ACC Association of Corporate Counsel

By in-house counsel, for in-house counsel.®

Written comments of the Association of Corporate Counsel on the case AKIOLIS GROUP vs. France, Application no. 22585/22

1 February 2024

The Association of Corporate Counsel ("ACC") is a global association that promotes the common professional and business interests of in-house counsel who work for companies, associations and other organizations through information, education, networking opportunities, and advocacy initiatives. We have a worldwide network of legal professionals comprising more than 47,000 members, employed by more than 10,000 organizations, and spanning more than 100 countries. Our European group (ACC Europe) comprises more than 3,600 in-house counsels registered and located in 36 European countries.[1]

Part of our role is to file amicus curiae briefs in cases that we consider to be of significant importance for the effectiveness of in-house counsel. We do so in order to assist the court in understanding the implications of their decisions for the legal departments of companies and other private organizations, and the practice of law in a corporate setting more generally.

We have been made aware of the Akiolis case further to its publication on HUDOC on 25 September 2023. We have sought permission to intervene and this permission was granted by the Court by letter of 12 January 2024.

We hereby submit the following written comments.

This case raises an important issue related to the protection of the legal privilege in the context of internal investigations.

We understand that, during the course of a dawn raid at Akiolis in 2017, the French Competition Authority seized three binders bearing the label "Privileged and confidential / Attorney-client communication". We understand that those binders contained emails that were selected and annotated by external counsel, at the request of Akiolis in-house counsel. Those lawyers had carried out an audit review of employees' mailboxes in 2016, to identify potential competition law issues and material relevant to that assessment. They selected material that they considered to be relevant, organised that material, and presented it as part of their advice on the company's potential exposure and how any legal risks could be addressed.

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1 European countries where members of ACC are located include Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Gibraltar, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and United Kingdom.

The Paris Court of Appeals refused to annul the seizure of those binders on the basis that they contained internal emails and these underlying emails did not include any analysis from external counsel. The Court also found that there was no proof that the binders had been prepared by external counsel. This is a factual question on which ACC is not well placed to comment.

Akiolis' appeal to the French *Cour de cassation* was dismissed. In its application to the ECHR, Akiolis argues that seizure of the binders was in breach of attorney-client privilege and violated article 8 of the European Convention on Human Rights, which protects the right to privacy and private communications, and article 6, which protects the right to a fair trial, including the right to remain silent and to not incriminate oneself.

We do not seek to repeat or critique the detailed legal submissions made by the parties to this litigation. We confine ourselves to the specific topics on which ACC is best placed to comment. As the largest global association of in-house counsel, our members regularly undertake internal investigations within their companies and interact daily with other lawyers (including external advisers) regarding the organization, conduct, and analysis of such investigations. Our comments therefore explain: (i) the importance of internal investigations for legal compliance within companies, (ii) the essential role that is played by lawyers in such investigations, and (iii) the absolute necessity that communications with legal advisers be protected by legal privilege.

I. The importance of internal investigations for law enforcement within companies

Every aspect of business life is now governed by laws and regulations that are increasingly complex and enforced by both judicial and regulatory authorities, at a national and EU level.

This has led companies to set up compliance programs, of which internal investigations are an integral part.

Internal investigation can be defined as "*the process launched by the company to determine whether or not there are grounds for suspecting possible breaches of its internal rules or the laws and regulations applicable to it. Its purpose is to establish the circumstances of a specific factual situation to enable the company to take appropriate measures, if necessary (change of policy, termination of contracts, disciplinary sanctions, change of management, tightening of controls and compliance policy, etc.) and to manage the consequences that may follow (for example, contacting the authorities, preparing for a criminal or regulatory investigation, or preparing for litigation)*".[2]

Events that may prompt a company to open an internal investigation may be internal (e.g., whistleblowing coming from an employee, a potentially abnormal situation revealed by internal controls and internal audits, an accident) or external (e.g., whistleblowing coming from a co-contractor, opening of proceedings by a public authority, or a potentially abnormal situation revealed in the context of an audit by a regulator).

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2 Guide « L'Avocat français et les enquêtes internes », Conseil National des Barreaux, General Meeting of 12 June 2020.

The internal investigation can cover a wide range of issues including ethical, commercial, social and potentially criminal issues.

The decision of a company to carry out an internal investigation serves a dual purpose: (i) to understand the facts (in complex structures such as large international companies, it is often difficult to have a clear picture of everyone's actions) and (ii) to determine the appropriate response.

The results of internal investigations are critical for companies in several respects.

First, they allow companies to identify behaviour that would put them at risk, and to remedy it. They facilitate compliance with law, and a compliance culture more generally.

Second, they allow companies to exercise their rights of defence in the context of an existing or future investigation by public authorities. To be able to defend itself effectively, a company needs to understand the possible breaches of the legal or regulatory framework that have occurred. This not only enables a company to develop its defence strategy, but also allows companies to demonstrate to regulators and other authorities that they took appropriate steps to put an end to any non-compliant practices.

Internal investigations are therefore critical to ensure and enhance legal compliance.

II. The role of counsel in internal investigations

Internal investigations are an essential part of a lawyer's role in advising private entities.

Lawyers advise their client companies on legal issues and strategy and assist them in litigation or pre-litigation situations. It has always been one of the lawyer's roles to gather factual information, analyse the legal risks incurred by their client, and suggest the best course of action.

Lawyers, both external and in-house lawyers, bring specialist skills that allow companies to ensure that internal investigations are conducted efficiently, i.e. they can identify the facts that are relevant to analyse a specific legal issue, assess the legal risk based on those relevant facts, advise the client on how to remedy potential legal breaches and define a defence strategy in an existing or potential litigation. They can, for instance, assess whether it is advisable to seek a negotiated settlement with public authorities, or to make a leniency application.

The use of lawyers to conduct international investigations also provides certain guarantees for the company. Lawyers are subject, in all circumstances, to codes of ethics that guarantee investigations are carried out thoroughly and independently.

For the company, this ensures that an internal investigation will be conducted with independence and objectivity. It also ensures that the rights of persons likely to be targeted by the investigation (such as individual employees) are protected, including before their data are reviewed and before they are interviewed.

Most importantly, the use of lawyers to carry out internal investigations is the only way to guarantee the confidentiality of the content of the investigation, because any communication with them as well as the product of their work will be covered by legal professional privilege, to ensure open and full communication with the client and its representatives.

III. Attorney work products in internal investigations must be protected by the legal privilege

The ECHR states "*while article 8 protects the confidentiality of all "correspondence" between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves*"[3]. Any interference with the legal privilege by a public authority must therefore pursue a legitimate aim (i.e., correspond to a pressing social need) and be proportionate to that aim. Seizure of legally privileged documents is generally considered to be disproportionate except when the lawyer is suspected of unlawful practices.[4]

To be effective, this protection must apply to exchanges between lawyers and their clients in the context of internal investigations.

As explained above, internal investigations are often used by companies to prepare their defence in existing or future investigations by public authorities. Therefore, lawyers cannot fulfil their fundamental role of defending their clients if exchanges with them during the internal investigation are not confidential.

In addition, investigative work can only be effectively carried out if it benefits from the full and complete protection that enables lawyers to communicate fully and frankly with their clients. As emphasized by the Supreme Court of the United States, the purpose of the privilege is also "*to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice.*"[5]

Companies would not normally grant their lawyers full access to their internal documents and data if the work product resulting from these investigations were not protected and must simply be handed over to public authorities. Access by public authorities to the results of internal investigations conducted would be particularly harmful for companies' right to a fair trial and right to avoid self-incrimination, since these investigations are precisely intended to identify unlawful behaviours that may be sanctioned by public authorities and to determine the right course of action, including vis-à-vis the public authorities.

And the advisers carrying out those investigations must be able to provide frank and effective legal advice without fear that their advice will be disclosed. Seeking advice that is not protected by legal professional privilege would be ineffective; it would undermine full and frank communication between client and counsel. Consider, for example, a lawyer that wishes to advise the company that a course of action would be unlawful. The business would be reluctant to provide the necessary information (or allow counsel to collect the necessary information freely from the internal sources), and the adviser may be reluctant to provide such candid

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3 Michaud v. France, case n°12323/11, §118.

4 *See* e.g. Laurent v. France, case n°28798/13; Smirnov v. Russia, case n° 71362/01.

5 Upjohn Co. v. United States, 449 U.S. 383 (1981).

advice, if they know the advice could be disclosed and potentially relied upon as incriminating evidence against the company in future proceedings. Moreover, employees and the company more generally, having a more limited understanding of the law, may be unwilling to disclose evidence to its lawyers that it believes it to be damaging when it is in fact exculpatory.[6]

For these benefits to be achieved, the protection of the legal privilege should cover all attorney work-products in relation to the internal investigation, and not just the investigation report. Indeed, the results of the internal investigation are often a collection of internal documents (including e-mails and similar communications) that were selected, organized and sometimes annotated by the external counsel, as we understand was the case for Akiolis.

Even if the underlying documents are not privileged per se, the collection is privileged because the selection and organization, and any annotation, reflects external counsel's legal judgment. A selection of a few relevant documents raising potential legal issues from the review of thousands of documents and their classification in relation to a category of unlawful practices is undoubtedly legal analysis. For corporate counsel, it is essential to be able to view the material on which a formal report or other advice is based. And again, giving access to such a selection of incriminating documents to public authorities, who could use the work performed by the lawyers against the company would necessarily violate the company's right to a fair trial and right to avoid self-incrimination.

ACC does not suggest that underlying emails that are part of daily business communications, without any involvement of lawyers, should become privileged retrospectively simply because they become relevant to a legal or regulatory investigation. But the careful and deliberate collection of materials by a lawyer that provides the basis for legal analysis and advice presented to a client must benefit from protection for the process of legal compliance to be effective. The authorities should themselves identify and select these documents from the company's files (excluding the collection specifically created by counsel in preparation for litigation or to provide legal advice).

In conclusion, lawyers play a vital role in internal investigations. This is possible only because the exchanges between them and their clients are confidential and protected from disclosure to public authorities.

In the absence of protection of the legal privilege, companies would not engage in serious and exhaustive investigations, with many adverse consequences for the companies themselves. That would limit their ability to identify non-compliant behaviours, analyse the risks incurred, prepare their defence and self-report to and/ or settle with public authorities.

In the end, it is legal compliance that would be undermined if privilege is not fully protected in the context of internal investigations.

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6 Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St. John's L. Rev. 191, 213 (1989).

We remain at your disposal to answer any question you may have.

Yours sincerely,

Susanna McDonald
Vice President and Chief Legal Officer
mcdonald@acc.com
+ 1 202.696.1556