawyer. In some jurisdictions, the national rules offer a narrower protection than EU legal professional privilege.

For example, under national legal professional privilege rules in Germany, only communications created after the initiation of an investigation are protected.

Companies and their lawyers need to be aware of these differences and understand the risks they are exposed to in their jurisdictions of operation. It is therefore of utmost importance to have correct internal procedures dealing with legal professional privilege and to appreciate the differences between the various regimes of legal professional privilege.

**RECENT CASES AND/OR OTHER LEGAL DEVELOPMENTS IN EUROPEAN UNION**

How to proceed when EU legal professional privilege is disputed during a dawn raid conducted by the European Commission investigating possible breaches of EU competition law?

The European Commission's powers in investigating anti-competitive behaviour include the power to conduct dawn raids to examine and copy books and other records found at the premises. Documents protected by EU legal professional privilege are an exemption to the European Commission's powers.

In the course of a dawn raid, if a document is protected by EU legal professional privilege, the person claiming EU legal professional privilege protection should give the European Commission's inspectors a cursory look at the headings of the document to demonstrate that the document is indeed protected by EU legal professional privilege. He is entitled to refuse to allow the European Commission's inspectors to take a cursory look where he believes a cursory look is impossible without revealing the content of the documents, and he provides the European Commission's inspectors with appropriate reasons for this belief.

Where the protection of EU legal professional privilege is disputed during a dawn raid by the inspectors of the European Commission, the following procedure is to be followed:

1. The disputed document is placed in a sealed envelope.
2. The European Commission's inspectors may remove the sealed envelope from the premises.
3. If the matter cannot be resolved directly with the European Commission, the person claiming EU legal privilege protection may ask the Hearing Officer to examine the claims of EU legal professional privilege. The Hearing Officer may inspect the document and will communicate his preliminary view and take appropriate steps to propose a mutually acceptable decision.
4. Where no resolution is reached, the Hearing Officer will formulate a reasoned recommendation and deliver it to the European Commission, which is not binding on the European Commission but which the European Commission will examine.
5. The European Commission then takes a decision on whether or not to grant EU legal professional privilege protection to the document. The person claiming EU legal professional privilege may apply to the General Court of the EU to annul a negative decision by the European Commission.
6. The European Commission will not look at the document before the deadline for seeking annulment of the decision by the General Court of the EU has passed, or, if seeking annulment, before the annulment proceedings are closed.

Companies should exercise caution when making claims of EU legal professional privilege, as unwarranted and deceitful claims are prohibited and may be punishable by a fine.

Exchange of information within the European Competition Network

The European Competition Network consists of the European Commission and the national competition authorities of the 28 EU Member States, and allows them to cooperate on competition matters. The members of the European Competition Network have the power to exchange and use information collected for the purpose of applying EU competition law, including confidential information. National competition authorities may use information exchanged within the European Competition Network in order to enforce EU law, or to enforce their national competition law when it is applied in parallel with EU law and does not lead to a different outcome.

This has implications on the treatment of legal professional privilege. A national competition authority in one Member State (eg the UK) is able to obtain a document from an authority in another EU Member State which is subject to more relaxed legal professional privilege rules (eg Germany). A national competition authority, in this case, is thus able to obtain and use documents even if they were collected under rules which are less protective than its own. Companies, particularly large multinationals, must therefore ensure they have adequate and efficient policies to ensure that legal professional privilege protection is most effectively used.

Private damages actions for breaches of EU competition law

Natural and legal persons that have suffered damage due to breaches of EU competition law have a right to obtain damages from those found to have breached EU competition law. Private damages actions are brought in national courts of EU Member States. In order to increase the possibility of bringing private damages actions for breaches of EU competition law, an EU Directive has been adopted. The Directive requires all EU Member States to allow for courts to impose disclosure obligations in private damages actions for breaches of EU competition law. As regards such disclosure, the Directive requires EU Member States to ‘ensure that national courts give full effect to applicable legal professional privilege under (European) Union or national law when ordering the disclosure of evidence’. It remains to be seen how EU Member States will implement that provision and when the EU or national legal professional privilege regime will apply in private damages actions for breaches of competition law. EU Member States have until approximately December 2016 to implement the Directive.

Legal professional privilege in the context of merger control

Due to rapid technological development in the past few years, the merger control landscape has made room for complex highly technical mergers. A lack of understanding of certain sectors or the level of complexity of some transactions can create uncertainty as to the potential theory of harm put forward by a competition authority.

This lack of understanding around new sectors has in turn led to substantial requests for information from competition authorities. In the past, the number of requested documents from the Commission were of several hundred, whereas now the number has increased to several hundred thousand. The Commission relies heavily on internal documents to assess the markets and the strategy of the parties involved.

Deadlines might not be proportionate to the volume and complexity of the information requested. Responding to an RFI that corresponds to thousands of documents requires having access to resources that some respondents might not have access to. Considering the above, it is evident that an undertaking that wishes to make any claims of legal privilege will be in a difficult position. Therefore, the excessive amount of information requested by the Commission effectively undermines the concept of legal professional privilege. However, the Commission may decide to stop the clock in merger control proceedings until the request for internal documents has been complied with, so as to avoid the withholding of internal documents by merging parties.
Evidently, legal professional privilege plays a more significant role in complex merger cases than it used to.

Legal professional privilege has not been clearly defined within the context of merger control. EU case law on legal professional privilege relates to cartel proceedings and there is no EU case law on merger cases so far. Nevertheless, legal professional privilege has been recognized as a fundamental right and therefore it cannot be disregarded within the context of merger control proceedings. Furthermore, the EU's submission to the OECD paper (mentioned in the 'scope' section above) put forward that the Commission typically applies the same principles derived from the existing case law also in merger control proceedings.

Given that there is lack of jurisprudence for legal professional privilege in the context of merger control, we would have to look at the past behaviour of the Commission which indicates a narrow interpretation of the EU case law relating to legal professional privilege. In practice, case teams can be more flexible in light of the increased volume of documents. This does not preclude the Commission from examining legal professional privilege claims more closely nowadays. Claims of legal professional privilege claims add a significant administrative burden of work on the parties. Legal professional privilege claims are submitted in privilege logs, which must set out the reason why a document or part of it is protected by legal professional privilege.

There are two practical aspects that need to be considered having to do with responsive documents covered by legal professional privilege and responsive documents covered by legal professional privilege rules of a third country.

**Responsive documents covered by the EU legal professional privilege rules**

Written communications emanating from an independent EU qualified lawyer to his client within the context of a merger control proceeding are protected by legal professional privilege. Communications that are not related to competition law proceedings, eg communications in relation to other areas of law such as employment or tax, are not covered by legal professional privilege. Additionally, communications dated before the competition law proceedings might be considered not to be covered by legal professional privilege, given that they are not connected to the proceedings.

Company documents that reflect the legal advice obtained by external counsel are covered by legal professional privilege. However, it is quite common for company documents containing legal advice to also deal with other non-legal issues as well. In such cases, the documents will be partially redacted.

**Responsive documents covered by third country legal professional privilege rules**

When legal advice is being obtained by external counsel that are not EU qualified, this advice is not covered by EU legal professional privilege rules. The issue becomes more complex for transactions that have an international dimension, in which multiple competition authorities investigate a transaction.

It is quite common that authorities will ask for confidentiality waivers from the parties, in order to be able to exchange information with other competition authorities. If that is the case, the different ways in which legal professional privilege rules around the world apply can become problematic, given that some are less strict than others. Where this is the case, a document obtained by one competition authority can be disclosed to another competition authority, which the latter would not normally have access to under the legal professional privilege laws of its jurisdiction. In that regard, it is quite common that documents requested by the Commission are covered by US legal professional privilege but not EU legal professional privilege (eg in-house counsel communications), which can amount to a waiver of US legal professional privilege.

Below we set out some examples of communications and documents, and their respective treatment from the Commission in relation to legal professional privilege.

- **Correspondence between client and external lawyer**: Correspondence that emanates from an external legal counsel to the client is covered by legal privilege. However, the same does not necessarily apply for correspondence from the client to the external legal counsel. Such correspondence would have to be justified in the privilege log.
- **Internal notes reflecting external legal advice**: In Hilti the Court found that 'internal notes which are confined to
reporting the text or content of those communications’ with an independent lawyer containing legal advice are covered by legal professional privilege. The Commission sometimes interprets the reading of Hilti very narrowly as to consider only documents containing exclusively legal advice to be protected by legal professional privilege. However, the key message from Hilti is that the content of legal advice needs to be protected irrespective of the form of the communication that contains it. In practice, the Commission will ask for a partial redaction of documents that are partially covered by legal professional privilege.

- Legal advice not related to competition proceedings: The decisional practice in cartel cases indicates that legal professional privilege covers written communications between the client and his lawyer, after the initiation of a proceeding, and it can also extend to earlier communications if there is a link with the subject matter of the proceeding. Within the context of merger control, earlier communications between a lawyer and his client are protected by legal professional privilege if there is a link with the subject matter of the proceeding for a specific transaction. Legal advice that refers to alternative transactions would therefore not be covered by legal professional privilege.

- Correspondence with economists: legal professional privilege is limited to communications with lawyers. There is no EU case law dealing with communications with economists in merger cases. Moreover, the Best Practices Notice of the Commission clearly indicates that legal professional privilege does not extend to other professions, therefore it would be hard to make a legal professional privilege claim for correspondence with economists. However, advice obtained from economists, but vetted through an external lawyer, would likely be covered by legal professional privilege. The content of the correspondence with economists could be incorporated within the legal advice obtained by an external lawyer, which is evidently covered by legal professional privilege.

In a nutshell, legal professional privilege in merger control proceedings has acquired a new importance. It is imperative that companies have set up beforehand adequate mechanisms to respond to potential document requests from competition authorities in order to ensure that legal professional privilege in documents or communications is not undermined by the vast number of documents requested. In addition, even in circumstances where legal professional privilege would normally not be applicable, there might be ways to prevent documents from being disclosed. Communications emanating from EU qualified external lawyers are presumably covered by legal professional privilege. By incorporating within these communications information obtained by other professionals, there is the potential to extend the application of legal professional privilege to advice obtained from other professionals. However, this requires that no communications take place directly between the undertaking and the other professionals.

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