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The EU's Battle For Transparency

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Law360, New York (December 05, 2011, 7:23 PM ET) -- Transparency is a hot topic in the European Union. In 1997, the Netherlands and Scandinavian member states insisted on including in the Amsterdam Treaty a provision that guarantees every EU citizen and resident a right of access to the documents held by EU institutions (see Article 15(3) of the Treaty on the Functioning of the EU). In 2001, the European Parliament and the Council jointly adopted the Transparency Regulation that governs this right of access (Regulation 1049/2001 of 30 May 2001, 2001 OJ L 145/43).

On its face, the Transparency Regulation appears extremely permissive. Its Article 2(1) reiterates the principle according to which any EU citizen or resident has a right of access to the documents held by EU institutions. The devil, however, is in the exceptions.

Under Article 4(1) of the Transparency Regulation, access to documents can be denied if their disclosure would compromise public interests (e.g., military matters, diplomatic secrets, financial policies) or individual privacy and integrity. This is rather straightforward, but things get more complicated with Articles 4(2) and 4(3).

EU institutions can rely on these provisions to refuse access if disclosure of a document would compromise private commercial interests, court proceedings or legal advice, inspections and investigations, or the administrative decision-making process. Given their broad wording, these exceptions were bound to become the crux of litigation.

Litigation was indeed inevitable in light of the regulation's growing popularity. In 2002, the European Commission received 991 access requests under the Transparency Regulation. By 2010, the number of yearly requests ballooned to 6,127. Typically, the commission communicates the requested documents; however, it has repeatedly used Articles 4(2) and 4(3) of the Transparency Regulation to deny disclosure in antitrust cases.

In 2010, the commission received over 550 access requests concerning antitrust matters. This number is hardly surprising. The commission has enormous antitrust powers: it can prohibit multibillion euro deals and impose fines of up to 10 percent of a company's global annual turnover. Moreover, EU antitrust investigations are notoriously opaque. The parties are granted access to file only at a very late stage in the proceedings and third parties normally do not have access at all. Companies involved in EU antitrust proceedings and litigation increasingly rely on the Transparency Regulation in order to circumvent these limitations.

Transparency vs. Antitrust

The documents that the commission is reluctant to disclose in antitrust cases can be divided into three categories.

The first category consists of the documents submitted by the parties to the commission during merger control and antitrust investigations. Third parties are often keen to have access to these documents in order to use them in an appeal against the commission's decision or in damages litigation.

The commission argued that the disclosure of these documents would compromise private commercial interests protected by Article 4(2) of the Transparency Regulation. The General Court, however, ruled that in merger control cases the commission should disclose nonconfidential versions of the parties' submissions or at least provide their detailed description (Case T-237/05, Odile Jacob v. Commission; Case T-111/07, Agrofert v. Commission). The court has not yet taken position on the disclosure of leniency statements made in cartel investigations.

The second category includes internal notes and opinions prepared by the commission's Legal Service. The Legal Service occasionally has to defend in court a position which differs from the one that it adopted during the administrative procedure. If the Legal Service's previous opinions are disclosed, the claimant would be able to point out these contradictions and undermine the commission's defense. The commission relied on Article 4(2) to deny access to internal legal advice. The General Court agreed that disclosure was not required, provided that legal advice related to a decision which could still be challenged (Case T-237/05, Odile Jacob v. Commission; cf. Case C-506/08 P, Sweden v. Commission).

Finally, numerous access requests target the commission's internal documents, such as briefing notes and draft decisions. The commission argued that disclosure of these documents would compromise its decision-making process and the effectiveness of its investigations. Unfortunately, relevant case law is a patchwork of inconclusive rulings and incoherent solutions.

For instance, in one case, the Court of Justice objected to the communication of internal documents relating to a state aid inquiry (Case C-139/07 P, Commission v. TGI). Conversely, in a more recent ruling, the court encouraged disclosure of internal documents relating to a merger control investigation, at least once the merger decision could no longer be appealed (Case C-506/08 P, Sweden v. Commission).

Transparency Wins? Not So Fast

The Transparency Regulation has emboldened the parties seeking access to the commission's antitrust files. But has it really opened a Pandora's box? Will claimants be able to force the commission to disclose highly sensitive documents, such as leniency applications?

The commission has been fighting very hard to prevent disclosure of these documents — or at least to delay their communication until they can no longer be used in litigation. EU courts have not yet ruled conclusively on these issues and several important cases are currently pending. The General Court will have to rule on several cases in which third parties rely on the Transparency Regulation to request access to leniency applications while the Court of Justice is currently reviewing appeals in the Odile Jacob and Agrofert cases mentioned above.

In 2008, the commission published proposed amendments to the Transparency Regulation. The commission suggested, inter alia, to exclude from the scope of the regulation documents submitted by natural or legal persons to EU institutions in the context of an administrative investigation (e.g., leniency applications) and documents submitted to courts by parties other than EU institutions.

The commission's internal documents would become accessible to the public only after the investigation has been closed. However, the European Parliament is strongly opposed to these proposals. The Parliament's civil liberties committee has recently issued a report that goes in the opposite direction and advocates narrowing down the scope of the regulation's exceptions. The battle for transparency rages on.

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