

Lawyers question judge's peculiar ruling in Shell privilege case

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Shell oil company (Credit: iStock.com/RiverNorthPhotography)

Legal experts in the Netherlands have said that a recent privilege ruling against Anglo-Dutch oil company Shell will likely not stand up in an appeals court.

The comments were made after the District Court of Rotterdam ruled on 7 October that Shell's in-house lawyers were not covered by legal privilege as they were not sufficiently independent from their external counsel.

The court gave two main reasons why the in-house counsel's independence could not be assured. Firstly, Shell and

its internal lawyers failed to sign a professional statute guaranteeing their independence, as required in the Netherlands. Secondly, the head of the company's legal department is also on the executive board, presenting a potential conflict of interest.

The decision forms part of an overarching bribery investigation by the Netherlands Public Prosecution Service (OM) into how Shell and Italian oil company Eni obtained the rights to a Nigerian oil field known as OPL 245. The companies are also on trial in Italy and deny wrongdoing.

Han Jahae at Jahae Raymakers in Amsterdam said the judge's decision is "difficult to understand", explaining that if in-house lawyers are entitled to foreign privilege protections, there is no logic in applying a different standard in the Netherlands.

"In short, I think there is a considerable chance that the decision will be overruled," Jahae added.

Maarten 't Sas at Simmons & Simmons in Amsterdam said that the court refusing to recognise the independence of the head of Shell's legal department, because they were also on the executive board, was unlikely to survive an appeal.

“The judge’s opinion is peculiar in my view,” he said. “This ruling in which the judge says the head of the legal department does not have enough independence is strange, as lawyers are supposed to safeguard their own independence by being compliant with Dutch bar regulations – they’re assumed to be independent.”

Ramifications for multinationals

Considering the ruling, the legal community said that corporations based in the Netherlands may wish to undergo structural changes to ensure the independence of their internal lawyers.

Niels van der Laan at De Roos & Pen in Amsterdam said that it might be worthwhile for corporates to rethink their structure if their legal department head is on the executive committee. Although, he cautioned against a knee-jerk reaction to a single verdict by a single judge.

’t Sas said the most obvious action companies will take is to make sure that all foreign in-house counsel based in the Netherlands have signed the professional statute.

“I would hope that if they had signed the statute, it would have been enough for the judge as they would have complied with local regulations,” he said. “The local regulations say nothing about the structure of the legal department, therefore I find the court’s assessment of the structure of Shell’s legal department incomprehensible.”

He recommended that Dutch companies provide an extra barricade for their communication with counsel to ensure that they are protected by privilege.

“In light of this specific ruling, communications between corporations and in-house lawyers in other jurisdictions should go through Dutch or foreign lawyers based in the Netherlands who have signed the professional statute,” he said.

The OM previously told GIR that it was pleased with the judgment but was waiting to see how the court ruled on the privileged status of the specific documents seized as part of the investigation. It said it would also wait for the outcome of Shell’s appeal against the ruling before continuing its probe.

The agency has also called for privilege reform in the wake of postponing the Shell probe to avoid such delays happening again in the future. The Dutch legal community, however, expressed concern that it was just a ploy to destroy the notion of attorney-client privilege.

Diluting privilege: a global trend

Sharon Oded at Norton Rose Fulbright in Amsterdam said the Shell privilege decision was yet another example of authorities watering down the power of legal privilege and that it affects many international corporations in the Netherlands.

“It goes into the broader discussion about the global trend of challenging privilege and the way courts sometimes compromise privilege around the world,” he said. “Companies are sometimes expected by enforcement authorities to give up their privilege to show that they are cooperating, but this all may have adverse consequences on the way companies would seek legal advice and act in investigations.”

Oded added the trend reneges on privilege's original goal: to make clients feel safe in sharing full and frank information with their counsel. Shrinking the scope of privilege may help authorities to win certain legal battles, but eventually everyone else will lose out, according to Oded.

"I believe it's the responsibility of the authorities to think about the impact of diluting privilege in this way," he said.

't Sas voiced a similar opinion: "It's too important a principle to be stripped away bit by bit. In the Netherlands, you can see the prosecution service is trying to restrict the scope of legal privilege, and I do not think it's a good thing."

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