

# Dutch Court Rules On Legal Privilege For In-House Lawyers

March 4, 2021

On January 28, 2021, the Rotterdam District Court handed down judgment in an appeal brought by Royal Dutch Shell (Shell) against an October 2019 magistrate ruling regarding the scope of legal professional privilege (LPP) over legal advice given by Shell’s in-house lawyers.<sup>1</sup> The judgment is a welcome clarification of the rules of LPP as they apply to in-house lawyers in the Netherlands and elsewhere.

The Court held that in-house lawyers (whether registered within or outside the Netherlands) working permanently in the Netherlands must enter into a “professional statute”—an agreement with their employer guaranteeing their independence—in order for their advice to benefit from LPP. The Court further held that legal advice from foreign lawyers working outside the Netherlands can benefit from LPP in Dutch proceedings if it is so protected under the rules in their home jurisdiction. Finally, the Court did not follow the reasoning that the magistrate had adopted, namely that LPP is denied if the in-house counsel reports to a General Counsel with a seat on Shell’s Executive Committee. Both parties are lodging appeals against the judgment to the Dutch Supreme Court.

The significance of the judgment goes beyond the Netherlands, as it emphasises the importance of LPP for in-house counsel, upholds the relevance of national rules on LPP, and supports the representation of internal counsel at the highest level of company management. Conversely, it highlights that companies with in-house lawyers established in foreign jurisdictions should be alive to local rules governing LPP, which may be stricter or require positive action before foreign in-house lawyers’ advice benefits from LPP.

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<sup>1</sup> Judgment of the Rotterdam District Court of January 28, 2021, ECLI: NL: RBROT: 2021: 527 (the Judgment). Cleary Gottlieb assisted in-house counsel associations in the preparation of legal and policy arguments for the recognition of LPP for in-house counsel.



## Background to the Appeal

The appeal arose from a bribery investigation into Shell's acquisition of exploration rights in relation to an oil field in Nigeria. During the course of that investigation, in 2016, the Dutch public prosecutor seized documents that were sent or received by fifteen Shell in-house lawyers. These lawyers were registered in jurisdictions outside the Netherlands. Some were established (*i.e.*, permanently based) in the Netherlands, whereas others were established outside the Netherlands. Following a complaint by Shell, the public prosecutor submitted the seized documents to an examining magistrate requesting an opinion on whether the documents were protected from disclosure by LPP.

In October 2019, the magistrate decided that none of the fifteen Shell in-house lawyers could be considered "*holders of confidential information*" within Section 218 of the Code of Criminal Procedure and that they were therefore not entitled to LPP in the Netherlands.<sup>2</sup> The magistrate found that the lawyers in question fell into two categories.

- The foreign in-house lawyers established in the Netherlands were found not to benefit from LPP: (i) because the company and the lawyers had not executed a "professional statute" guaranteeing their independence as "*Cohen advocaten*", as required by Section 5.12 of the Dutch Legal Profession Regulations; and (ii) because Shell did not put any other measures in place to guarantee their independence. The order stated: "*There are indications to the contrary now that the head of the Legal Department is a member of the Executive Committee and is therefore one of the persons responsible for the general course of affairs within Shell. This will jeopardise the independent position of the Legal Department and therefore that of the foreign in-house lawyers working within the legal department.*"
- For the foreign in-house lawyers established outside the Netherlands, the magistrate stated that "*it must be assumed that they can in principle rely on confidentiality*" in the

Netherlands if they benefit from LPP in their home countries. The magistrate nevertheless went on to state that "*in this case the head of the Legal Department forms part of the Executive Committee. As a result, the independence of the Legal Department and the persons working for it is not sufficiently guaranteed.*"

Shell appealed the magistrate's decision to the Rotterdam District Court.

## Judgment of the District Court

On January 28, 2021, the Rotterdam District Court handed down judgment on appeal, overturning the magistrate's decision in part.<sup>3</sup>

As a starting point, the Court held that different jurisdictions are, in principle, free to make regulations and formulate requirements regarding the practice of law, whether lawyers are employed or self-employed. In the Netherlands, independence is a "*decisive element*" when deciding whether an in-house counsel can benefit from LPP protection within Section 218 of the Dutch Code of Criminal Procedure. But an in-house lawyer's professional conduct rules and "*the good intentions of the in-house counsel and his employer*" are insufficient guarantees of independence. Instead, the Dutch Legal Profession Rules require in-house lawyers and their employers to put in place a signed professional statute, which "*protects the independent practice of the lawyer against undue influence by his employer with whom, by definition, there is a hierarchical relationship.*"

The Court then considered the application of these principles to foreign in-house counsel, distinguishing between those established in the Netherlands and those established outside the Netherlands.

For foreign in-house lawyers established outside the Netherlands, the Court held that the mere circumstance that those in-house lawyers were employed by a subsidiary of a Dutch company was insufficient to justify their being subject to the applicable Dutch legislation. It must therefore be assumed that those lawyers were entitled to rely on

<sup>2</sup> Judgment of the Rotterdam District Court (Cabinet of Examining Magistrate) of October 7, 2019, ECLI: NL: RBROT: 2019: 7856.

<sup>3</sup> Judgment, pages 9-13.

LPP insofar as their home jurisdiction rules permitted. By the same logic, one Shell in-house counsel established in Switzerland did not benefit from LPP as they were not entitled to LPP protection as a matter of Swiss law.<sup>4</sup> The Court therefore overruled the magistrate’s decision in relation to this category of in-house lawyers, with the exception of the lawyer working permanently in Switzerland.

For foreign in-house lawyers established in the Netherlands, the situation is “*fundamentally different*”.<sup>5</sup> For these lawyers, the Court placed great weight on the professional statute as a “*safeguard*” for in-house counsels’ independence.<sup>6</sup> There was no reason to distinguish foreign in-house lawyers established in the Netherlands from Netherlands-registered in-house lawyers working in the Netherlands. Due to the absence of a signed professional statute, it could not be assumed that the foreign in-house lawyers established in the Netherlands complied with the requirement of independence. The statute is “*not just a paper formality*,” and the absence of a signed statute is sufficient to deprive an in-house counsel of their “*position of holder of confidential information*”. This group of three in-house lawyers was therefore not entitled to LPP protection under Section 218 of the Dutch Code of Criminal Procedure.

Both Shell and the Dutch Public Prosecutor are lodging appeals to the Dutch Supreme Court.

## Observations

The judgment is a welcome clarification of the position under Dutch law of LPP for in-house lawyers:

- First, the judgment affirms that the rules of LPP in foreign jurisdictions will be recognised in respect of in-house lawyers registered and

working abroad, even if they provide legal advice to a Netherlands-headquartered company. Whether or not these in-house lawyers’ advice benefits from LPP depends on the law of their home jurisdiction. Under Dutch law, LPP is not just a right of the client, but can be invoked also by the lawyer independently.<sup>7</sup>

- Second, the judgment provides clear guidance to multinational firms that have in-house lawyers established in the Netherlands, whether they are registered with the Dutch bar or in their home jurisdictions: they must *all* sign (and their employers must countersign) the professional statute in order to guarantee their independence and benefit from LPP protection in the Netherlands. Once the statute is signed, the advice of foreign in-house lawyers based in the Netherlands, who benefit from LPP in their home country, is protected by LPP in Dutch courts on the same basis as the advice of Dutch in-house lawyers. This is a welcome clarification to the magistrate’s ruling, which had anticipated that, absent a signed professional statute, the independence of Shell’s lawyers could have been guaranteed in some other way, but the magistrate did not specify how Shell might have done so.
- Third, the judgment lends no support to the magistrate’s ruling that the independence of Shell’s entire legal department had been vitiated because the General Counsel was a member of the company’s Executive Committee.

Although the Court’s ruling is specific to Dutch law, it is a welcome recognition of the principle that the advice of in-house lawyers should benefit from LPP even when they are working or advising in-house clients outside their home jurisdictions.<sup>8</sup> Companies

<sup>4</sup> Judgment, pages 11-12.

<sup>5</sup> Judgment, page 12.

<sup>6</sup> *Ibid.*

<sup>7</sup> Dutch Supreme Court, Case 19/03244, February 19, 2021, ECLI:NL:HR:2021:273.

<sup>8</sup> In-house counsel LPP is not recognized universally, and is denied in proceedings before the European Commission. See Case 155/79 AM&S Europe Ltd. v Commission [1982] ECR 1575, ECLI:EU:C:1982:157, and Case C-550/07 P AKZO v Commission [2010] ECR I-8301, ECLI:EU:C:2010:512. See also Maurits Dolmans & Dr.

John Temple Lang, *The Independence of In-house Counsel, and Legal Professional Privilege in the EU*, in *Independent by Design* (Coen and Roquilly Eds). There are limitations to LPP in other jurisdictions too. In a recent decision with potentially far-reaching implications, *Alasaad v. Mayorkas*, Nos. 20-1077, 20-1081, 2021 WL 521570 (1st Cir. Feb. 9, 2021), the U.S. First Circuit rejected First and Fourth Amendment challenges to U.S. government agency policies governing border searches of electronic devices, potentially exposing LLP materials to discovery. See Alert Memorandum [here](#).

should nevertheless remain alert to local jurisdiction rules on LPP whenever their in-house lawyers move from one country to another, as local rules may take precedence over the rules in the lawyer's home jurisdiction.

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