

Privileged Conversations: Netherlands Court Affirms In-house Privilege

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The ACC Docket *series "Privileged Conversations" is a collection of interviews and discussions on in-house privilege and ACC's efforts to defend it worldwide.*

ACC filed a submission before the Rotterdam District Court in July 2020 in support of Royal Dutch Shell's position that in-house privilege attaches to the work of in-house counsel who are members of the Bar or Law Society in a jurisdiction that recognizes the privilege. The case arose from a 2016 investigation into the acquisition of the Etosha offshore oil field by Royal Dutch Shell in Nigeria. A Dutch magistrate had ruled that documents prepared by Shell's in-house lawyers were discoverable because they were not prepared by a Dutch Bar member who had signed a "professional charter" (as a "Cohen Advocate") guaranteeing their independence. The magistrate also held that the professional independence of the entire in-house legal department was vitiated because Shell's Head of Legal sat on the company's Executive Committee.

On appeal, ACC intervened to ask the Court to recognize legal privilege for in-house lawyers whose work was protected in their home jurisdictions. The Court agreed with many of the principles advocated by ACC and others. It affirmed that each country could make its own legal privilege laws and recognized that in-house privilege is protected in many countries. The District Court held that long as an in-house lawyer is qualified to practice in a jurisdiction that extends legal privilege to in-house counsel and meets the requirements there, the privilege will be honored in the Netherlands. In-house counsel working permanently in the Netherlands, even if registered outside the Netherlands, must sign a "professional charter" certifying their independence in order to benefit from legal

privilege.

The Court did not lend any support to suggestions made at first instance that, where a general counsel sits on a company's board, that could vitiate the independence of, and privilege claims by, the company's legal department as a whole.

ACC was represented by Paul Gilbert, a partner in the London office of Cleary Gottlieb. He spoke with the *Docket* about his practice and why in-house privilege in business is necessary.

An interview with Paul Gilbert of Cleary Gottlieb

ACC: Why were you interested in working with ACC on this case of in-house privilege?

ACC is uniquely placed to present the perspective of in-house lawyers in this debate and in the Dutch courts. Its research provided compelling evidence showing the beneficial effect if in-house privilege and reasons for encouraging in-house lawyers to be given a seat on company boards and other decision-making bodies.

Legal privilege is a fundamental right of due process. It is essential to encouraging full and frank communication between lawyers and their clients. It's not only important for the individuals and companies that finds themselves under investigation; it also promotes legal compliance and fair administration of justice to the benefit of society as a whole.

Companies and their boards will think twice about asking for legal advice if they fear it's not protected. And yet legal privilege has been under attack on many fronts, at least in Europe. In-house advice is not protected before the European Commission. In England, for example, only advice given to a narrow "directing mind" of the company is protected. We should all care about any attempts to chip away at what's left.



Paul Gilbert, a partner in the London office of Cleary Gottlieb

Why is legal privilege protection important for companies and their counsel?

The justification for recognizing in-house legal privilege is no different from the reasons for protecting any legal privilege. All legal advice should be offered freely and openly, without risk of discovery by regulators or courts.

Also, in-house lawyers play an even more important role in ensuring legal compliance, and may provide advice more efficiently than outside counsel. We explained this in our court submissions. Large organizations, in particular, rely on in-house legal departments as a cost-effective way to manage their legal challenges and encourage high standards of compliance. And in-house lawyers can often provide legal advice more efficiently because they have an unparalleled depth of knowledge about their client and have developed a relationship of trust within the company.

What was the crux of your argument?

A Dutch magistrate had issued a highly controversial ruling at first instance. She found that foreign in-house lawyers based in the Netherlands did not benefit from legal privilege because they had not signed a “professional charter” — a formal document under Dutch law that certifies their ability to give independent advice. This is largely a formality. More controversially, the magistrate went on to suggest that no foreign in-house lawyer, whether based in the Netherlands or elsewhere, could benefit from legal privilege because there were no other guarantees of independence and because Shell’s Head of Legal sat on the company’s Executive Committee.

Our submissions focused on three main arguments.

- First, we showed that in-house lawyers were subject to strict professional rules of conduct and ethics in their home jurisdictions. If a lawyer fails to comply with their professional conduct obligations, they face a range of serious consequences, including having their practicing rights revoked. Put another way, there are more than adequate guarantees of professional independence for in-house lawyers.
- Second, for the reasons I’ve already mentioned, there are strong policy reasons for ensuring that in-house legal advice is protected.
- Third, it made no sense to conclude that allowing a general counsel to sit on a company board should undermine their independence or that of their team. The opposite is true. Relying on research by ACC, we were able to demonstrate that involving senior counsel in board decisions ensures that legal advice is presented directly to decision-makers at the critical time and strengthens a culture of compliance across the organization as a whole. If it had stood, the magistrate’s ruling could have forced companies to demote their in-house legal advisers to more junior roles and exclude them from having direct and

contemporaneous access to the decision making. That would have been a perverse outcome.

What does this ruling mean for in-house counsel in Europe and those who wish to practice in Europe?

The Court found that in-house lawyers based in the Netherlands have to enter into a “professional charter” before their advice can benefit from legal privilege. That is largely a recognition of their independence and does not call into to question the wider principle of in-house legal advice.

More importantly, the Court has held that foreign lawyers working outside the Netherlands can benefit from privilege in Dutch proceedings, provided that advice would be protected in their home jurisdiction. This is the only relevant criterion; the judgment does not lend any weight to the suggestion that a lawyer’s independence depends on whether the company’s general counsel sits on its board.

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The judgment is welcome for three reasons. First, the judgment reaffirms that the narrower EU privilege rules do not apply in national proceedings in EU countries. Second, it is a welcome restatement of the principle that in-house lawyers should be entitled to rely on legal privilege, even when advising outside their home jurisdiction. Third, and at the risk of repeating myself, it would have been perverse if the Dutch Court had prevented companies from including in-house lawyers in decisions by their boards.

Tell us about your background and what you enjoy most about law or being a lawyer.

It’s because I’m an antitrust lawyer that the question of in-house privilege is close to my heart. We spend a lot of time working with in-house lawyers who are advising on difficult judgement calls, working to create robust company compliance policies, or carrying out internal investigations. These projects rely on in-house counsel being able to give honest and independent advice to their clients.

Like many UK lawyers, I didn’t study law as an undergraduate, but came to it later — in my case after a degree in Classics and then flirting with a career as a Lloyd’s insurance broker. Since then I worked mainly as an antitrust lawyer in London and Brussels. For most of that time, I’ve been in private practice but I’ve also spent time at the UK competition agency, seeing cases from the other side.

What I enjoy most about my job is the sheer variety of work. As an antitrust lawyer, you have to get under the skin of whatever industry you’re looking at. One day it will be technology company, the next day pharmaceuticals, and the next day industrial chemicals. Each market has its own unique dynamics and economics. Learning how they work in enough detail to present compelling arguments to an antitrust authority or court is what keeps us fresh.

Want more? Read Privileged Conversations: Ruling in US Facebook Case Clarifies Attorney-Client Privilege and Work Product Doctrine for implications of the *Attorney General v. Facebook, Inc.* decision on internal investigations led by in-house counsel in the United States.

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