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The International Comparative Legal Guide to:

Merger Control 2018

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A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fourteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 44 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Nigel Parr of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Legal Professional Privilege Under the EU Merger Regulation: State of Play

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Introduction

The proliferation of multi-jurisdictional antitrust merger control investigations has brought into sharp focus the interpretation of the existing EU legal professional privilege ("LPP") rules set out in the landmark *Akzo, AM&S* and *Hilti* cases. In this article, we will describe how a strict interpretation of the current rules on LPP falls short in addressing the complexities of global merger control cases and in ensuring the protection of companies' rights of defence. We will also point to some potentially useful approaches to limit the unwanted waiver of US LPP on documents to be submitted to the European Commission ("EC").

State of Play

When issuing document requests under the EU Merger Regulation ("EUMR"), the EC typically summarises the LPP rules as follows:

1. written communications with an independent, EU-qualified, lawyer made for the purposes and in the interests of the exercise of the client's rights of defence in competition proceedings. That protection can also extend to earlier written communications between lawyer and client which have a relationship to the subject-matter of that procedure;
2. internal notes circulated within an undertaking which are confined to reporting the text of the content of communications with an independent, EU-qualified, lawyer containing legal advice; or
3. working documents and summaries prepared by the client, even if not exchanged with an independent, EU-qualified, lawyer or not created for the purpose of being sent physically to an independent, EU-qualified, lawyer, provided that they were drawn up exclusively for the purpose of seeking legal advice from an independent, EU-qualified, lawyer in exercise of the rights of defence. The mere fact that a document has been discussed with a lawyer is not sufficient for it to be covered by LPP.

These rules appear to summarise the conclusions of the Court of Justice of the European Union ("CJEU") in its three seminal judgments, *Akzo, AM&S* and *Hilti*. However, and very importantly, all these judgments related to conduct cases, *i.e. Akzo*, and *AM&S* to cartel investigations, and *Hilti* to an abuse of dominance case. As discussed below, there is an argument that the EC's summary of the CJEU's judgments on LPP is too restrictive. In addition, there is no reason why the EC should apply to merger cases LPP rules that are drawn from CJEU judgments that are not related to merger control. The specific nature of merger control investigations creates the necessity for different LPP rules.

Potential Shortcomings of EU LPP Rules in Merger Cases

Leaving aside the long-standing problem about the lack of protection of in-house counsel communications in the EU, we will focus here on three key issues that could seriously undermine the effective protection of a company's rights of defence in the context of a global merger control case.

First, while global transactions often involve highly sensitive legally privileged communications exchanged with non-EU external legal counsel, EU law technically only protects communications with independent, EU-qualified external legal counsel.

Second, and more importantly, although merger control cases are fundamentally different from conduct cases, EU case law has not yet developed a concept of joint defence or common interest privilege. There is simply no case law of the CJEU on this point. A formal reading of the *Akzo, AM&S* and *Hilti* cases, which refer to "client" when setting out the rules on LPP, could lead to the interpretation that only client communications with their own external counsel may be protected by LPP.

Lastly, an important issue is whether a document production to the EC, which includes documents covered by US LPP, would amount to a waiver of US LPP.

We will address each of these key issues below.

EU/non EU-qualified external legal counsel

Consider a major M&A deal involving a US company and highly sensitive antitrust advice provided by US external legal counsel prior to the signing of the transaction. Technically, EU law does not prevent disclosure of such communications to the EC.

While the CJEU case law formally requires communications to be exchanged with an independent, EU-qualified lawyer, in order to benefit from privilege protection, in several recent cases the EC has accepted LPP claims on communications involving non-EU external legal counsel.

This is certainly a sensible approach. However, due to the lack of formal rules, one cannot entirely rule out the risk that such communications be requested in specific cases. An official statement by the EC or a judgment by the CJEU confirming this position would be most welcome and consistent with notions of comity in cross-border transactions, where in other jurisdictions LPP often contemplates communications between parties and outside counsel for both parties.

The right test of LPP in merger control investigations

Multinational companies involved in merger control investigations before the EC are now routinely confronted with the issue of LPP. The EC increasingly relies on internal documents in its review of notified transactions. As a result, it is now common for the EC to issue multiple, compulsory requests for vast numbers of internal documents. In the process of selecting the responsive documents, companies are requested to identify privileged documents by relying on the three LPP principles set out above. This process can sometimes lead to paradoxical results.

LPP protection is intimately linked to a company's effective exercise of its rights of defence in a competition law investigation, which is one of the fundamental rights established under EU law. In addition to what the correct test should be for LPP in a merger control context, the procedural rules of the EUMR must be fully compliant with this fundamental right. The EUMR process is based on a set of strictly defined statutory deadlines. In the context of today's common cross-border transactions, document requests often result in the review and production of hundreds of thousands of documents. As a result of the strict overall review deadlines, the EC typically imposes very tight deadlines, often as short as ten days to two weeks. This makes it almost impossible for parties to conduct a proper privilege review. Because LPP is necessary to ensure a company's effective exercise of its rights of defence, a fundamental right under EU law, the procedural requirements of efficiency under the EUMR (in the form of set deadlines) should never trump this fundamental right.

As mentioned above, the *Akzo*, *AM&S* and *Hilti* cases, taking into account the way the EC summarises the LPP rules in its RFIs, could lead to the interpretation that only client communications with their own external legal counsel may be protected by LPP.

However, the rules on LPP established by *Akzo*, *AM&S* and *Hilti* (all Article 101 and 102 TFEU cases) cannot be applied strictly in a merger control context. Merger control proceedings are fundamentally different from conduct cases where one party alone generally holds all necessary information about the object of the investigation. As a result, according LPP protection solely to communications between one party and its respective external legal counsel (or to the internal notes of the client containing legal advice received from its own external legal counsel or to preparatory documents drawn up by one party for its respective attorney) may be sufficient to ensure protection of such party's rights of defence in a conduct case.

In a merger control context, instead, each independent party to the concentration holds information that is necessary for conducting the proceedings and, therefore, in principle, for the exercise of the rights of defence of all parties to the notified concentration. Extensive and strategically sensitive information needs to be exchanged between the parties to a concentration and/or their lawyers at various stages of the merger control process. For example, during the negotiations of the transaction agreements, it is common for outside counsel for the parties, and the parties themselves, to share legal analysis of potential competition issues involved in the proposed transaction, the legal views around the preparation of the Form CO and requirements for notifications in other jurisdictions, responses to Commission RFIs and on occasion the development of strategies on potential remedies and negotiations with the EC of such remedies. On all these issues, it is necessary for one party to obtain information held or prepared by the other party and its counsel to the merger to be able to exercise its rights of defence as part of the merger control procedure.

Given the above considerations, the interpretation of the *Akzo/AM&S/Hilti* judgments that reserves LPP to communications with a client's own external legal counsel (or internal notes of the client containing legal advice received from its own external legal counsel, or documents prepared by one party for its own external legal counsel) cannot be strictly transposed to a merger control context. Under the EUMR, the protection of the parties' rights of defence can and must be ensured by extending LPP also to certain cross-party communications.

In this respect, it is important to note that para. 41 of *Akzo* provides that "*the exchange with the lawyer must be connected to the client's rights of defence*" (emphasis added). It could be argued that this wording of *Akzo* does not preclude the possibility that cross-party communications be covered by LPP. What *Akzo* requires is that the exchange with an independent lawyer be "connected" to the client's rights of defence. For the reasons outlined above, communications between external legal counsel in a merger context, whether or not their clients are involved in that communication, are obviously "connected" to their own clients' rights of defence. In addition, communications between one party and the external counsel of the other party may be very well be "connected" to the rights of defence of that other party, as that party (the client of the external counsel) may not be able to exercise its rights of defence without obtaining certain information from the other party. However, whether or not such communications fall within the scope of *Akzo/AM&S/Hilti* should be irrelevant, as the EC should not simply extend rules applicable to conduct cases to merger control cases.

Another example where merger control requires specific LPP rules are "internal notes" circulated within an undertaking which are confined to reporting the text of the content of communications with an independent lawyer. In a merger review context, communications often occur between the two external counsel of the parties. Therefore, when a company reports internally on the content of those communications with external counsel of another party, such reports should be covered by LPP.

The same applies to "preparatory documents" exchanged or prepared independently or *jointly* by the parties, even if not exchanged with an independent lawyer or not created for the purpose of being sent physically to an independent lawyer. Again, one could even conclude that this position is supported by *Akzo*, which states that "so that a person may be able effectively to consult a lawyer without constraint, and so that the latter may effectively perform his role as collaborating in the administration of justice by the courts and providing legal assistance for the purpose of the effective exercise of the rights of the defence, it may be necessary, in certain circumstances, for the client to prepare working documents or summaries, *in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought*" (emphasis added). In merger control, certain information necessary for the exercise of one party's rights of defence will be held by the other party. Thus, it is critical to: (i) recognise that certain preparatory documents may be discussed and/or prepared jointly by the parties to a merger proceeding; and (ii) acknowledge that preparatory documents prepared by one party can be necessary to ensure the effective exercise of the rights of defence of the other party in a merger review proceeding.

In view of these considerations, applying a strict "client-own external legal counsel" standard and denying LPP protection to certain cross-party communications in a merger review context would be tantamount to denying the parties' effective exercise of the rights of defence.

These principles can be memorialised by merging companies in an agreement. When companies and their external attorneys engage in discussions about a potential transaction, they often enter into a joint defence and common interest agreement precisely with the purpose of allowing the exchange of documents and information so as to enable the external counsel of each party to provide legal advice to their respective clients in relation to the antitrust merger control aspects of the transaction.

While joint defence and common interest privilege are well established doctrines in the US and in the UK, the CJEU has not (yet) developed similar doctrines.

US federal courts and Delaware courts have acknowledged these principles. Recently, in *3Com Corp. v. Diamond II Holdings Inc.*, 2010, the Court of Chancery of Delaware held: "The Court once again looks to Rule 502(b) of the Delaware Rules of Evidence, which extends the attorney-client privilege to certain communications made by the client, his representative, or lawyer, to a lawyer "representing another in a matter of common interest." In the transactional context, "common interest" has been defined as an interest "so parallel and non-adverse that, at least with respect to the transaction involved, [the two parties] may be regarded as acting as joint venturers. […] Newco and Huawei appear to have had a common interest in obtaining CFIUS approval and seeing the merger to its completion. […] If the parties were in common interest with respect to the matters addressed, the communication will remain privileged."

UK courts have also recognised a similar concept of "common interest privilege". In the *Wintherthur* case, 2006, a UK Commercial Court held that "where a communication is produced by or at the instance of one party for the purposes of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this "common interest privilege" must be the common interest in the confidentiality of the communication."

Under the current rules on LPP as applied by the EC, there appears to be a potentially dangerous gap, as the LPP rules applied to its document production RFIs seem to limit LPP to client-own external legal counsel communications, or internal notes incorporating legal advice from own external legal counsel, or preparatory documents for one party's own external legal counsel. This may lead to a violation of the rights of defence of the parties to a notified concentration sharing a common interest in obtaining a clearance decision. Therefore, an official position by the EC or a judgment of the CJEU addressing these issues appears to be necessary.

Waiver of US LPP

Another risk that parties to a merger proceeding currently face is the unwanted waiver of US LPP in the context of a document submission to the EC. Documents requested by the EC frequently include a substantial amount of documents covered by US LPP that however do not qualify for LPP under EU rules (e.g. in-house counsel communications).

In recent cases, so as to mitigate the risk that US LPP would be waived as a consequence of a submission to the EC, the parties requested that the EC issue an Article 11(3) EUMR decision pertaining to the document production. The issuance of an Article 11(3) decision essentially compels the parties to produce the documents to the EC under penalty of a fine. While not entirely straightforward, a document production under such circumstances is less likely to amount to a waiver of US LPP. Here again the merging parties would welcome the EC issuance of procedural guidance that resolves these inconsistencies in application and preserves LPP.

Conclusion

The reliance on the use of internal company documents by the EC in its merger control investigations raises a legitimate question of whether the existing rules on LPP are sufficiently clear or suitable to the specifics of EUMR proceedings. In particular, certain internal documents and cross-party communications in a merger review context must be accorded LPP protection. The risk would be a denial of one party's or both parties' effective exercise of the rights of defence.

Given the potential inconsistent outcomes of a strict interpretation of the existing EU rules on LPP, guidance from the EC or a ruling by the CJEU on these points would be most welcome.

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