New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 257—NO. 107
TUESDAY, JUNE 6, 2017

White-Collar Crime

Expert Analysis

Erosion of the Corporate Attorney-Client Protection in Europe

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The internationalization of white-collar practice has forced defense attorneys dealing with conduct in the corporate setting to become more aware of the disparate rules around the world regarding the protections for counsel's activities.[1] Recent investigative actions, including a highly-unusual raid on the Munich office of the U.S. law firm Jones Day by German authorities,[2] as well some notable European court rulings suggest an erosion of protections for attorney communications and work product in the corporate context. As a result, corporations operating globally face significant uncertainty regarding their ability to maintain confidentiality, especially in the context of internal investigations. Companies and their U.S. law firms must carefully consider the manner in which they conduct internal investigations abroad.

A recent landmark decision from the United Kingdom's High Court of Justice, a court of first instance, demonstrates this troubling trend. In *Director of Serious Fraud Office v. Eurasian Natural Resources*,[3] the London Court ruled that documents prepared during an internal investigation—or at least the early stages of such an investigation—are not protected by any privilege.

Europe and the European Union

In the United States, case law, statutes, and rules of professional responsibility protect counsel's activities in the corporate context, principally by means of the attorney-client privilege, applicable to attorney-client communications, and the work-product doctrine, which protects materials prepared by counsel in anticipation of litigation. The value placed on these protections abroad can be much lower. In many instances, protection for attorney confidentiality applies only to communications between lawyers and clients for the purpose of exercising the client's right of defense, and courts do not recognize the work-product doctrine as understood in the United States.

In practice, a number of other significant distinctions exist between protections afforded counsel activities in the United States and abroad. First, many European countries and the EU reject the application of any legal privilege to in-house counsel. Despite strong disapproval from bar organizations in those countries, these jurisdictions take the position that the privilege applies only to "independent lawyers" who have no employment relationship with the corporation. A soon-to-be-published survey of in-house counsel by the Association of Corporate Counsel reports that more than 60 percent of European respondents said the privilege does not apply to them.[4] Further, protection for counsel activities in Europe extends only to counsel who are admitted to a bar in one of the member states of the European Union. Thus, admission to a bar in the United States is insufficient to support such protection in Europe.

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In addition, a clear expectation exists among some European prosecutors that lawyers representing corporations should share the core product of their internal investigations with regulators—a position that stands in stark contrast to the current position articulated by the U.S. Department of Justice and Securities and Exchange Commission. Finally, aggressive actions by prosecutors overseas demonstrate little regard for the protection of attorney confidentiality in the corporate context. Prosecutorial raids of corporate offices to seize documents without regard for confidentiality or privilege are increasingly common, and recently have extended to the offices of outside corporate counsel. After raiding Volkswagen and Audi corporate offices in connection with the investigation of emissions fraud at Volkswagen, in March 2017, German prosecutors raided the Munich offices of Volkswagen's outside counsel, U.S. law firm Jones Day, seizing documents they believed relevant to the firm's internal investigation of the wrongdoing.

Media reports that the highly unusual[5] raid was conducted because of Volkswagen's lack of cooperation with German investigators. Jones Day is not alleged to have participated in any wrongdoing, yet in May 2017, the Munich Regional Court ruled that the searches were legal—a decision Volkswagen has vowed to appeal to Germany's highest court.[6] To justify its actions, the German government argues that the privilege does not apply because Jones Day was hired to conduct a limited internal investigation and was "not functioning as the company's legal representative."

The Case Involving ENRC

The European offensive against the protection for counsel activities in the corporate context recently found new ground as a result of the London High Court's decision in *SFO v. ENRC*. Between 2011 and 2013, the Serious Fraud Office (SFO) of the United Kingdom, an independent government department that investigates and prosecutes complex fraud and corruption, and Eurasian Natural Resources Corporation (ENRC), a multinational group of companies operating in the mining and natural resources sector, were engaged in discussions about ENRC's dealings in Kazakhstan and Africa.

Prior to and during this period, ENRC engaged two different law firms and forensic accountants to conduct an internal investigation into the related conduct. The law firm Dechert represented ENRC while it was in conversation with the SFO. According to the court's recitation of facts, representatives of ENRC and Dechert met with the SFO dozens of times over an 18-month period and shared information regarding allegations of wrongdoing. When ENRC fired Dechert in April 2013, the SFO terminated its discussions with the company and initiated a criminal investigation.

As part of its investigation, the SFO sought the production of documents generated during the internal investigation. These documents were requested primarily from third-party law firms and forensic accountants. ENRC objected to the production of those documents on the grounds of the United Kingdom's legal professional privilege, which encompasses a litigation privilege, covering any communication between a client and lawyer if litigation or adversarial proceedings have commenced or are anticipated, and a legal advice privilege, which protects advice given by lawyers to their clients.

The documents requested by the SFO included notes taken by Dechert attorneys of interviews of individuals, including past and present employees or officers of ENRC and its subsidiaries, their suppliers, and other third parties, about the events being investigated and documents indicating or containing the factual evidence presented by Dechert to ENRC's corporate governance committee in March 2013. All of the requested documents were the result of or prepared by counsel in connection with the internal investigation ordered by ENRC. Whether these documents were protected from disclosure by either of the legal professional privileges was considered by London's High Court. The Hon. Mrs. Justice Andrews DBE ruled that with one exception, the privilege did not apply to the documents prepared as part of ENRC's internal investigation into alleged misconduct.

Despite the company's ongoing discussions with the SFO and its internal investigation of allegations that people within the company had engaged in corrupt practices, the court found that ENRC was unable to show that it was "aware of circumstances which rendered litigation between itself and the SFO *a real likelihood rather than a mere possibility*." The court opined that although it is always *possible* that a criminal prosecution will result from an SFO investigation, it was not a foregone conclusion. Further, the court found no evidence that ENRC was investigating anything beyond unverified allegations. Accordingly, prosecution was not yet a real prospect, only a fear.

Interestingly, the court distinguished between civil and criminal proceedings, creating what seems to be a significantly higher bar for application of the legal professional privilege in the criminal context. The court observed that reasonable

grounds to anticipate a civil lawsuit arise much sooner because there is "no inhibition on the commencement of civil proceedings where there is no foundation for them, other than the prospect of sanctions being imposed after the event." On the other hand, criminal proceedings cannot be initiated until there is a "sufficient evidential basis for prosecution." Accordingly, the reasonable anticipation of a criminal proceeding is much less likely.

The court similarly dismissed ENRC's argument that the disputed documents were covered by the legal advice privilege, which attaches to all communications passing between the client and its lawyers in connection with the provision of legal advice. Specifically, notes taken by Dechert during the internal investigation were not covered because no evidence existed that any of the interviewed persons were authorized to seek or receive legal advice on behalf of ENRC. Similarly, evidence gathered by Dechert during the internal investigation was not privileged because it was intended to be used by ENRC to present to the SFO.

Attorneys acting in Europe would appear well advised to minimize the creation of investigation-related documents that may be subject to government seizure and to make clear to their corporate clients the uncertainties outside the United States regarding the legal protections for counsel's activities in the corporate context.

The court found to be protected by the legal advice privilege only a group of documents prepared by Dechert for the specific purpose of giving legal advice to ENRC's corporate governance committee in March 2013. It clarified, however, that the internal investigation reports, factual findings by the firm, and the underlying data upon which the documents were based would not be protected by the privilege because they were not generated for the March 2013 presentation.

Press reports indicate that ENRC will appeal the decision because "the effect [] is that a party who wishes to consult a lawyer in relation to an SFO dawn raid or criminal investigation is not entitled to the protections afforded by litigation privilege."[7] The court's ruling that the litigation privilege does not apply in these circumstances creates a real dilemma for corporate entities that seek to be proactive when allegations of wrongdoing arise. Arguably, any information obtained or prepared by the company and its lawyers in an attempt to investigate and analyze such allegations before substantiated proof of the same are subject to disclosure to the government.

Conclusion

The Jones Day raid and the decision in the ENRC case are only recent examples of the potential weakness of confidentiality protections for the activities of corporate counsel in Europe. U.S. law, as set forth in *Upjohn Co. v. United States*,[8] allows multinational corporations and their attorneys to conduct internal investigations with relative confidence that the confidentiality of documents prepared by attorneys and communications with attorneys will be respected. This is true whether the attorneys are in-house or outside counsel. In Europe, the same corporations and attorneys must navigate the minefield of different rules applicable in the EU and different European countries.

Attorneys acting in Europe would appear well advised to minimize the creation of investigation-related documents that may be subject to government seizure and to make clear to their corporate clients the uncertainties outside the United States regarding the legal protections for counsel's activities in the corporate context. To the extent possible, companies should endeavor to maximize the more extensive protection in the United States by conducting investigation-related activities, such as employee interviews and meetings with management, in the United States and involving U.S.-based lawyers. This approach, however, may sometimes be frustrated by applicable data protection requirements. In this evolving area, solutions may need to be tailored to the country and the circumstances.

1. Robert Anello, "Latest International Assault on Attorney-Client Privilege Causes Headaches for Corporations' Lawyers," The Insider Blog, Forbes.com (December 10, 2015); Robert J. Anello, "Clients in Cross-Border Investigations: Considerations Relating to Privilege," Business Crimes Bulletin (August 2012).

2. Jack Ewing and Bill Vlasic, "German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry," The New York Times (March 16, 2017).

3. [2017] EWHC 1017 (QB).

4. Richard Levick, "Volkswagen Under Siege: Unprecedented Search, Unanswered Questions," Forbes.com (April 17, 2017).

5. The authors could find only one other examples of a U.S. law firm being raided in a foreign country. In 2009, it was reported that the Russian interior ministry had raided the Moscow offices of DLA Piper and White & Case in connection with the investigation into the development of a hotel in Moscow. Sofia Lind, "DLA and White & Case Moscow Offices Raided in Fraud Investigation," The American Lawyer (June 17, 2009).

6. Linda Chiem, "VW to Appeal Raid on Jones Day to German High Court," Law360 (May 16, 2017).

7. "ENRC to Appeal Landmark Ruling," The Global Legal Post (May 10, 2017).

8. 449 U.S. 383 (1981)