

Member States to request the Commission to review them. Under this approach, however, virtually any significant transaction could be called in for EU review, creating a high degree of legal uncertainty. Clear guidance on the new approach will be essential.

The Commission is also promising changes to its internal procedures to expand the current simplified procedure and further reduce the burden on mergers reviewed under that procedure. Such initiatives would be welcome and indeed were expected following the 2016 Consultation. Efforts to reduce the burden on companies notifying transactions that don't qualify for the simplified procedure, going beyond the 2016 Consultation, would also be very welcome.

The Commission's most ambitious merger reform goals, reviewing the impact of high-profile past decisions and re-assessing its approach to significant future transactions, will be a multi-year project. These initiatives will also be welcome, though it seems unfortunate to defer revision of the Commission's merger guidelines until the Hutchison/Telefónica appeal is resolved. In recent years, the Commission has significantly developed its case law in important areas not fully addressed in the existing guidelines, such as innovation competition and big data. The antitrust community would benefit from an interim update of the current guidelines to reflect these changes.

ENDNOTES:

¹“Consultation on evaluation of procedural and jurisdictional aspects of EU merger control,” available at https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.

²See, “A Franco-German Manifesto for a European industrial policy fit for the 21st Century,” available at [https://www.bmw.de/Redaktion/DE/](https://www.bmw.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2)

[Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2](https://www.bmw.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2).

³ Executive Vice-President Margrethe Vestager, “The Future of Merger Control,” available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

⁴ Commission Notice on a simplified procedure for treatment of certain concentrations, available at https://ec.europa.eu/competition/mergers/legislation/simplified_procedure.html.

⁵ Peter Ormosi, Franco Mariuzzo, and Richard Havell, “A review of merger decisions in the EU: What can we learn from ex-post evaluations?,” available at <https://ec.europa.eu/competition/publications/reports/kd0115715enn.pdf>.

⁶ FTC to Examine Past Acquisitions by Large Technology Companies, available at <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

⁷See <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200065en.pdf>.

ATTORNEY-CLIENT AND COMMON INTEREST PRIVILEGE IN ANTITRUST MERGER REVIEW

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A federal magistrate judge in the U.S. District Court for the Middle District of Pennsylvania recently issued a ruling on the scope of the attorney-client and common interest privileges in communications between attorneys, clients, and third parties made during the antitrust merger review process. The opinion illustrates the risk that common types of communications between anti-

trust counsel, clients, and third parties in an anti-trust investigation may not be protected from discovery in subsequent litigation.

Background

In connection with Walgreens' proposed acquisition of Rite Aid, shareholders filed an action alleging that certain Walgreens executives made misleading statements about the likelihood of a successful resolution of the Federal Trade Commission's ("FTC") antitrust investigation of the transaction. The companies terminated their merger agreement in January 2017 following feedback from the FTC that led them to believe that the parties would not have obtained FTC clearance to consummate the merger.¹ The companies subsequently entered into an asset purchase agreement in which Walgreens agreed to acquire 1,931 stores and related distribution assets an inventory from Rite Aid. The parties completed the transfer of stores in March 2018.

The plaintiffs sought discovery of communications from Walgreens' attorneys to the company, with the Federal Trade Commission staff attorneys, and with Fred's, the proposed buyer of stores to be divested to resolve the FTC's antitrust concerns. Walgreens withheld or redacted documents that contained communications between in-house and outside counsel about the merger review process, claiming that the attorney client privilege or the common legal interest privilege protected the materials from discovery.

The Communications at Issue

The types of attorney communications addressed in the opinion are communications that antitrust lawyers routinely prepare during a merger investigation. The court ordered Walgreens to produce nearly all of the withheld communications or

at least produce them with legal advice redacted. The challenged materials included:

- *Lawyer communications summarizing meetings, discussions with the FTC staff, and feedback from the FTC on the status of the merger review.* The court determined that these materials could not be withheld as privileged unless the summaries were "incidental" to or "inextricably intertwined" with the provision of legal advice. The court permitted the defendants to redact the portions of the documents that contained legal advice.
- *Reports from outside counsel to Walgreens about the status of the FTC's review or discussions with the FTC staff.* According to the court, these communications relayed information that "originate[d] from the FTC" and therefore could not be withheld.
- *Communications about the sale process for store divestitures to resolve the FTC's concerns.* The court held that these communications did not contain legal advice and therefore were not privileged.
- *Attorney comments on draft press releases, investor call scripts, and media statements prepared during the merger review process.* The court held that these communications were not privileged unless the documents were created with the primary purpose of giving or obtaining legal advice.
- *Walgreens' communications with Rite Aid and Fred's, the proposed buyer of divested assets.* The court held that these communications were protected by the common interest privilege because all three companies shared a common interest in obtaining FTC

clearance. The court, however, also held that Walgreens waived the privilege when it raised the issue of the company's knowledge about the FTC review process as part of its defense, putting these facts in issue in the shareholder litigation.

Conclusion

This case illustrates that purely factual attorney communications to clients about the daily twists and turns of a merger review may not always be protected from future discovery, particularly where the documents are mostly or entirely factual recitations of discussions between company counsel and the FTC staff.

Attorney-client privilege analysis is always very fact-specific, and another court could hold that the privilege protects similar communications about the same topics. Indeed, there often is case law to support any colorable argument in defense of a claim of privilege, however, documents must contain legal advice or analysis in order to be protected from discovery. Merger reviews are fast paced and necessarily involve frequent lawyer-client communications about business facts and the status of the review. This case is a reminder to consider whether communications about the merger review are discoverable in future litigation. In particular, when appropriate, counsel should couch factual reports in legal analysis or advice, explaining the significance of facts for the legal analysis and how the facts affect legal advice or strategy.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

¹ Press Release, Rite Aid Corporation, Rite Aid Enters Into an Agreement with Walgreens Boots Alliance to Sell 2,186 Rite Aid Stores and Related Assets for \$5.175 Billion (June 29, 2017), <https://www.riteaid.com/corporate/investor-relations/quarterly-results/-/pressreleases/rite-aid-enters-into-a-n-agreement-with-walgreens-boots-alliance-to-sell-2-186-rite-aid-stores-and-related-assets-for-5-175-billion>.

CFIUS RELEASES FINAL REGULATIONS CHANGING MANDATORY FILING REQUIREMENTS

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On May 20, 2020, the Treasury Department issued proposed regulations to fundamentally change the mandatory filing requirement related to a foreign person acquiring control over, or making a covered investment in, a U.S. business involved with critical technologies in certain industry sectors. The proposed regulations also would modify slightly the separate mandatory filing requirement with respect to the acquisition of a substantial interest in a U.S. business that involves