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Law & Economics Webinar

Legal privilege in the EU & the US: What's new?

Webinar - 16 September 2021*

> "The issue of legal privilege is an illustration of the conflict between the common law system and the civil law system."
>
> Jacques Buhart

Jacques Buhart

Jacques Buhart acted as moderator of the discussion. The issue of legal privilege is an illustration of the conflict between the common law system and the civil law system. The debate regarding legal privilege has its origins in the fundamental principle that the client has a right to seek independent legal advice. The critical criterion discussed was that pertaining to the independence of legal counsel. On the one hand, there is the concept of legal professional privilege (LPP) in the common law system. LPP is the main attribute of lawyers in common law jurisdictions. LPP belongs to the client and not to the lawyer, which means that it can only be waived by the client. On the other hand, in civil law systems, members of the bar are usually under an obligation not to disclose confidential information received from their clients (*"secret professionnel"*). Unlike LPP, this obligation is binding on the lawyer. One of the main issues that has arisen in Europe is whether a corporate legal counsel who is a member of the bar, but who is also bound to the company by an employment relationship, is entitled to legal privilege. This issue was first raised at the European Court of Justice in *AM&S Europe Ltd v. Commission* in 1982

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* Marie de Monjour drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

where, for the first time, the Court of Justice recognized the right of defence of each client. At the same time, it ruled that a lawyer employed by a company is in a situation of economic dependence. This means that he/she is not entitled to LPP, even though he or she is a member of the bar. This was later confirmed by the General Court in 2007 and by the Court of Justice in 2010 in the *Akzo* case. In the period between those two cases, some EU member states amended their legislation and modified the status of corporate counsel. This is what happened in Spain.

In this context, two further aspects need to be addressed: whether LPP applies to internal investigations, and to what extent the protection afforded by LPP is maintained when using a cloud service to store privileged documents.

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Javier Ramírez Iglesias pointed out that the new Spanish General Statute of the Legal Profession that entered into effect in Spain on July 1st, 2021, applies to the whole legal profession in Spain, not only to in-house counsels. The new regulation does not make a difference between the in-house lawyer and a practitioner in a law firm, both are just different modalities of exercise of the legal profession, subject to the same rights and obligations. Under the previous legislation, in-house counsel was subject to the principles of freedom and independence in their professional practice, but there was not an explicit reference to professional secrecy. The new Spanish regulation completes this provision about the practice of law as in-house lawyer and adds that the in-house lawyer is also subject to professional secrecy in the performance of his duties. Thus, the express recognition of LPP for in-house lawyers in Spain will contribute to stronger preventive compliance. As stipulated in the Regulation, legal privilege *"extends to all facts, communications, data, information, documents, and proposals known, issued or received by legal professionals in the course of his or her legal practice"* (article 22). The legal protection of professional secrecy also applies to the persons who collaborate with the lawyer and is not limited in time but remains in place after representation has ceased. In addition, the new Spanish Regulation provides for the first time that all lawyers have the right to ask that any search of their premises by the authorities is conducted in the presence of the President of the Bar - or his/her delegate - to ensure that legal professional privilege is preserved during inspection of any seized documents, computer media or files.

There are two recent judicial decisions concerning the legal professional privilege space for foreign lawyer. Both have been adopted not in the context of competition law proceedings, but in connection with criminal investigations.

The first case that is relevant for the application of LPP to foreign lawyers is in the Netherlands. The case, *Royal Dutch Shell*, was decided by the District Court of Rotterdam on January 28th, 2021. The communications sent or received by 15 in-house lawyers working at Shell in several offices in the Netherlands and abroad were confiscated in the context of an investigation run in the Netherlands for events that were happening in Nigeria. Following a complaint by Shell, the public prosecutor requested an opinion from a examining magistrate that decided in October 2019 that none of these communications can be protected by legal professional privilege. First, for foreign in-house lawyers working in the Netherlands as visiting lawyers, and who had not executed the "professional charter" - a formal undertaking that must be signed by employed lawyers and their employer to certify their ability to provide independent legal advice, as explicitly required by section 5.12 of the Dutch Legal Professional Regulations - the examining judge denied the legal privilege. Moreover, this refusal was allegedly also justified by the lack of independence of the legal department because the legal director was part of the executive committee. Second, for the in-house lawyers registered in their respective bar associations but working abroad, the examining judge considered that they could benefit from the LPP as long as they benefit from it in their home jurisdiction. However, this was overridden by the same argument that before: Given the position of the legal director, it was considered that there was not a sufficient guarantee of independence of the whole Legal Department. This first ruling had extraordinary implications, because it could force Dutch companies to demote their GCs to lower levels and exclude them from having direct access to the decision making at executive level. On the contrary, in ACC's view, involving the most senior lawyer in the discussion and adoption of board decisions ensures that e to those decision makers at the critical time and promotes a culture of compliance across the company.

The case was appealed to the District Court of Rotterdam. ACC filed a submission to the Court in support of Shell's position that LPP should apply to in-house lawyers who are members of the bar

in a jurisdiction that recognizes their comms to be protected by LPP. The Court decided on 28 January 2021: First, foreign lawyers working in the Netherlands were assimilated to local lawyers registered in the Netherlands and were denied LPP because none of them had signed the "professional charter ". Second, for in-house lawyers working outside the Netherlands, it ruled that they were entitled to LPP since the local regulations applicable to them in their respective countries provide them with LPP. Third, the judgment does not provide any relevance to the argument that the independence of the whole Legal Dept is compromised if the Legal Director s a member of the Executive Committee.

Another relevant judicial decision has been adopted by the Swiss Federal Supreme Court on 22 June 2021, about the confiscation of documents concerning company A in connection with a criminal investigation for money laundering against another company B. Company A claimed LPP on all legal communications with its lawyers from Switzerland, EU, EFTA as well as third countries, but the Federal Supreme Court concluded that communications with lawyers from third countries is not subject to LPP. It is important to make clear that this concerns criminal proceedings, but there are some passages that provide that there could be potentially a more extensive protection in civil and administrative proceedings. This ruling is also welcome because it accepts as a lawyer to any legal professionals that are qualified as a "lawyer" in their respective EU member state, meaning that communications with in-house lawyers that are admitted to the bar in their respective country should be eligible for LPP protection in Switzerland.

Stéphanie Fougou

Stéphanie Fougou highlighted that the first law related to lawyers, external lawyers, and in-house lawyers was adopted in 1971. Since then, no other legislation was adopted allowing in-house counsel to benefit their companies of this legal privilege. The French government itself disclosed in 2021 a pre-bill aiming to review the legislation with regards to the issues relating to lawyers and the legal privilege of external lawyers. After many discussions, the idea was that in-house lawyers would be indicated at the bar and that there would be an experimentation for a time of five years during which it would slowly make the ability for everyone to get adapted to this new situation. The main objective was not to look at all the in-house lawyers, but only the ones that are fulfilling the conditions of capacity, which means have their diploma, have five years of experience in a company as an in-house counsel, and that they would have some decision-making power. However, the amendment of the legislation proposed at the beginning of 2021 was dropped possibly because of the main differences that are existing inside the country. However, in August 2021, an amendment was passed with unanimity to safeguard a little bit more the external lawyers, but still nothing for the in-house lawyers.

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> Stéphanie Fougou

Anthony Mariano

Anthony Mariano mentioned that in the United States, one of the ways that the government will handle potentially privileged materials is using filter or taint teams. This is a team of individuals, often including federal prosecutors, who are not and will not be working on that investigation or prosecution, tasked to review seized materials to determine whether they appear privileged or not. If they do not appear privileged, those can go to the prosecutors that are working on the actual case. If they are privileged or potentially privileged, then those privilege claims can be resolved through the privilege holder or by going to court to get a resolution on those claims. However, this process of the use of filter teams has come under some criticism from certain courts recently in the United States. Despite these criticisms, filter teams are going to continue to be used, though they will vary in composition and procedure based on the facts and circumstances of the case. Moreover, there are alternatives to filter teams. One of the alternatives is the Special Matters Unit. This is specific for the Fraud Section, and they handle filter team responsibilities as well as litigating privilege issues before a court on Fraud Section matters. Another alternative is to use special masters, private practitioners who can be the arbiters on questions of privilege.

In the US it is possible to lose privilege protection if the person has disseminated privileged material too broadly, beyond those with a need to know the information based on their job responsibilities. For example, if legal advice is placed on the cloud or on a shared drive and more people than necessarily have access to it, this is going to be a critical factor in determining whether that material will be protected or not.

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It is possible to define a set of persons within the organisation who need to receive high-level training on what it means to investigate.”

Clara Ingen-Housz

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Clara Ingen-Housz explained that to ensure that a company does not break the law it is important that it organises itself in a very professional way internally. For example, this can be done by developing dedicated compliance teams and compliance programs. This will first allow a self-assessment of the legal risks. Following this assessment, the company can establish its strategies to address these risks. In this perspective, it is possible to define a set of persons within the organisation who need to receive high-level training on what it means to investigate. It also means that the company must have a very detailed policy on how any document gathering, any document production, any interview of any person is going to be conducted in the context of an investigation. However, these mechanisms are easier for large companies to put into place because they require an important investment and an important dedicated number of people who will know how to lead an investigation. These internal investigations require companies to be more proactive and to invite employees to report more cases. There are a lot of advantages for a company to manage to conduct the whole process and come up with a complete internal investigation itself: speed; the sense of trust that people can come to us and talk internally without having an outside lawyer.

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The main risk would be for the company to accidentally waive the privilege by sharing a document with a person who is not involved in the legal world.”

Martin D’Halluin

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Martin D’Halluin noted that the use of the cloud is a reality. However, it also creates risks for in-house counsel and outside lawyers. First, for the in-house counsel, the risk is the accidental waiver. The main risk would be for the company to accidentally waive the privilege by sharing a document with a person who is not involved in the legal world. Then, the risk for the lawyers is to make sure that the confidentiality of the documents saved on the cloud is protected so that the privilege is also protected. ■