

FULL HANDBOOK

Legal privilege global guide

Table of contents

About 5

Australia 5

Austria 13

Bahrain 16

Belgium 18

Brazil 21

Canada 26

Chile 31

China 35

Croatia 40

Czech Republic 43

Denmark 47

England and Wales 50

Egypt 55

Estonia 57

European Union 63

Finland 68

France 74

Germany 82

Greece 86

Hong Kong 89

Hungary 93

Ireland 98

Israel 103

Italy 105

Japan 108

Kuwait 113

Latvia 115

Lebanon 118

Lithuania 120

Luxembourg 123

Malaysia 126

Morocco 130

Netherlands 133

New Zealand 139

Norway 145

Oman 150

Poland 152

Portugal 156

Qatar 163

Romania 165

Russia 169

Saudi Arabia 174

Scotland 177

Singapore 182

Slovak Republic 187

Slovenia 190

South Africa 194

South Korea 196

Spain 203

Sri Lanka 207

Sweden 212

Thailand 216

Turkey 219

Ukraine 221

United Arab Emirates 223

United States 225

About

Welcome to DLA Piper's Legal Professional Privilege Global Guide, the ultimate guide to legal professional privilege around the world.

Legal professional privilege protects the confidentiality of communications between lawyers and their clients and it has become an exception to the general principle of public policy for full disclosure. It is, in substance, a fundamental human right.

Although the concept of legal professional privilege is universal, its scope and limitation differ between jurisdictions. We are aware that many of our clients operate on a global platform, so it is of critical importance that they are aware of these differences in order to make informed decisions about the countries in which they are active and about how their business interests may be protected.

This global guide is a dynamic resource containing up-to-date details of the varying concepts and scope of legal professional privilege across dozens of jurisdictions globally. New jurisdictions are regularly being added to the guide, so if you cannot find the jurisdiction you are seeking, please let us know.

How to use this guide

Let us provide a few examples:

1. You are a Compliance Director for a listed company located in Country A and you have found that problematic conduct has occurred within your subsidiary in Country B.

Scenario A: You are about to send an e-mail to your in-house colleague in Country B with a legal assessment of the conduct in question. Before you push the button, you think about the scope of legal privilege. You will ask yourself: "Does Country B protect in-house lawyer communications? Or can my e-mail be seized by inspectors or discovered in court?" Our guide provides a first answer.

Scenario B: You plan to forward the legal advice received from DLA Piper to your colleague in Country B. Then you ask yourself the following question: "What is the scope of legal privilege in Country B?" Indeed, virtually all jurisdictions recognize the concept of privilege, but there is a big difference in terms of when privilege applies (e.g. only after the start of an investigation) and how broad is the scope. Again, our guide provides a first answer.

2. You are a freshly appointed Compliance Director for your internationally active company, and no clouds darken your horizon - yet. Before launching a new communications policy, you want to find out about the underlying privilege issues.

Our guide provides initial guidance for your strategic legal communications and planning, and will help shape your strategy for sourcing and storing legal advice.

But remember, our Legal Professional Privilege Global Guide **does not constitute legal advice**. While this guide will be essential reading for those who need to find out more about the scope of legal professional privilege around the world, it is imperative that you contact the contributors to the individual chapters for more comprehensive guidance and legal advice in your particular case.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.



Australia

Last modified 28 June 2021

Concept of legal professional privilege

Legal professional privilege is derived from the common law and from legislation, such as the *Evidence Act 1995* (Cth), at both a state and federal level. It is important to remember that legal professional privilege (which is often referred to as client privilege) is a fundamental right that vests in the client. Legal professional privilege also applies in the context of criminal investigations and regulatory investigations by authorities such as the competition authority.

Communications that are protected by legal professional privilege include confidential communications between a lawyer and a client, one or more lawyers acting for the client, or lawyers acting for the client and a third person (such as an expert witness), if the dominant purpose of the communication is for providing legal advice or professional legal services, in relation to a current or anticipated legal proceeding.

Legal professional privilege also extends to confidential documents prepared for the purpose of giving or obtaining legal advice and for the purpose of a legal proceeding. Legal professional privilege may be abrogated by some common law exemptions and by the express and/or necessary implication of legislative provisions. For example, if a client seeks legal advice in an attempt to further a crime or fraud, this advice, and related communications, will not be subject to legal professional privilege. Further, a claim of legal professional privilege is unlikely to be able to be maintained if it is being used to frustrate a process of law.

Legal professional privilege in the context of civil litigation

In the context of civil litigation, where the court may order documents to be produced during processes such as discovery, such orders will not require documents that are subject to a claim of legal professional privilege to be produced. However, the documents will need to be identified in a list of documents that is provided to the party seeking discovery.

Legal professional privilege may be claimed when, as a third party, you are subpoenaed by a Court or required by a regulatory authority to produce documents. The process for making such a claim will depend on the court or regulatory authority and advice should be sought.

Scope of legal professional privilege

What is protected by legal professional privilege?

Communications and / or documents must be confidential and have occurred or come into existence for the 'dominant purpose' of obtaining legal advice or in relation to actual or anticipated litigation in order to attract legal professional privilege.

The purpose for which a communication occurs or a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's creator, or of the person who authorised or procured it, is not necessarily conclusive.

'Dominant' has been held to mean a 'ruling, prevailing or most influential' purpose. In determining whether the dominant purpose exists,

the courts will examine the circumstances of the case objectively, rather than considering the subjective view of the person making the communication.

Typically, legally privileged communications occur between a client and their legal adviser, but can include those between a client and a third party (eg consultant) where the client engages the third party to produce something (eg tax advice) for the purpose of obtaining legal advice.

If the dominant purpose test is met, legal professional privilege may extend to documents such as:

- Notes, memoranda or other documents made by staff of the client, if those documents relate to information sought by the client's legal adviser to enable legal advice to be provided
- A record or summary of legal advice, even if prepared by a non-lawyer, but not to the client's opinions on, or stemming from, the legal advice
- Drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer, whether or not they are actually communicated to the lawyer, or
- A lawyer's revisions of the client's draft correspondence

Are communications with in-house counsel protected by legal professional privilege?

In Australia, courts have considered whether in-house lawyers are protected by legal professional privilege by assessing whether they are acting in their capacity as a lawyer and have the requisite independence to provide unfettered advice.

To attract legal professional privilege, communications/documents must be made in a lawyer's capacity as a lawyer in order to provide the client (i.e. the company) with legal advice or for the purpose of actual or anticipated litigation.

Communications made by in-house lawyers who act beyond their role as a legal adviser (eg by weighing in on operational matters) will fall outside the scope of legal professional privilege. This is also the case if a communication or document is found to have been made for mixed purposes.

Exercising independent professional judgement is a key factor that will be considered in establishing whether in-house counsel is acting in the capacity of a lawyer. Claims for legal professional privilege have been rejected on the basis that in-house counsel have not acted at sufficient arm's length from their client, such as when documents are produced by in-house lawyers who are subject to the directions of their managers and therefore giving rise to the impression that they lack the necessary independence.

Legal professional privilege has also been denied in relation to communications where in-house lawyers have been involved in the commercial decision-making of a transaction.

Whether an in-house lawyer has a practising certificate has also been considered by courts in Australia when deciding whether legal professional privilege should apply to their advice. While failing to have a current practising certificate is not necessarily fatal to a claim of legal professional privilege, it may lead to a court inferring that the communications made and documents created by the in-house lawyer are not for the purpose of providing legal advice or for the purpose of litigation.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Legal professional privilege is available in relation to legal advice from foreign lawyers, provided that the 'dominant purpose' requirement is met.

How is legal professional privilege waived?

A client will be deemed to have waived legal professional privilege if the client acts in a way which is inconsistent with the confidentiality which the legal professional privilege is supposed to protect. Waiver of legal professional privilege may be implied in some circumstances.

It is important to maintain the confidentiality of communications and documents that legal professional privilege attaches to. Legal professional privilege has been deemed to be waived in circumstances where the substance, general essence or conclusion of legal advice has been communicated in a public forum such as a media statement, board papers that have been provided to third parties, through partial disclosure to a regulatory body of the contents of a document or during negotiations.

Legal professional privilege in the context of merger control

Under the *Competition and Consumer Act 2010* (Cth), the Australian Competition and Consumer Commission (**ACCC**) has broad powers to compel the production of documents, including by way of subpoenas and search warrants.

The general principles of privilege (as outlined above) apply to competition or merger control in Australia, and in respect of enforcement action taken by the ACCC.

Whilst it is clear that documents subject to legal professional privilege are protected from compulsory disclosure and requests for production by regulators (such as the ACCC), it is often impossible to ascertain if documents are privileged if the production of the documents is required immediately. If that is the case, the person or company that is the subject of the immediate requirement to produce documents, ought to identify the potentially privileged documents, and reserve the right to assert a claim of privilege. The potentially privileged documents should be produced separately, and in a sealed package, to the regulator. If agreement cannot be reached with the regulator as to whether the documents are privileged, the issue of privilege will be determined by the Court.

Typically, records of internal investigations will be privileged where they were generated for the purpose of providing legal advice on the subject matter of the investigation. On the other hand, records of a transaction will generally not be privileged, even if that transaction is later investigated.

Recent cases and/or other legal developments

Waiver of legal professional privilege

Recent cases have highlighted that parties and practitioners must take care to avoid the unintentional waiver of legal professional privilege.

For example, in *ASIC v Park Trent Properties Group Pty Ltd* [2015] NSWSC 342, the Supreme Court of New South Wales held that the defendant had waived privilege over legal advice provided in the preparation of a compliance manual by voluntarily disclosing the manual to the Australian Securities and Investments Commission (**ASIC**). Key to the Court's finding was that a) the legal advice shaped the substance of the manual, and b) the manual was deployed to obtain an advantage. This decision reaffirms that privilege can be waived by disclosing the effect of the legal advice, regardless of whether the advice itself is disclosed. Accordingly, it reminds parties to think twice before voluntarily disclosing compliance material that has been prepared by lawyers.

The Western Australian Supreme Court found that the privilege in lawyer-client emails may be waived if a third party is copied. In *TEC Hedland Pty Ltd v The Pilbara Infrastructure Pty Ltd* [2018] WASC 300, the central issue was whether the maintenance of the privilege is inconsistent with the use of the relevant communication. TEC had agreed to supply electricity to Pilbara. B&V, the party copied into the emails between TEC and its lawyers, had been engaged to perform a test procedure. The test procedure was one of the issues in dispute. The court referred to the Full Federal Court decision of *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237 and endorsed the principle that "*for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege*". The court concluded that TEC had waived privilege over the emails with its lawyers by copying B&V. This case confirms the importance of ensuring only essential parties, and not third parties, are copied into privileged communications.

In the related case of *TEC Hedland Pty Ltd v The Pilbara Infrastructure Pty Ltd* [2020] WASC 364, a recent case involving the same parties, the Supreme Court of Western Australia ruled a novel point not previously considered by the courts. The case involved the question of whether an email seeking legal advice that was sent to 10 recipients, only one of whom was a lawyer, would be protected by legal professional privilege. The Court held that, unless the dominant purpose of the communication is to settle instructions to the lawyer, only the copy of the email that is sent to the lawyer will be privileged. If the dominant purpose of the email was to obtain commercial views rather than legal advice, the communication would not be privileged.

Another recent case that considered waiver of privilege in the context of a regulatory investigation is *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511. This case involved a prosecution of cartel conduct offences, following an investigation by the ACCC into an institutional share placement undertaken by various financial institutions. JP Morgan Australia (**JP Morgan**) had been granted conditional immunity from civil and criminal action in relation to the ACCC's investigation. One of the conditions was that JP Morgan "*provide full, frank and truthful disclosure and cooperation to the ACCC and withhold nothing of relevance.*" JP Morgan later produced redacted copies of various documents to the ACCC, and asserted privilege over the redacted portions. The ACCC pressed for unredacted copies by way of a subpoena and, eventually, the parties agreed that JP Morgan would give partial disclosure to the prosecutor by reading aloud the portions of redacted documents. JP Morgan who maintained a claim of privilege in the document read out to the ACCC agreed to the partial disclosure because it thought it would risk losing its immunity by not complying with

the subpoena. However, the Federal Court ultimately found that the partial disclosure consisted a waiver of any privilege that JP Morgan had over the documents at the time they were created.

Illegality

The principle that legal professional privilege does not apply to communications made for improper and/or illegal purposes is well settled. The Federal Court has applied this principle in circumstances where the lawyers involved were not necessarily aware of the illegality. In *Aucare Dairy Pty Ltd v Huang* [2017] FCA 746, there was evidence to indicate that the defendant, Huang, had moved and/or placed ownership of assets of an insolvent company beyond the reach of Aucare, with whom the insolvent company had previously been in a failed joint venture with. The Court found that Huang's lawyers knew and/or participated in the alleged fraud, despite the plaintiff not having suggested this and there being no direct evidence that this was the case. The Court ordered production of privileged correspondence between Huang and her lawyers. This case emphasises that there is a risk that where there is evidence of illegality and/or improper purpose by a party, that party will not be entitled to legal professional privilege.

Directors

In *Equititrust Ltd (in Liq) (Receivers appointed) (Receivers and Managers Appointed) v Equititrust Ltd (in Liq) (Receiver appointed) (Receivers and Managers Appointed) (No.3)* [2016] FCA 738, the Federal Court held that a director may only claim privilege over documents containing legal advice if it relates in some way to the director in his/her personal capacity, and not merely to the operations of the company. A former director of Equititrust claimed privilege (both joint and common interest) over a range of documents produced by Equititrust that contained legal advice. The Court held that only 11 of the 625 disputed documents were privileged. In relation to joint privilege, the Court found that there was scarce evidence that the director had personal concerns in the matters raised by the documents disputed and clarified that: legal advice addressed to a director or 'the Directors' did not necessarily mean that the advice was provided on the basis of joint privilege; and the fact that a director was involved in procuring the legal advice did not on its own establish joint privilege. In relation to common interest privilege, the Court highlighted that commonality of interest is a prerequisite for the privilege to apply – the mere fact that legal advice was communicated to Equititrust does not mean that its directors had a common interest privilege in that advice; and the fact that a company can only act through its directors does not give rise to a common interest. This case reminds directors of the need to clearly identify legal advice obtained in their personal capacity in order for it to be subject to privilege. It is also important to remember that a director cannot assert legal privilege on behalf of a company once the company is in liquidation.

Trustees

In *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, Gina Rinehart claimed privilege over documents produced by her former lawyer pursuant to a subpoena issued by her daughter, Bianca, as the new trustee of the Hope Margaret Hancock Trust (Gina was the former trustee). The Supreme Court of New South Wales found that there was no evidence to support Gina's claim of privilege. Gina had not adduced any evidence about the circumstances and purposes of the disputed documents, including whether the documents had been created for Gina in her capacity as trustee. The Court noted that if the costs of obtaining legal advice are paid from the trust fund, the suggestion is that advice was obtained on behalf of the trust and not the trustee personally. This case reiterates the position that legal advice obtained by a trustee belongs to the trust and not the trustee personally.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

Internal Investigations

Legal professional privilege applies in the context of civil proceedings, criminal investigations and in the context of regulatory investigations by authorities such as the office of the Australian Information Commission (the primary privacy regulator in Australia).

The test for legal professional privilege in each context (internal, criminal and data protection matters) in Australia is the same.

Legal professional privilege is derived from the common law and from legislation, such as the Evidence Act 1995 (Cth), at both a state and federal level. In Australia, legal professional privilege (which is often referred to as client privilege) is a fundamental right that vests in the

client – not in or with the lawyer.

The test – in summary

Confidential communications:

between a lawyer and their client, one or more lawyers acting for the client, or lawyers acting for the client and a third person (such as an expert witness);

which are for the dominant purpose of providing legal advice or professional legal services; and

are in relation to a current or pending legal proceeding, are protected by legal professional privilege.

Legal professional privilege also extends to confidential documents prepared for the purpose of giving or obtaining legal advice and for the purpose of a legal proceeding. For example, a report/document prepared by a forensic IT consultant or an internal IT operative that is created to obtain legal advice will normally be privileged.

How is privilege lost?

Legal professional privilege may be abrogated by some common law exemptions and by the express and/or necessary implication of legislative provisions.

For example, if a client seeks legal advice in an attempt to further a crime or fraud, this advice and related communications will not be subject to legal professional privilege. Further, a claim of legal professional privilege is unlikely to be able to be maintained if it is being used to frustrate a process of law.

In the context of civil litigation, where the court may order documents to be produced during processes such as discovery, such orders will not require documents that are subject to a claim of legal professional privilege to be produced. However, the documents will need to be identified in a list of documents that is provided to the party seeking discovery.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

There is no limitation period placed on legal professional privilege in Australia.

c) Are communications to/by companies and in-house counsel protected by privilege?

In Australia, courts have considered whether in-house lawyers are protected by legal professional privilege by assessing whether they are acting in their capacity as a lawyer and have the requisite independence to provide unfettered advice.

To attract legal professional privilege, communications or documents must be made in a lawyer's capacity as a lawyer in order to provide the client with legal advice or for the purpose of actual or anticipated litigation.

Communications made by in-house lawyers who act beyond their role as a legal advisor (for example by weighing in on operational matters) will fall outside the scope of legal professional privilege. This is also the case if a communication or document is found to have been made for mixed purposes.

Exercising independent professional judgement is a key factor that will be considered in establishing whether in-house counsel is acting in the capacity of a lawyer. Claims for legal professional privilege have been rejected on the basis that in-house counsel have not acted at sufficient arm's length from their client, such as when documents are produced by in-house lawyers who are subject to the directions of their managers and therefore giving rise to the impression that they lack necessary independence.

Legal professional privilege has also been denied in relation to communications where in-house lawyers have been involved in the commercial decision-making of a transaction.

Whether an in-house lawyer has a practising certificate has also been considered by courts in Australia when deciding whether legal professional privilege should apply to their advice. While failing to have a current practicing certificate is not necessarily fatal to a claim of legal professional privilege, it may lead to a court inferring that the communications made and documents created by the in-house lawyer are not for the purpose of providing legal advice or for the purpose of litigation.

In a data breach/cyber incident, it is important that any in-house counsel makes it clear when they are giving legal advice and when they

are acting in an operational capacity – for example as an incident response coordinator which may involve giving commercial advice on how to respond to the incident.

d) Are there any specific requirements of a privileged incident response engagement letter?

Yes, it is recommended that external counsel engage any third parties required to assist with a response in order to best set up an ability to claim privilege over the work done.

All third-party engagement letters should include a statement that the third party is being involved for DLA Piper/in-house counsel to advise the affected entity.

b) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes.

Communications or documents must be confidential and have occurred or come into existence for the “dominant purpose” of obtaining legal advice or in relation to actual or anticipated litigation to attract legal professional privilege. The term “dominant” has been held to mean a “ruling, prevailing or most influential” purpose.

To avoid any later arguments as to what the dominant purpose of the document, it is recommended that a lawyer (internal or external) prepare the record of the interview if at all possible. If it is not possible for a lawyer to prepare the record of the interview, it should be clearly noted at the commencement of the interview that the purpose of the interview is to enable the affected entity to obtain legal advice.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

It does not matter whether the documents are located at the client or lawyer's premises.

c) How are seized documents put into evidence in a criminal/civil procedure?

Generally, privileged materials cannot be used in legal proceedings in Australia.

There are extremely limited circumstances where this general rule will not apply.

A party who claims privilege will generally have a right to object to use of privileged material. External counsel should be briefed as a matter of urgency if a government agency or third party attempts to use privileged materials.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

A client will be deemed to have waived legal professional privilege if the client acts in a way that is inconsistent with the confidentiality which the legal professional privilege is supposed to protect.

The waiver of legal professional privilege is available under several circumstances. Firstly, the privilege can be waived by disclosing the effect of the legal advice, regardless of whether the advice itself is disclosed. Accordingly, it reminds parties to think twice before voluntarily disclosing compliance material that has been prepared by lawyers.

Secondly, the privilege may be waived if a third party is copied into the communication. The principle endorsed by the Full Federal Court is that “for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.”

The legal professional privilege will also not apply in circumstances where the communications are made for improper and/or illegal purposes, notwithstanding the fact that the lawyers involved were not necessarily aware of the illegality. The Federal Court in *Aucare Dairy Pty Ltd v Huang* emphasised that there is a risk that where there is evidence of illegality and/or improper purpose by a party, that party will not be entitled to legal professional privilege.

Additionally, legal professional privilege may only be claimed by a company director over documents containing legal advice if the documents are related in some way to the director in their personal capacity and not merely to the operations of the company. The Federal Court found in *Equititrust Ltd (in Liq) (Receivers appointed) (Receivers and Managers Appointed) v Equititrust Ltd (in Liq) (Receiver appointed) (Receivers and Managers Appointed) (No.3)* that the fact documents containing legal advice were addressed to a director or "the Directors," or procured by a director did not mean that the director had personal concerns in the matters raised by the documents disputed or mean that the advice was provided on the basis of joint privilege.

The Court also held that commonality of interest is a prerequisite for common interest privilege to apply and that the mere fact the legal advice was communicated to Equititrust and that a company can only act through its directors did not mean that its directors had a common interest privilege in that advice.

Legal professional privilege was also dismissed in *Hancock v Rinehart* where the Supreme Court of New South Wales held that legal advice obtained by a trustee belongs to the trust and not the trustee personally. The Court noted that the costs of obtaining the legal advice were paid from the trust fund, and accepted the suggestion that the advice was obtained in behalf of the trust and not the trustee in her personal capacity.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

It may be possible that a company could wish to rely on a privileged report or documents created during an investigation. In those circumstances it will be necessary to waive privilege.

It may be possible to waive privilege only in that document but care must be taken.

External legal counsel should be engaged in any discussion about a decision to waive privilege as in Australia it is possible, through a concept called "issue waiver" to lose privilege over all materials relating to a particular topic.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

It will depend on the scope and nature of the information shared.

Again, care should be taken as to the contents of such notifications so as to not inadvertently waive privilege.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

We have not located any decisions on privilege that have arisen in the context of a data breach in the last five years.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

Australia is a federation. There is relevant legislation dealing with privilege at a federal and state level, as well as in the common law.

There are numerous courts cases that consider cross-border privilege issues.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Yes, that is the general approach.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

The critical element to maintaining privilege in Australia is to ensure that the privileged material remains confidential and that there is no express or implied (through conduct) waiver of that privilege.

Key contacts

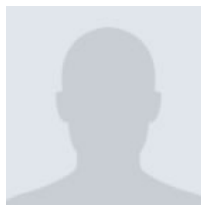


Gowri Kangeson

Partner

gowri.kangeson@dlapiper.com

T: +61 39274 5428



Matthew Spain

Partner

matthew.spain@dlapiper.com

T: +61 3 9274 5085



Austria

Last modified 21 February 2022

Concept of legal professional privilege

Austrian law does not provide legal professional privilege protection to the extent to which it is established in many other jurisdictions.

Legal professional privilege in the context of civil litigation

In the context of civil litigation, where the court may order documents to be produced during processes, such as discovery, each party is obliged to produce and present the documents it refers to as evidence for its arguments. The Austrian Code of Civil Procedure further sets out a disclosure obligation on the part of the opposing party if:

- the opposing party itself referred to a document for evidentiary purposes;
- the opposing party is subject to a disclosure obligation under Austrian civil law; or
- the document is a joint document (meaning that the document was either drawn up in the interest of the opposing parties or refers to legal relationships between the parties).

Other documents are subject to conditional disclosure only and the opposing party may refuse to provide disclosure for certain important reasons (eg if the disclosure would expose the opposing party or a third party to the risk of criminal prosecution). It is difficult for a party to invoke legal professional privilege to avoid having to disclose a document. The obligation of an opposing party to disclose documents is not enforceable, but the court may give weight to a refusal to do so.

With regard to third parties (including lawyers holding documents on their own behalf), there may be an obligation to disclose documents:

- under Austrian civil law; or
- which are joint documents for the third party (eg a lawyer) and the party producing the evidence.

However, this rule applies only if the third party acts on its own behalf. If the lawyer kept the document on behalf of and in the name of their client, the client is subject to a disclosure obligation. The disclosure obligation of third parties is a non-conditional obligation and principally cannot be avoided by invoking legal professional privilege. It is enforceable by fines and prison sentences.

Under the Austrian Code of Civil Procedure, a lawyer has the right to refuse to testify in court regarding facts related to advice given to a client. Based on the obligation to maintain confidentiality under the Austrian Attorney Regulation, a lawyer called as witness in a civil case against their client must refuse to answer questions regarding information and matters subject to their obligation of confidentiality if non-disclosure is in the interest of the client and the client has not released the lawyer from the obligation of confidentiality. The Attorney Regulation requires lawyers to maintain confidentiality in the interests of clients with respect to matters entrusted to them and information they have obtained in their capacity as lawyer, and in so far as non-disclosure is in the interest of the client.

Legal professional privilege in the context of criminal investigations

Legal professional privilege is recognised in the context of criminal investigations. The Austrian Code of Criminal Procedure stipulates a lawyer's right to refuse to give evidence regarding matters they are entrusted with in their capacity as defence lawyer. The right to refuse testimony may not be circumvented in any way, particularly by interviewing the lawyer's employees or by seizing documents kept at their office.

Legal professional privilege in the context of investigations by the antitrust/competition authority

A more limited scope of legal professional privilege is recognised in the context of investigations by the competition authority. The applicable administrative procedural law recognises a lawyer's right to refuse to give evidence regarding matters they are entrusted with in their capacity as a lawyer. More extensive legal professional privilege protection exists in the context of European Union competition law but not within the statutory provisions of Austrian competition law. Therefore, where the Austrian Competition Authority acts on its own behalf, there is no guarantee that any 'privileged' communications are protected. This is especially true, if any suspicion (e.g. drafting of a cartel agreement) is directed against a lawyer or a chartered accountant. Please note that the Austrian Competition Authority now tends to recognize legal professional privilege during home searches, although it remains uncoded in Austrian Antitrust Law.

Scope of legal professional privilege

In the context of civil litigation and investigations by the competition authority, a lawyer may not give evidence relating to advice given to a client on the basis of their obligations of confidentiality under the Attorney Regulation. The Attorney Regulation also prohibits any attempted circumvention of the confidentiality obligation.

In the context of criminal investigations, legal professional privilege is derived from the prohibition of attempts to circumvent a lawyer's right to refuse to give evidence on matters subject to legal professional privilege. It covers communications between a client and their lawyer and is not limited to communications between a lawyer and their client after a criminal investigation has been initiated. Legal professional privilege protection begins when a client consults their lawyer about conduct of the matter, even if the police do not have any evidence against the client at that point. Legal professional privilege remains in place even after the termination or conclusion of the lawyer-client relationship. It is not limited to the lawyer but extends also to the lawyer's employees.

Examples of protected communications include minutes of meetings and notes on conversations between the client and the lawyer, compliance reports, strategy papers, copies of contracts given to the lawyer for information and expert opinions, as well as the lawyer's notes and memos regarding the case. Documents recording the results of inquiries regarding the client made by the lawyer are also protected.

Evidence of criminal activity is not protected by legal professional privilege and so cannot be made 'immune' from disclosure by being deposited with a lawyer. This means that exhibits of evidence (eg original contracts) are never covered by legal professional privilege regardless of the time of their creation. In criminal investigations any documents or information disclosed to the attorney by the defendant or from the attorney to the defendant for the purpose of obtaining or giving legal advice or developing a defence strategy may not be seized, **regardless of whether the information is in the possession of the attorney or the defendant himself.**

Are communications with in-house counsel protected by legal professional privilege?

Legal professional privilege is not applicable to in-house counsel as in-house counsel cannot be or remain registered with the Austrian Bar. To be able to register or remain registered with the Austrian Bar, lawyers need to be independent and not under the control of the client. These requirements are not met by in-house counsel that are normally integrated in the organisation of their client. In-house counsel usually have various functions, which extend beyond the services normally provided by a lawyer, sometimes including management functions.

There are no explicit legal provisions protecting communications between in-house counsel and officers, directors or employees of a company. However, Austrian labour law establishes a general duty of loyalty owed by employees to an employer. This means that all employees of a company (including in-house counsel) are obliged to protect the employer's business interests. It includes the obligation not to disclose relevant information concerning the enterprise to third persons. Under Art 15 DSG, the Austrian Data Protection Act, data which has been accessible during and by virtue of one's employment, has to be treated as confidential subject to any legal requirements for its disclosure. Communications between in-house counsel on the one hand and officers, directors or employees of the company on the other are subject to this general duty of secrecy if this is in the employer's interest. These secrecy obligations, however, are not applicable if the employee is called as witness in proceedings which are criminal, administrative or civil. Furthermore, this obligation of secrecy normally only lasts for the duration of the respective employment contract. At a later stage, the employee is only committed to confidentiality if a particular confidentiality agreement has been entered into.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Legal professional privilege principally only applies to lawyers registered with the Austrian Bar and to European lawyers (lawyers from other EU and EEA Member States). Therefore, there is no guarantee that a client's communications with other foreign qualified lawyers are protected.

How is legal professional privilege waived?

While the client can release their lawyer from the obligation to maintain confidentiality, this does not mean that the lawyer therefore automatically loses their right to refuse to give evidence in a criminal investigation against the client, since the right of refusal to testify is personal in nature and has to be exercised in accordance with the professional code of conduct (Austrian Attorney Regulation).

An exception to legal professional privilege is applied in cases of money laundering. When there is a suspicion that a certain client is connected to money laundering activities, their lawyer is obliged to report such activities to the Austrian Federal Office of Criminal Investigation. This rule does not apply in respect of facts learned in the preparation of court proceedings.

Legal professional privilege in the context of merger control

Neither of the Austrian competition acts contain any express provisions regarding legal professional privilege in the context of merger control procedures, or in general. There has also been no case so far heard by the Austrian cartel court regarding legal professional privilege.

Recent cases and/or other legal developments

Even though the issue of (the lack of) legal professional privilege in Austrian antitrust and competition law has been a matter of discussion for many years, the Austrian legislator did not choose to introduce legal professional privilege in Austrian antitrust and competition law with the recent amendments to the Austrian Cartel Act, which entered into force in 2013.

Data privilege

Content to follow shortly.

Key contacts



Claudine Vartian

Partner

claudine.vartian@dlapiper.com

T: +43 1 531 78 1038



Bahrain

Last modified 01 September 2021

Concept of legal professional privilege

There is no federal system in Bahrain. Instead, the legal system draws upon Shari'a law ("**Islamic Religious Law**"), tribal law, Egyptian codes and English common law. The Shari'a courts deal primarily with the personal legal matters of Muslims (e.g. marriage and divorce), and the civil courts (derived from the Egyptian system) deal with all other matters. Due to the nature of the civil law legal system, there is no system of precedent in the courts and judgments are often unpublished. Proceedings are conducted in Arabic, mainly on the basis of written submissions with little reliance on live evidence (e.g. from witnesses).

In many civil law jurisdictions in the region, including Bahrain, the concepts of legal professional privilege and "without prejudice" communications do not exist per se. The parties therefore have the right to use any document which may support their position. Lawyers in Bahrain, however, will be bound by duties of confidentiality; these duties in many cases incorporate concepts similar to legal professional privilege.

Article 67 of the *Bahraini Law of Evidence in Civil and Commercial Matters* provides that "*lawyers who acquire knowledge of certain facts or information through the carrying on of their practice may not disclose these unless the facts or information were told to them for the sole purpose of committing a felony or misdemeanor*".

Scope of legal professional privilege

Legal professional privilege protects all communications between a professional legal adviser and their client from being disclosed without the permission of the client. The privilege is solely for the benefit of the client and not the lawyer. The objective of this legal principle is to protect one's access to the justice system by ensuring individuals can disclose all relevant information to their legal advisers without the fear that this disclosure may result in negative repercussions or prejudice them in the future.

A lawyer ceases to be bound by the requirements of legal professional privilege if the lawyer can demonstrate that documentation or information:

- was in the public domain at the time it was disclosed to the lawyer;
- entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer; or
- was in the lawyer's possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by records in existence at the time of disclosure.

Notwithstanding the lawyer-client privilege, a lawyer may disclose certain documents / information to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the lawyer provides the client with reasonable prior written notice of such disclosure, and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents / information so disclosed be used for the purposes for which the law or regulation was required, or for which the order was issued.

It is advisable that if parties are attempting to settle their dispute in Bahrain, they should qualify any form of communications with statements to the effect that any offer or communication does not constitute an admission of liability. Parties should also seek an

undertaking that any information contained within such communications will not be used as evidence in any subsequent proceedings.

It appears that the same privilege protections do not apply to in-house legal counsel advising officers, directors or employees of the company as they are not independent of the client. However, to protect this information, it is possible to enter into a confidentiality agreement between the employer and the employed in-house legal counsel.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Bahrain.

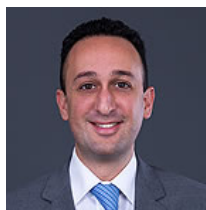
Recent cases and/or other legal developments

There do not appear to be any recent cases or other legal developments in Bahrain regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts



Peter Anagnostou

Senior Legal Consultant

peter.anagnostou@dlapiper.com

T: +971 4 438 6392



Belgium

Last modified 21 February 2022

Concept of legal professional privilege

The obligation on lawyers to maintain professional secrecy is set out in Article 458 of the Belgian Criminal Code and indirectly covered by instruments of international law such as Article 6 and 8 of the European Convention on Human Rights (**ECHR**), the European Court of Human Rights (**ECtHR**) and the International Covenant Civil and Political Rights (**ICCPR**). Under Belgian law, lawyers are required to keep secret any correspondence exchanged between them (acting in their capacity as lawyers) and their client, as well as advice and any other information given to them by the client for the management of the client's file. A lawyer's professional secrecy therefore covers not only the legal proceedings itself (before, during, after), but also legal advice provided to the client (Decision of the Belgian Constitutional Court of 23 January 2008, n° 10/2008). In particular, it covers written (including electronic) correspondence, telephone and oral communications between lawyers and their clients, the consultation given, personal notes passed on to lawyers by their clients and the notes produced by a lawyer (Judgment of the Criminal Court of Brussels of 20 February 1998, JT 1998, 361).

This obligation of professional secrecy is also incorporated in the Belgian Rules of Professional Conduct, which specify that lawyers must observe various duties, including the duty to maintain professional secrecy and confidentiality with regard to their matters. According to the Belgian Court of Cassation, evidence resulting from a breach of professional secrecy cannot in principle be used to obtain a civil judgment or criminal conviction (Judgment of the Court of Cassation of 14 February 2001, n° P.00.1350.F).

Belgian jurisprudence has applied the obligation of professional secrecy set out above in combination with Articles 6 and 8 of the ECHR to establish that documents protected by professional secrecy are protected regardless of where they are held. The documents are protected when in the possession of the lawyer but also when the documents are in the possession of the client.

Belgium does not have an equivalent to the U.S. procedure of mandatory disclosure (Article 877 of the Belgian Judicial Code regulates the submission of evidence, however, it does not allow for "fishing expeditions").

It should be noted that foreign qualified lawyers practising in Belgium are also subject to Belgian professional secrecy rules (Article 9 and 21 of the International Private law Code and Regulation (EC) No 593/2008 of 17 June 2008 (Rome I)).

Legal professional privilege in the context of civil litigation

In the context of civil or commercial litigation, there is no formal process of disclosure of the type that can typically be found in many common law jurisdictions. The parties do however have a duty of good faith to cooperate as regards the production of documents. The judge can order the production of a document that is relevant and contains key information for the resolution of the dispute, on the basis of Article 877 of the Belgian Judicial Code. Document production may nevertheless be refused if there is a legitimate reason (Article 882 of the Belgian Judicial Code), and such legitimate reason can include the documents being protected by legal professional privilege.

Legal professional privilege in the context of criminal investigations

Legal professional privilege also applies in the context of criminal investigations and regulatory and other investigations. Notwithstanding the application of Article 460ter of the Belgian Criminal Code, a lawyer is allowed - if their client approves and if it would be in their best interests - to disclose information relating to a criminal investigation.

Professional secrecy rules cease to apply when a lawyer is subject to a criminal investigation (i.e. if a lawyer is suspected of an offence or of assisting in an offence). The obligation of confidentiality is superseded by a right to remain silent.

Legal professional privilege in the context of investigations by the antitrust / competition authority

In the context of investigations launched by the Belgian Competition Authority (**BCA**), the BCA issued Guidelines for dawn raids (*Lignes directrices de l'Autorité belge de la Concurrence dans le cadre des procédures de perquisition / Richtsnoeren van de Belgische Mededingingsautoriteit betreffende de huiszoekingsprocedure*), of which Sections 5.3 and Section 6 provide guidance on how the authority deals with documents that are potentially protected by legal professional privilege and how the authority may challenge a claim of privilege.

Separate from legal professional privilege, correspondence between lawyers (whether external or in-house) within Belgium are confidential, in accordance with Article 6.1 of the Belgian Rules of Professional Conduct. Such correspondence may therefore not be produced or disclosed in court or out-of-court, without the consent of the President of the Bar (*le Bâtonnier / de Stafhouder*). Certain types of correspondence exchanged between lawyers are deemed to fall outside the scope of legal professional privilege such as communications considered as an act of procedure or which manifest a unilateral and unreserved commitment (Article 6.2 of the Belgian Rules of Professional Conduct).

Scope of legal professional privilege

What is protected by legal professional privilege?

Legal professional privilege applies to lawyers (*Avocat / Advocaat*) who are members of the Flemish (**OVB**) or the French and German Bar (**OBFG**) in Belgium. Under Belgian law, correspondence with a foreign lawyer is generally official unless agreed otherwise (Article 5.3 of the Code of Conduct for European Lawyers). Legal professional privilege is not limited in time and is also applicable during any pre-trial stage.

Any information received by a lawyer (acting in their capacity as lawyer) or obtained in the context of the provision of legal advice, legal proceedings or any dispute in general, or in matters determining the client's rights and obligations, are protected by legal professional privilege. This may include emails, correspondence, notes, advice, or preparatory documents.

Are communications with in-house counsel protected by legal professional privilege?

Belgian law recognises legal professional privilege for in-house counsel. Under Article 5 of the Act of 1st March 2000 creating the Belgian Institute for In-house counsel (*Institut des Juristes d'Entreprise / Instituut voor Bedrijfsjuristen*), advice given by in-house counsel, for the benefit of the counsel's employer and in the framework of its activity as in-house legal counsel, is confidential.

This was confirmed by the Brussels Court of Appeal in a judgment of 5 March 2013. The Court of Appeal held that in accordance with Article 5 of the Act of 1st March 2000 (mentioned above) read in conjunction with Article 8 of the ECHR (right to privacy), the BCA could not seize documents containing legal advice provided by in-house counsel. The Court of Appeal held that legal professional privilege also covered internal requests for legal advice, correspondence relating to the legal advice, draft opinions and preparatory documents.

In the context of antitrust/competition investigations, depending on whether investigators are acting under a European mandate or a mandate of the Belgian competition authority, the legal privilege rules applicable to in-house counsels will differ. In-house counsels are not protected by EU legal professional privilege, while under the framework of an investigation by the Belgian competition authority, in-house counsels are protected by legal professional privilege.

How is legal professional privilege waived?

The question of whether legal professional privilege can be waived has been often debated: whereas some commentators consider that the core principle of legal professional privilege can never be waived, as it is an obligation of public policy, others consider that legal professional privilege belongs to the client and may therefore be waived.

Past judgments have held that legal professional privilege may be overridden in certain cases in favour of the client's right of defence. Such disclosure must be justified by a compelling reason of public interest and be strictly proportionate (Decision of the Belgian Constitutional Court of 23 January 2008, re-affirmed by the Belgian Constitutional Court in its Decision of 17 December 2020, n°167/2020).

Furthermore, the President of the Bar should be consulted and allow for such disclosure (in line with Article 6.1 of the Belgian Rules of Professional Conduct).

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Belgium.

Recent cases and/or other legal developments

The following three leading cases have confirmed the important role of legal professional privilege in Belgium:

Belgian Court of Cassation, 19 October 2021

The Belgian Court of Cassation annulled a decision of the Antwerp Court of Appeal convicting a defendant based on the content of a conversation this defendant had with the lawyer of a co-defendant. The Court of Cassation considered the content of this communication to be covered by legal professional privilege and held that the Court of Appeal should have verified whether the irregularity committed (i.e. unlawfully produced evidence) had affected the reliability of the evidence, or whether its use is not contrary to the right to a fair trial.

Belgian Constitutional Court, 24 September 2020, case n° 114/2020

The Constitutional Court ruled on 24 September 2020 on the appeal for partial annulment of the law of 18 September 2017 on the prevention of money laundering and the financing of terrorist activities. The Court found that a lawyer cannot be obliged to send a report of suspicions to the CTIF (*Cellule de traitement des informations financières* / Financial Information Processing Unit) when his client, on his advice, withdraws from a suspicious transaction, nor can a third party to the relationship of trust between the lawyer and his client, even if he is a lawyer, be allowed to communicate information covered by professional secrecy to the CTIF.

Court of Justice of the European Union, request for a preliminary ruling from the Belgian Constitutional Court (Case C-694/20)

In December 2020, the Constitutional Court referred a preliminary question to the Court of Justice of the European Union (**CJEU**) in relation to the DAC 6 rules (i.e. Directive (EU) 2018/822 of 25 May 2018 imposing reporting obligations on lawyers and their clients or tax purposes). DAC 6 requires that intermediaries, who are exempted from reporting on the basis of legal professional privilege, notify other intermediaries. The preliminary question submitted relates to a possible violation of the right to a fair trial and the right to privacy by DAC 6, which imposes an obligation on lawyers to share with another intermediary who is not the lawyer's client the information which becomes known to the lawyer in the course of the exercise of essential professional legal activities, namely the defence or representation of the client in court and legal advice, even outside legal proceedings. At the time of writing, the case was pending before the CJEU.

Data privilege

Content to follow shortly.

Key contacts



Daniel Colgan

Partner

daniel.colgan@dlapiper.com

T: +32 2 500 6504



Astrid Dorigny-Sicard

Lawyer

astrid.dorigny@dlapiper.com

T: +32 2 500 1504



Brazil

Last modified 15 March 2019

Concept of legal professional privilege

The attorney-client relationship is regulated by Federal Law 8,906/94, which governs the legal profession in Brazil and the functioning of the Brazilian Bar Association, and by the Code of Ethics and Discipline enacted by the Brazilian Bar Association. Confidentiality is deemed to be a principle 'inherent to the legal profession' and attorneys are obliged to preserve the confidentiality of any information disclosed to them by clients, including information disclosed in the context of civil litigation, criminal investigations and investigations by any competition or other authorities.

The attorney-client privilege in Brazil applies to a communication that is made:

- to an attorney duly enrolled with the Brazilian Bar Association
- by a person who is, was or is sought to become a client of the relevant attorney, and
- in the context of an attorney-client relationship and for the purpose of securing legal advice.

Attorneys will be subject to disciplinary sanctions, criminal prosecution and claims for damages if they breach 'without just cause' their duty of confidentiality.

Scope of legal professional privilege

What is protected by legal professional privilege?

Attorneys cannot disclose any non-public information received from their clients or otherwise obtained in the context of the attorney-client relationship, regardless of the nature of such information or the manner in which it is disclosed / obtained. Moreover, attorneys cannot testify before courts or any other authority about facts pertaining to their clients or when such testimony involves matters that may be subject to the duty of confidentiality.

The attorney's office / workplace, work tools / products and work-related communications are also protected by the attorney-client privilege and cannot be searched and / or seized by third parties (unless the attorney is the subject of an investigation for having committed a crime, whether in collusion with their client or not, and a specific search warrant is obtained from a competent court).

The duty of confidentiality must be observed by all attorneys duly enrolled with the Brazilian Bar Association, including in-house counsel and foreign attorneys acting in Brazil as 'consultants on foreign laws' under Rule 91/00 enacted by the Federal Council of the Brazilian Bar Association.

The privilege applies without distinction, whether the attorney-client relationship involves civil litigation, criminal investigations or investigations by any competition or other authorities.

The privilege will not apply to information that is already in the public domain at the time that it is disclosed / obtained or that subsequently enters the public domain, and while attorneys should refrain from publicly discussing matters involving their clients, they will not be in violation of their duty of confidentiality if they discuss with third parties information already in the public domain at the time of

their engagement or that enters the public domain outside their control.

Attorneys will only be authorised to disclose confidential information revealed to or obtained by them in the context of the attorney-client relationship in the cases of 'severe threat to life or honour' or when any action taken by the client against the attorney is regarded as an 'affront' and the disclosure of confidential information is required in 'self-defence'. The cases that may fall into the category of 'severe threat to life or honour' or 'affront' are not expressly defined by Law 8,906/94 or by the Code of Ethics and Discipline.

Legal professional privilege in the context of merger control

As in Europe, rapid technological development has changed the merger control landscape, with complex highly technical mergers taking place. The lack of understanding of certain sectors leads to massive requests for information and review of corporate internal documents is often required in order to assess the markets and the strategy of the undertakings. This may result in disclosure to the detriment of legal professional privilege in some cases.

Legal professional privilege is not defined within the context of Brazilian merger control, but has been recognized as a fundamental right under the Brazilian legal framework and will not be disregarded within the context of merger control proceedings.

Given the lack of case law on legal professional privilege in the context of merger control, undertakings may rely on the basic legal privilege set forth by the Federal Law 8,906/94 to prevent undue use of privileged information by the Competition regulator ('CADE'). Any breach of legal privilege by CADE in the course of a merger filing could be challenged in courts and any decision rendered by the regulator misusing privileged data may be held null and void by a court of law. CADE may then be obliged to reassess the merger filing using solely the content that does not breach Brazilian legal privilege, creating delays, compromising enforcement and entailing a reputational risk to the authority. The decision will be granted by a court of law using Brazilian Federal laws not necessarily CADE's regulations.

In merger cases, it is relatively common to rely on work prepared by economists as well. These documents are not covered by privilege and may be freely used by the Competition Regulator and even shared with other competition regulators, provided that they ensure that competitively sensitive data (prices, quantities, commercial strategy, business secrets, amongst others) cannot be accessed by competitors and the general public.

Recent cases and/or other legal developments

No details for this country.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

The lack of regulation for internal investigations includes legal professional protection, so the general rules set forth for lawyers are applied in internal investigation conducted by lawyers.

The engagement of a lawyer has historically been an effective way to create and maintain confidentiality in an internal investigation. In Brazil, having lawyers in charge of the investigation is crucial, considering the specificities of the local legal professional confidentiality treatment.

The Brazilian Bar Association Statute ("BBAS") sets forth "the inviolability of the lawyer's office or place of work, as well as their work tools, written, electronic, telephone and telematics correspondence, as long as they relate to the practice of law" as every lawyer's right. Law Enforcement Agencies in charge of criminal investigations, therefore, cannot have access to evidence originating from the protected sources mentioned above, except in cases in which there is indication that the lawyer took part in a crime or keeps physical evidence of a crime in their office.

No special legal privilege rules for data protection matters.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

The legal professional protection applies throughout all criminal investigations.

c) Are communications to / by companies and in-house counsel protected by privilege?

The BBAS does not distinguish in-house lawyers from external counsel. The BBAS specifically sets forth the practice of “legal management” as a lawyer’s private activity. Unlike many European countries, in-house lawyers have the same rights and duties of external counsel, as long as their role exclusively relates to the practice of law. This means in-house lawyers who perform executive management roles or other activities not related to the practice of law do not have the same legal treatment. In addition, the Brazilian Bar Association Ethics Code (“BBAEC”) provides that in-house attorneys must also preserve their liberty and independence.

Foreign lawyers are not allowed to practice law in Brazil and are considered “Consultants” when acting in Brazil, as per Provision nº 91/200 of the Brazilian Bar Association. Therefore, considering that foreign lawyers are consultants when acting in Brazil, the local legal professional protection guarantee may have less strength for foreign lawyers.

d) Are there any specific requirements of a privileged incident response engagement letter?

No, there are no specific requirements in that sense.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Notes or transcripts of employee interviews: yes.

Expert reports prepared or obtained for the purpose of giving legal advice: yes, if the expert work was retained or requested by a lawyer.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

Yes, as stated above, the BBAS sets forth “the inviolability of the lawyer’s office or place of work, as well as their work tools, written, electronic, telephone and telematics correspondence, as long as they relate to the practice of law” as every lawyer’s right. Law Enforcement Agencies in charge of criminal investigations, therefore, cannot have access to evidence originating from the protected sources mentioned above, except in cases in which there is indication that the lawyer took part in a crime or keeps physical evidence of a crime in their office.

c) How are seized documents put into evidence in a criminal / civil procedure?

Search and seizures are a precautionary measure set forth in the Brazilian Criminal Code of Procedure. Documents seized during the execution of search and seizures must be listed in a notice drafted by the responsible law enforcement agent and later presented in investigation files, usually in separated and specific records.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

The legal professional protection may not be recognized in the following situations:

If the communication is in furtherance of a crime, or to avoid a threat to someone’s life or honor.

For the attorney’s own protection in cases of “severe threat to life or honor” or when any action taken by the client against the attorney is regarded as an “affront” and the disclosure of confidential information is required in “self-defense against the client.”

If previously authorized by a client to disclose (waiver), except for the attorney to serve as witness.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so, does that mean privilege

has been waived?

As the data protection law in Brazil is very recent and only became enforceable in August 2020, data breach class action is still not common in Brazil. In any case, legal professional protection will not be recognized following the same understanding to the above answer.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

Please refer to question 3a.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

Not that I am aware of.

b) Are there any rules and/or cases in the jurisdiction that deal specifically with privilege in a multi-state/ cross-border scenario?

No, there are no specific rules or cases in Brazil in that sense.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

There is no specific legislation ruling data that holds a privileged nature in foreign countries.

However, if a foreign lawyer is authorized by a license granted by the Brazilian Bar Association to practice law in Brazil, the individual has the same rights as Brazilian lawyers, including legal privilege.

In other circumstances, according to the rules set forth by the Civil and Criminal Procedure Codes, an individual may not be compelled to testify about facts that are protected by professional confidentiality. In that sense, foreign attorneys could decline to testify based on information obtained in the attorney-client relationship, considering it to be covered by legal privilege.

d) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

Any data requested by foreign countries in the event of a civil / criminal investigation must be done through International Legal Cooperation.

In Brazil, the Ministry of Justice plays the role of central authority for the international legal cooperation system, being the recipient of demands usually made through diplomatic channels. One of the responsibilities of the central authority is to classify the requests received according to the nature of the claim and to give the proper guidance to the matter.

In the case of a data request, the request would be submitted to the Brazilian Superior Court of Justice (STJ), which will only grant authorization to fulfill the requested measure after examining the comprehensibility of the case and the possibility of offense to the national sovereignty, public order, or human dignity.

In situations where compliance with legal cooperation measures abroad is required by Brazilian authorities – whether they are investigative, administrative, or judicial – the procedure does not go through the STJ. In such cases, the dispatch of the magistrate's request is made directly by the Ministry of Justice, which also plays the role of central authority for active cooperation requests.

Based on that, the request for data protected by legal privilege would have a very low chance of being granted by the STJ, except in very exceptional cases that would follow the answer provided in Question 3a.

Key contacts



Marcus Vinicius Bitencourt

Partner

mbitencourt@cmalaw.com

T: +55 21 3262 3008



Paula Mena Barreto

Partner

paula.menabarreto@cmalaw.com

T: +55 21 3262 3028



Ricardo Caiado Lima

Partner

ricardo.caiado@cmalaw.com

T: +55 11 3077 3591



Canada

Last modified 15 March 2019

Concept of legal professional privilege

Solicitor-client privilege is a principle of fundamental justice, and a civil right of supreme importance that forms a cornerstone of the Canadian judicial system. Solicitor-client privilege protects communications between a person and their solicitor that are made for the purpose of obtaining legal advice. Privilege is firmly rooted in the common law, professional codes of conduct, and the constitution.

Privilege and confidentiality

Privilege is a rule of evidence excluding the admission of otherwise relevant evidence and a basis for resisting production of documents or information that may otherwise be compelled by law. Privilege is similar to, but different in important respects, from confidentiality.

Confidentiality imposes a duty on a party receiving documents or information in confidence to maintain that confidence. Lawyers have a professional obligation to hold in confidence business and personal information acquired through a lawyer-client relationship, and may not reveal confidential information without the client's approval or unless required by law.

A duty of confidentiality can arise in a number of other relationships and can also be imposed by contract or by the circumstances in which information is shared.

Categories of privilege

SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege protects certain communications between a client and its lawyer. Only communications are protected under solicitor-client privilege - physical objects are not. Solicitor-client privilege endures forever, even upon the death of the client. Only where one of the narrow exceptions is met, will solicitor-client privilege be waived. The requirement for establishing solicitor-client privilege are:

- There must be a communication, whether oral or written
- The communication must be of a confidential character
- The communication must be between a client (or their agent) and a legal advisor, and
- The communication must be directly related to seeking, formulating or giving legal advice

Preliminary discussions made by a prospective client to a solicitor with the view to retaining the lawyer will be privileged, even if the prospective client chooses not to retain the lawyer.

There is a continuum of seeking or giving legal advice and privilege may attach in particular circumstances even though a document itself does not incorporate specific legal advice.

Privilege may be asserted during the course of criminal investigations, as a basis for declining to provide documents or information that could be compelled absent privilege. For example, privilege may be asserted when authorities are executing a search warrant. The legal protection of solicitor-client privilege is not confined to the physical limits of a law office, but rather, 'any place where privileged documents may reasonably be expected to be located.' Privilege may also be claimed in the face of investigations by Canada's Competition Bureau.

LITIGATION PRIVILEGE

Litigation privilege (also known as 'solicitor's brief' or 'attorney work product' privilege) protects from disclosure documents that are prepared for the dominant purpose of litigation. Litigation privilege does not exist to protect the confidential relationship between solicitor and client, but to facilitate the adversarial process of litigation. Even non-confidential material may be protected if the dominant purpose for its existence is litigation. Information obtained from third parties in the course of litigation, even without an expectation of confidentiality, is still subject to litigation privilege. Litigation privilege applies in both court and regulatory proceedings.

Litigation privilege requires that the documents in question must have been created:

- In contemplation of litigation which is 'in reasonable prospect', and
- For the 'dominant purpose' of use in the litigation.

'Reasonable prospect' means when a reasonable person, with all the relevant information, would conclude that it is unlikely that the claim for loss will be resolved without litigation. Litigation privilege is meant to create a zone of privacy for the lawyer or litigant during the course of litigation. Litigation privilege ends when the litigation ends. There may be overlap between solicitor-client privilege and litigation privilege, and solicitor-client privilege will continue even when the litigation has ended.

SETTLEMENT PRIVILEGE

Written or oral communications made with a view to reconciliation or settlement are protected from disclosure. Settlement privilege belongs to both parties to the settlement discussions and cannot be unilaterally waived by only one party. In order for settlement privilege to apply, the following criteria must be met:

- A litigious dispute must be in existence or within contemplation
- The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed, and
- The purpose of the communication must be to attempt to effect a settlement

The substance of the communication is more important than its form. Using the words, 'without prejudice' is not conclusive of the intention, but it may constitute evidence that the communication is privileged.

Other categories of privilege

SPOUSAL COMMUNICATIONS

Communications that take place between spouses are privileged (in both criminal or civil proceedings). Although spouses can be compelled to give evidence against each other, the scope of their testimony may be limited by privilege.

CASE-BY-CASE PRIVILEGE

Privilege may arise in other relationships on a case-by-case basis, where the following four criteria are met:

- The communication must originate in a confidence that it will not be disclosed
- This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties
- The relationship must be one which, in the opinion of the community, ought to be sedulously fostered, and
- The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation

For example, a professor giving a candid opinion about a colleague to a tenure committee was held to be privileged. Also, a claim for protection of journalistic sources has been held to be privileged in certain cases. However, material prepared by an accountant for the purpose of providing tax advice to clients was not privileged.

Scope of legal professional privilege

Are communications with in-house counsel privileged?

In-house counsel, performing the function of a lawyer, are covered by privilege. However, where in-house counsel are acting in a business capacity rather than a lawyer's role, privilege will not apply. It is the nature of the communication and the relevant circumstances which will determine privilege, not the job title.

Are communications with foreign qualified lawyers privileged?

As long as the client is seeking legal advice from a qualified lawyer in a foreign jurisdiction, communications will be privileged. This issue has not been addressed extensively in Canadian courts. The safer option would be to retain a Canadian lawyer who then communicates with the foreign qualified lawyer, which would provide a stronger basis for ensuring the communications are privileged.

Are there any exceptions to legal professional privilege?

There are three exceptions to privilege that are rooted in public policy and are not controlled by the client:

- No privilege attaches to communications that are made for the purpose of assisting someone to commit a crime
- Privilege may be set aside in order to afford an accused person the right to make a full answer and defence when innocence is at stake, and
- There is an exception to the privilege where there exists a 'clear, serious and imminent threat to public safety.' This is called the public safety exception. The exception only applies to future harm, and not past harm that has already occurred.

How is legal professional privilege waived?

Privilege will cease to apply where it has been waived; privilege can be waived expressly or by implication. Waiver requires some voluntary action by or on behalf of the client that is inconsistent with continuing to protect privilege.

Privilege can only be intentionally waived by the client. Privilege can be waived on a limited scope, restricting the amount of information that will be disclosed as long as it is not misleading or would take unfair advantage.

Privilege can also be waived by implication. Waiver by implication typically occurs where a party to litigation takes a legal position that is inconsistent with maintaining privilege, for example, by putting in issue the legal advice it obtained.

Implied waiver will occur where the following three criteria are met:

- The voluntary disclosure by the privilege holder that they sought or received legal advice
- On an outstanding issue between the parties, and
- The attempt by the privilege holder to rely on that legal advice in order to justify a particular course of action

Implied waiver also arises where a client challenges the cost or adequacy of legal services or refuses to pay for legal services. In proceedings to review or collect a lawyers bill or in a negligence suit against a lawyer, privilege will be impliedly waived to the extent necessary to determine the issues in such lawsuits.

Where privileged information is disclosed through inadvertence, Canadian courts have resisted finding a waiver of privilege. Lawyers who receive privileged communications inadvertently generally have an ethical obligation to return or destroy the communications and not use them.

Legal professional privilege in the context of merger control

Privilege may also be claimed in the face of government investigations. Authorities may compel production of records in various ways, including orders requiring a person to deliver documents to a government agency and the execution of search warrants (referred to in some jurisdictions as a 'dawn raid').

The procedures for asserting privilege will depend on the governing legislative regime. For example, when Canada's Competition Bureau executes a search warrant under the Competition Act, the person whose premises are searched may, before or during the examination, copying or seizure of a record by the Bureau officer, claim privilege over the record and require it to be sealed in a package. The package will normally be placed into the custody of a court registry (or other person by agreement) for later judicial determination as to the privilege claim. A party who is otherwise required to produce information (including documents) to the Commissioner of Competition as part of merger review may withhold privileged information or redact privileged portions. In so doing, the party must inform the Commissioner under oath or statutory declaration and explain why the information has not been supplied.

Recent cases and/or other legal developments

IGGillis Holdings Inc v Canada (National Revenue) 2018 FCA 51

The Federal Court of Appeal affirmed the existence of common interest privilege among parties to a commercial transaction. IGGillis entered into a corporate transaction with Abacus. The lawyer for Abacus prepared a memo outlining the tax implications of the transaction. The Abacus memo was shared with IGGillis. The Canada Revenue Agency ('CRA') required IGGillis to produce the memo. IGGillis and Abacus opposed the production of the memo on the basis of common interest privilege.

The Federal Court of Appeal affirmed that the Abacus memo was protected from production based on common interest privilege. Where legal opinions are shared by parties with mutual interests in commercial transactions, there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated.

Common interest privilege is not a stand-alone ground for claiming privilege but rather is a defence to a claim that solicitor-client privilege was waived. An application for leave to appeal to the Supreme Court of Canada was dismissed.

Alberta v Suncor Energy, 2017 ABCA 221 - privilege and internal investigations

There was an employee death at one of Suncor's worksites. Suncor initiated an internal investigation and claimed privilege over all information pertinent to its investigation. The Alberta government challenged Suncor's blanket claim of privilege. The Alberta Court of Appeal limited Suncor's blanket claim of privilege and held that the privilege claims over the documents collected during Suncor's investigation must be considered on a case-by-case or category basis. The Supreme Court of Canada dismissed an application for leave to appeal.

Minister of National Revenue v Duncan Thompson, 2016 SCC 21.

The Canada Revenue Agency (CRA) sought access to a lawyer's accounts receivable. The lawyer was in arrears of taxes. The lawyer provided the balance owing on the accounts receivable but no further information. The Supreme Court of Canada (SCC) held that the CRA was not allowed to access the lawyer's accounts receivable because it was not the intention of the legislature for this type of information to be disclosed. The SCC reiterated that privilege belongs to the client and can only be waived by the client. The CRA was trying to gain access to information in the lawyer's possession without notice to the client, and no opportunity for the client to challenge the release of privileged information.

Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53.

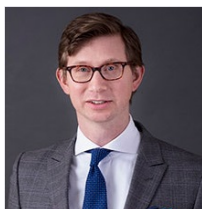
This case involved a wrongful dismissal action against the University by a former employee. During the course of the litigation, the former employee made an access to information request under the province's Freedom of Information and Protection of Privacy Act. The University refused to release certain information on the basis it was privileged. The Alberta Privacy Commissioner ordered production of the privileged material in order to determine whether privilege was properly asserted. The Supreme Court of Canada (SCC) set aside the Privacy Commissioner's order for production of privileged material.

The SCC noted that solicitor-client privilege is not merely a privilege of the law of evidence, but a substantive right that is fundamental to the proper functioning of the legal system. The SCC found that the Alberta privacy legislation did not abrogate the substantive right to solicitor-client privilege. To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so.

Data privilege

Content to follow shortly.

Key contacts



Dean L. Dalke

Partner

dean.dalke@dlapiper.com

T: +1 604 643 6369



Kevin Wright

Partner

kevin.wright@dlapiper.com

T: +1 604 643 6461



Chile

Last modified 12 November 2021

Concept of legal professional privilege

In Chile, there are no express legislative rules governing the concept of legal professional privilege, but the relevant rules can be found in the practices of different legal bodies and in the Professional Ethics Code of the Chilean Bar Association (hereinafter “PEC”). The concept is based on a client’s right of defence (adequate representation) and the absolute trust that must exist between clients and their lawyers.

There are two kinds of professional privilege for lawyers. Namely:

Legal attorney-client privilege

Although lawyers can be summoned to testify as a witness, they are able to invoke legal attorney-client privilege in order not to testify before the courts in respect of confidential information received from a client. This right is recognized in the Criminal Procedure Code and in the Civil Procedure Code.

Duty of Confidentiality

Under the PEC, lawyers cannot disclose confidential information received from clients. Although it is not mandatory to become a member of the Chilean Bar Association in order to practice in Chile, every lawyer, member and non-member, must comply with the provisions of the PEC, and this requirement is enforceable by the Chilean Courts.

Scope of legal professional privilege

What is protected by legal professional privilege?

The Criminal Procedure Code (Article 303) and the Civil Procedure Code (Article 360 No 1) contain similar provisions stating that lawyers are exempted from testifying in any type of court proceedings against the interests of clients or in connection with information received from clients, as part of their professional work for a certain client.

As regards the **duty of confidentiality**, the PEC defines confidential information as “*all information related to any client’s matters that the lawyer has been informed of in connection with his or her profession*” (Article 7).

Confidentiality imposes the following obligations on a lawyer:

- **Disclosure Prohibition:** Lawyers must not disclose any confidential information, or documents containing confidential information;
- **Duty of Care:** Lawyers must apply all necessary measures to protect a client’s confidential information;
- **Responsibility for team members:** The lawyer must take necessary measures to ensure that colleagues and other team members observe the applicable obligations regarding the client’s confidential information and do not disclose any such information.

In addition under the PEC, the duty of secrecy has a close connection to “legal attorney-client privilege” and entitles a lawyer to refuse to testify before the Courts in connection with a client’s secret or confidential information.

This duty also protects documents or any other device on which confidential information is stored, and it also extends to information produced by the lawyer from confidential information received, regardless of whether the lawyer, or the client, is in possession of it. Indeed, the Criminal Procedure Code establishes that *“The seizure of communications passing between the accused and persons who may refrain from testifying as witnesses under the provisions of article 303, cannot be ordered”* (Article 220).

The duty of confidentiality continues to apply even after the termination of an instruction or matter. Nevertheless, confidentiality is not an absolute right and it is possible for a lawyer to circumvent it if:

- the confidential information relates to a deceased person and its disclosure may avoid a criminal decision being passed on an innocent suspect.
- there are reasonable grounds to suspect that legal services have been used in order to achieve a criminal objective (of which the lawyer was unaware).

Are in-house counsel protected by legal professional privilege?

In-house counsel, if they are lawyers, are subject to the same duty of care and obligation of confidentiality applicable to lawyers in private practice. Lawyers are subject to these duties because of their profession, not because of the nature of the retainer or relationship held with clients, and as a result, any client or potential client is protected by this privilege.

Considering that the PEC does not expressly distinguish between in-house and external counsel, but it does restrict legal professional privilege to attorney-client relationships, there have been interpretations, including some resolutions from the Competition Tribunal discussed below, which have limited legal professional privilege to external lawyers only, as in-house counsel would not have an attorney-client relationship, but rather an employment relationship.

Pursuant to the PEC, a client is defined as an individual or legal entity that has established a professional relationship with a lawyer for the procurement of professional services such as legal advice, advocacy, and/or acting on behalf of an individual or legal entity’s interests. The individual or legal entity paying for the professional services is not necessarily the client, in circumstances where the beneficiary of the professional services is a third party. Where a legal entity has instructed a lawyer, the entity itself is regarded as the client, and not its directors, general managers, representatives, employees, shareholders or other authorities or members.

Non-lawyers are not subject to any kind of client-attorney privilege.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Yes. Chilean law does not distinguish between the treatment of advice or correspondence of qualified lawyers based on the jurisdiction in which they have qualified. The principles set out above in respect of legal professional privilege will apply in the same way.

How is legal professional privilege waived?

Privilege may only be waived by the client giving express or tacit consent to the lawyer to disclose the document or information in question. This consent must always be interpreted restrictively so that it is limited to the information that the client has waived. Legal professional privilege cannot be waived by the client in a broad or non-specific way.

Legal professional privilege can never be waived by the lawyer.

Recent cases and/or other legal developments

Confidential and privileged information in Chilean competition law

The consolidated text of Decree Law No. 211 (“**DL 211**”) sets out the legal framework for competition regulation which applies in Chile. It contains provisions regarding the treatment of privileged and confidential information in investigations and procedures carried out by the Fiscalía Nacional Económica (National Economic Prosecutor or “**FNE**”). The scope of legal professional privilege is not defined by DL 211, therefore the general principles applied by the PEC extend to competition investigations and procedures.

The FNE has the power to request information from parties when carrying out an investigation, which includes any investigation that is opened during a merger control procedure. Parties are obliged to provide such information and can be sanctioned if they fail to do so, unless they submit a formal application to withhold disclosure on the basis that sharing such information may cause harm to their interests or those of third parties.

- Confidentiality and/or privilege in respect of information and/or documents are determined by the FNE, pursuant to a request of the interested party or ex officio, on a case-by-case basis;
- In general terms, the FNE considers whether the information in question has the potential to affect the competitive development of the markets in order to assess whether it is confidential. The FNE has interpreted this criterion extensively throughout investigations, in order to avoid acting as an information facilitator to competitors;
- The obligation to maintain confidentiality extends to prosecutors, employees and any other person who renders services to the FNE;
- The burden of providing public (redacted) versions for the public file lies with the party that is seeking to protect confidentiality. Information can only be redacted if it is confidential.
- In principle parties can withhold information when it is protected by legal privilege. Normally the FNE will assess whether the information is privileged.

Legal professional privilege in merger control procedures

Due to the absence of specific legal rules governing legal professional privilege in the context of competition procedures and merger control in Chile, the general provisions of the PEC are applicable to such cases.

In this regard, a lawyer has a duty of confidentiality in respect of all information provided by a client in the context of a professional relationship. This duty commences when any person becomes a client by expressing a serious intention to obtain professional services, and the lawyer expressly or tacitly consents to providing such services. This legal professional privilege extends to potential clients.

Generally, all communications and documents that involve legal advice sent to or from counsel are subject to legal professional privilege. This implies that correspondence between a client and an external lawyer, internal notes reflecting external legal advice and legal advice (even when not related to competition proceedings) are subject to legal professional privilege.

In conclusion, lawyers in Chile are subject to a strict duty of confidentiality, which extends to the application of legal professional privilege. Due to the absence of specific legal rules governing legal professional privilege in the context of competition procedures and merger control in Chile, the general provisions of the PEC are applicable to such cases. This is particularly relevant considering that merger control procedures tend to involve requests for detailed and sensitive information, which will always remain confidential from third parties and competitors (where it adversely affects the party's competitive position) even where it is not subject to legal professional privilege.

Recent cases and/or other legal developments in Chile

On May 8, 2013, case N° 4380-12, the Supreme Court of Chile accepted a Complaint Appeal (a special disciplinary remedy against judges for faults or serious abuse committed in the exercise of their duties) filed by the State Defence Council, “**CDE**” (an autonomous body that is in charge of defending the interests of the Chilean State), against a decision of the Santiago Court of Appeals, upholding a decision from the “Council for Transparency” (an autonomous body that is in charge of supervising and resolving any complaint for denial of access to public information), which required the CDE to exhibit all documents, reports and communications in its own files which were being used to prepare the defence of the Chilean government in a lawsuit brought against it.

The CDE argued that lawyers cannot be forced to disclose information that they have acquired in the exercise of their profession and that the CDE maintains a relationship with the State that is akin to a lawyer-client relationship, to which the duty of confidentiality attaches.

The Supreme Court accepted this argument and allowed the appeal, declaring that the files were subject to professional secrecy and therefore protected from disclosure.

From the perspective of Chilean Competition Law, on March 18, 2021, in the context of a cartel case (Role C-386-2019), the TDLC resolved that communications between the main executives of a Company and their in-house lawyer were not subject to legal professional privilege and the transcript of such conversations could be included in the investigation file of the FNE.

Data privilege

Content to follow shortly.

Key contacts



Luis Parada

Partner

lparada@dlapiper.cl

T: +562 2798 2606



Felipe Bahamondez

Partner

fbahamondez@dlapiper.cl

T: + 56 2 2798 2602



Sofía O'Ryan

Counsel

soryan@dlapiper.cl

T: +562 2798 2600



China

Last modified 19 November 2021

Concept of legal professional privilege

The concept of legal professional privilege does not exist under the laws of the People's Republic of China (PRC). PRC laws and regulations do not contain any provisions that exempt lawyers from being forced to disclose information they receive from a client to a third party. There is no attorney work-product protection and there is no protection of communications between lawyers and clients on the basis of legal professional privilege in China.

Legal professional privilege in the context of civil litigation

While the PRC Lawyer's Law does contain provisions that require lawyers to keep confidential certain information they receive during the course of their practice, this requirement is not equivalent to the concept of legal professional privilege or attorney work-product protection.

The Lawyer's Law provides that:

- A lawyer must keep confidential information he receives from the client or others (who have not agreed to its disclosure) in the course of representing a client; an exception, however, is for information concerning the preparation or the commission of criminal acts (Article 38 of the Lawyer's Law);
- A lawyer shall keep confidential state secrets and commercial secrets which he obtains in the course of representing a client and should not disclose a client's personal secrets (Article 38 of the Lawyer's Law); and
- Meeting(s) between a criminal suspect or defendant and that person's lawyer shall not be monitored (Article 33 of the Lawyer's Law).

However, a PRC lawyer may be forced to disclose information referred to in points 1 and 2 above by:

- PRC governmental authorities (including PRC competition authorities mentioned below), although this is not specifically defined; and
- An order of a PRC court (Article 67 and Article 72 of Civil Procedure Law).

Again, under these situations, there is no claim for legal professional privilege since this concept does not exist in China.

Legal professional privilege in the context of criminal investigations

For criminal cases, the PRC's Criminal Procedure Law also contains the general principle concerning a lawyer giving testimony, similar to Article 72 of the Civil Procedure Law. On its face, general confidentiality protection for client and lawyer communications is afforded under Article 48 of the Criminal Procedure Law, which provides that "[a] lawyer has the right to keep confidential information of the client obtained during the professional practice. For information that involves any impending or on-going criminal activity which would jeopardize national and public security or cause serious personal safety damage, a lawyer must inform PRC judicial authorities." This provision appears to affirm the general requirement to protect lawyer-client confidential communications, although it only applies to criminal cases. However, our

understanding is that this provision does not afford blanket protection to 'lawyer-client communications' in practice and it is materially different from the absolute protection afforded under 'legal professional privilege' in common law jurisdictions. It also contains a number of exceptions that require disclosure of information to "PRC judicial authorities" as stated in Article 48.

Legal professional privilege in the context of investigations by the antitrust / competition authority

Legal professional privilege does not exist in the context of investigation in China by antitrust and competition authorities.

Article 42 of the Anti-Monopoly Law provides that business operators under investigation, interested parties or other relevant entities or individuals shall cooperate with the anti-monopoly law enforcement authorities, and shall not refuse to impede their investigations. A similar provision is also found at Article 14 of the Anti-Unfair Competition Law. These measures may be construed to impose the same requirements on lawyers to cooperate with Chinese competition authorities in the course of their investigations of anticompetitive conduct.

In the merger review context, Chinese competition authorities may in some circumstances request information covered by legal professional privilege in foreign jurisdictions; refusal to disclose such materials may impact the merger assessment. These provisions are sufficiently wide in scope that PRC lawyers are under the same obligation to cooperate with law enforcement authorities during their investigations.

Scope of legal professional privilege

No details for this country.

Recent cases and/or other legal developments

Not applicable.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

No. There is no legal principle or legislation on legal privilege in China. Therefore, there is no legal privilege in the context of internal or criminal investigations, and/or data protection matters. Under PRC law, a lawyer owes a general confidentiality obligation to the client that covers confidential information, state secrets and commercial secrets obtained from the client during the representation.

PRC law is silent on this issue. In practice, the instructions from the client does not need to come from in-house counsel for the confidentiality obligation to apply.

Confidentiality obligation applies in the context of criminal investigations. However, under certain scenarios, a lawyer has the obligation to report if the information is related to the preparation or commission of criminal acts.

Article 48 of PRC Criminal Procedure Law provides that "[a] defense lawyer has the right to keep confidential information of the client obtained during the professional practice. For information that involves any impending or ongoing criminal activity which would jeopardize state and public security or cause serious personal safety damage, a lawyer must inform PRC judicial authorities."

For details, please refer to DLA Piper Legal Professional Privilege Global Guide, China – Legal professional privilege in the context of criminal investigations.

As discussed above, legal privilege is not recognized in China, hence there are no special rules addressing legal privilege in the context of data protection.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

As discussed above, legal privilege is not recognized in China. Instead, certain confidentiality obligations apply when a Chinese lawyer starts representing the client.

c) Are communications to / by companies and in-house counsel protected by privilege?

The source of such information does not matter. As long as such information about the client is obtained during the lawyer's professional representation and falls under the scope of confidential information, a defense lawyer should be entitled to rely on article 48 of the PRC Criminal Procedure Law (the content of which is set out in the answer to question 1a) to assert confidentiality.

d) Are there any specific requirements of a privileged incident response engagement letter?

No. However, an engagement letter should nonetheless cover the work to be carried out in China, at least, as an attempt to preserve privilege protection of the China-related work product and communication that might be afforded to the same in jurisdictions outside of China. For each case, this needs a deeper analysis of the scope of work, involvement of cross-border teams, what non-Chinese jurisdictions are involved, and the applicable privilege considerations for those non-China jurisdictions.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

As discussed above, legal privilege is not recognized in China. PRC law does not set out in detail various categories of documents that are protected by confidentiality obligation owed by a lawyer. The law generally provides three broad categories of information that are protected: confidential information, state secrets, and commercial secrets.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

The location of where the documents are located does not matter. See further details in answer to question 2a) above.

c) How are seized documents put into evidence in a criminal / civil procedure?

Under PRC law, seized documents shall be clearly checked in the presence of a witness and the holder of such documents. A list must be made in two copies at the scene signed by the investigators, the witness and the holder of the documents. One copy of the list must be given to the holder, and the other copy must be attached to the collected documents and stored in the appropriate evidence archive. (Article 142 of the PRC Criminal Procedure Law)

Both the prosecution and the defendant are then entitled to present the seized documents to the court as part of their respective cases during the trial proceedings.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Exceptions to the duty of confidentiality include:

any fact or information concerning the client or any other party who is about to or is in the process of committing a crime that may endanger state security or public security or cause serious personal safety damage;

information that the client agrees to disclose;

if disclosure is required by regulatory authorities during administrative investigations; or

if disclosure is required by judicial authorities in civil litigation proceedings.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege

has been waived?

Data breach litigations are still relatively new in China and we are not aware of any such cases. In any event, the waiver point does not apply since legal privilege is not recognized in China.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

Data breach litigations are still relatively new in China and we are not aware of any such cases. As mentioned, the waiver point does not apply since legal privilege is not recognized in China.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last 5 years? If so, please provide details.

Legal privilege is not recognized in China. Therefore, there is no case precedent on this point.

b) Are there any rules and/or cases in the jurisdiction that deal specifically with privilege in a multi-state/ cross-border scenario?

Legal privilege is not recognized in China. Hence, there are no specific rules or cases in China that deal with privilege. However, for work products and data originating from China as part of a cross-border scenario/case, attempts should be made (including having certain engagement arrangements and work and communication protocols in place) to preserve privilege protection of the China-related work product and data/communication that might be afforded to the same in jurisdictions outside of China. For each case, this needs a deeper analysis of the scope of work, involvement of cross-border teams, what non-Chinese jurisdictions are involved, and the applicable privilege considerations for those non-China jurisdictions.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Legal privilege is not recognized in China, therefore, the privileged data outside of China will not be treated as privileged data in China. A lawyer in China may rely on the lawyer's confidentiality obligation as an attempt to resist disclosure of such data. However, there are exceptions to confidentiality as discussed in the answer to questions 3a) above.

d) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

Legal privilege is not recognized in China. However, for work products and data originating from China as part of a cross-border investigation, attempts should be made (including having certain engagement arrangements and work and communication protocols in place) to preserve privilege protection of the China-related work product and data/communication that might be afforded to the same in jurisdictions outside of China. For each case, this needs a deeper analysis of the scope of work, involvement of cross-border teams, what non-Chinese jurisdictions are involved, and the applicable privilege considerations for those non-China jurisdictions.

Key contacts



Sammy Fang

Partner

sammy.fang@dlapiper.com

T: +852 2103 0649



Nathan Bush

Partner

nathan.bush@dlapiper.com

T: +65 6512 6065



Xiaoshan Chen

Partner

xiaoshan.chen@dlapiper.com

T: +86 21 3852 2030



Croatia

Last modified 23 May 2022

Concept of legal professional privilege

In Croatia, the principles and provisions relating to legal professional privilege are contained in numerous Acts and Codes. The Constitution of the Republic of Croatia provides for the foundations of legal professional privilege, while further provisions regarding legal professional privilege are contained in the following legislation:

- The Legal Profession Act
- The Lawyers' Code of Ethics
- The Civil Proceedings Act
- The Criminal Act
- The Criminal Proceedings Act
- The Anti-Money Laundering and Terrorism Financing Act
- The Competition Act

Under the Legal Profession Act and the Lawyers' Code of Ethics, lawyers must preserve the confidentiality of anything that their clients have trusted them with, or that the lawyers have discovered in the course of representing clients. This secrecy obligation must also be upheld by other people who work, or have worked, in that law firm. In no circumstances may the confidential information be used to the detriment of the client.

Disclosure of a lawyer's secret is only allowed if the client unequivocally permits it. The Criminal Act provides that a lawyer who discloses confidential information given to them while performing their professional tasks, may be subject to imprisonment of up to one year. However, it is not a criminal offence if the information is disclosed in the public interest or in the interest of another person, which prevails over the interest of maintaining the secrecy of the information. Furthermore, a failure to report a serious criminal offence, for which long-term imprisonment is prescribed, is also a criminal offence. However, this does not apply to lawyers, who are not required to report criminal offences committed by their clients.

Scope of legal professional privilege

What is protected by legal professional privilege?

Litigation privilege

The Civil Proceedings Act provides that a lawyer acting as a witness may refuse to testify about the facts the client has confided to them, as well as facts that the lawyer has learned while performing their professional duties.

Legal advice privilege

The Lawyers' Code of Ethics provides that lawyers and other employees of a law firm are obliged to keep confidential everything they have learned from their client while providing legal assistance, representation or defence, and in no circumstances to use that information

to the detriment of the client. Disclosure is only allowed if the client unequivocally permits it.

Legal professional privilege in the context of criminal investigations

Under the Legal Profession Act, searches of lawyers or their law firms may only be ordered by a court if certain conditions are met. When searching a lawyer or a law firm, the secrecy of documents must not be violated to the detriment of a client. The search must be limited to the examination of only those documents and objects directly connected with the criminal offence which represents the basis for the search. Pursuant to the Criminal Proceedings Act, written statements of the accused to their lawyer cannot be seized by prosecutors or other authorities conducting criminal proceedings.

The Legal Profession Act provides that the search must be carried out in the presence of an authorised representative of the Bar Association, unless they do not respond to a timely invitation to be present at the search without a justified excuse. Moreover, the judge who issued the search warrant must be present at the search to decide which documents and objects should be examined. Evidence obtained without meeting the above conditions cannot be used in the proceedings against lawyers and their clients.

In addition, the Criminal Proceedings Act states that lawyers cannot testify as witnesses in criminal proceedings initiated against their clients unless the client so requests. Lawyers are also exempt from any duty to testify against their clients regarding information disclosed to them while providing legal services to clients.

Under the Anti-Money Laundering and Terrorism Financing Act, the lawyer-client relationship provides a partial exception to the requirement to report suspicious transactions. More specifically, lawyers are not obliged to deliver information or documentation collected from a client while assessing their legal position or representing the client in a court proceeding. However, if the lawyer submits data, information and documentation to the competent authority, this will not constitute a breach of legal privilege and the lawyer will not be responsible for any damage suffered by the party.

Legal professional privilege in the context of investigations by the antitrust/competition authority

In case of an unannounced search under the Competition Act, all letters, notifications and other means of communication between the investigated company and its lawyer are protected against seizure (referred to as privileged communication).

Legal professional privilege in merger control procedure

There are no specific provisions in Croatian legislation regarding legal professional privilege in merger control procedure. However, lawyers have the general obligation to keep confidential everything they have learned from their client while providing legal assistance, representation or defence.

Are communications with in-house counsel protected by legal professional privilege?

The protection of communications with in-house counsel is not explicitly regulated by statutory provisions. However, since the protection under the applicable legislation refers only to communication with lawyers (*odvjetnik*), this would indicate that communications with in-house counsel are not protected by legal professional privilege.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The law does not specify any restrictions on the application of the secrecy obligations in the case of foreign qualified lawyers. Pursuant to the Legal Profession Act, lawyers who are qualified to practice law in an EU Member State must comply with the Lawyers' Code of Ethics and therefore fall under the scope of the secrecy obligations.

How is legal professional privilege waived?

Disclosure of information received under the legal privilege by an attorney is allowed under the following circumstances:

- If the client unequivocally authorises it; or
- If it is necessary for the defence of the attorney; or
- If it is necessary to justify the attorney's decision to cancel the representation or defence to the client.

Legal professional privilege in the context of merger control

As stated above, there are no specific provisions in Croatian legislation regarding legal professional privilege in the context of merger control. However, lawyers are obliged to keep confidential everything they have learnt from their client while providing legal assistance, representation or defence.

Recent cases and/or other legal developments

In 2018, a defendant claimed that there had been a breach of legal privilege because his lawyer (LMP) submitted a letter to the Attorney General containing the defendant's threat to kill an Attorney who had previously represented him before the Municipal Criminal Court.

The defendant filed an appeal with the Municipal Criminal Court in which he requested the exclusion of a copy of the subject letter as illegal evidence because the copy of the letter was obtained by revealing a lawyer's secret.

The court rejected the defendant's appeal and ruled that the case did not constitute unlawful evidence because everyone is obliged to report a criminal offence of which they are aware, including lawyers. Furthermore, at the time the defendant sent her the letter, counsel LMP was representing the defendant before the court in the civil proceedings and was not his defence counsel in the criminal proceedings. Accordingly, she was relieved of her duty to testify about everything she discovered in the course of her representation of the defendant in civil proceedings. However, a lawyer has the option to waive the right to be relieved of its duty to testify, and giving such waiver, the lawyer would be entitled to testify about the respective information.

Accordingly, the court found that the LMP had the right to pass on her knowledge about a criminal offence to others, including the competent Attorney General.

Data privilege

Content to follow shortly.

Key contacts



Aleksej Miškovi

Partner

aleksej.miskovic@gamc.hr

T: +385 1 61999 30



Czech Republic

Last modified 19 November 2021

Concept of legal professional privilege

The legal basis for the protection of communications is found in the Czech Charter of Fundamental Rights and Freedoms (the 'Charter'). The right to legal assistance in proceedings before courts, other organs of the State and public administration organs is set out in Article 37(2) of the Charter. The right to protection against intrusion of personal life and confidentiality of letters is set out in Articles 10(2) and 13 of the Charter.

The protection of confidential communications between a lawyer and their client is set out in Act No. 85/1996 Coll. on the Legal Profession. In accordance with that law, a lawyer is obliged to preserve professional secrecy regarding any facts known to them in connection with their provision of legal services.

Legal professional privilege generally comes into play in criminal, administrative and civil proceedings when an on-the-spot inspection of a commercial premise, an office or a house takes place, exercised by the public authorities. It covers, for example, the situation when an officer of the Office for the Protection of Competition (the 'Office') enters commercial premises of competitors and finds, among other documents, documents that prove that an offence in the field of competition law has been committed.

The Czech case law recognising the concept of legal professional privilege is underdeveloped. While the rules governing legal professional privilege are not expressly set out in any legal regulation, case law has developed this concept in the area of competition law, based on general legal principles.

Generally, a public authority, in order to become familiar with the contents of a communication between a lawyer and their client, is obliged to obtain consent of the representative of the Czech Bar Association ('Chamber') and to inspect the contents in the presence of the representative of the Chamber. The consent of the representative of the Chamber can be replaced by a court order on a request submitted by a public authority requesting disclosure of the documents.

However, this procedure (ie to obtain consent of the representative of the Chamber or a court order) applies only in situations where a legal regulation requires it to be followed, and usually where the inspection is carried out on the premises of a lawyer. The procedure does not apply where an inspection takes place at the premises of a client.

Where a public authority seizes the evidence containing communications between a lawyer and their client from the premises of a party to administrative proceedings, no consent from the representative of the Chamber or court order is required.

Legal professional privilege is only discussed on the judicial level when the court decides on the merits of the case, eg when the actions against a public authority in the administrative judiciary are being decided. In accordance with the case law of the Supreme Administrative Court and the Regional Court in Brno, the seizure and familiarisation with the documents containing correspondence between a lawyer and a client does not conflict with the law.

Scope of legal professional privilege

What is protected by legal professional privilege?

The protection against seizure of documents on the premises of a lawyer covers all information provided between a client and a lawyer which is related to the proceedings and which was communicated either before or after the commencement of proceedings before the public authority. The protection of confidential information starts with the mere preparation for the representation in the proceedings, especially at the moment when the client turns to the lawyer and requests legal services.

There is no express regulation of 'protected' documents or communications. This is applicable to any spoken or written communications, documents or correspondence exchanged between a lawyer and their client. Any breach of this duty could lead to sanctions being imposed by the Chamber and under certain circumstances the lawyer can be held criminally liable.

Are communications with in-house counsel protected by legal professional privilege?

In comparison with external independent lawyers, in-house lawyers are in a different situation, especially with respect to functional, structural and hierarchy reasons. Communications between a company and its in-house lawyer are not protected against seizure.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Current Czech case law does not provide any guidance as to the question of whether communications with foreign qualified lawyers are protected. Most likely, the national approach would follow the position of EU law, ie the answer would be that the lawyer must be qualified to practise law in a country of the EEA, unless there are any strong reasons for a deviating position (this could be the case, for example, if the relevant non-EEA qualified lawyer, advising in a relevant matter, was registered by the Chamber as a 'foreign attorney'). The protection is applicable to non-national qualified lawyers who are members of the Chamber.

How is legal professional privilege waived?

A lawyer can be exempted from the duty of confidentiality only by waiver of a client or after the client's death or after the winding-up by a legal successor. When the subject of the proceedings is a dispute between a client or their legal successor, the lawyer is not bound by the duty of confidentiality to the extent the information is required for proceedings taking place before the court or other authority.

The duty of confidentiality does not apply to the legally imposed duty of preventing criminal offences in cases set by the law.

Recent cases and/or other legal developments

We are aware of one case heard by the authorities, namely the Billa – Meinl case (decision of the Supreme Administrative Court file no. 5 Afs 95/2007). This case involved legal professional privilege in its purest form, ie communication between an undertaking (subject to investigation by the national competition authority) and its external counsel (registered as a Czech lawyer) relating to a particular competition matter. The national competition authority took possession of documentation during a dawn raid, but immediately returned it and excluded it for the purpose of subsequent fact finding. The Supreme Administrative Court, hearing an administrative action against the decision of the national competition authority, confirmed, in obiter dictum to its judgment, the existence of legal professional privilege in this respect. The Court stated that legal professional privilege forms a part of the undertaking's right to legal protection and that the authority having become acquainted with the content of a document protected by legal professional privilege might violate that right.

Legal professional privilege in the context of merger control

Under Czech law, there is no specific regime in place relating to the application of legal professional privilege in merger control procedures (ie there are no specific guidelines issued by the Czech Antimonopoly Office or any relevant case law on the point). Instead, the general principles relating to the protection of communications between a lawyer and a client apply (for example as applied in the context of dawn raids as explained above). In the case of multinational mergers, the relevant EU rules apply (see the EU chapter regarding legal professional privilege).

However, according to the Supreme Administration Court, the fact that the administrative body is familiar with the contents of the correspondence between a lawyer and a client and that this correspondence was seized during an on-the-spot inspection is not automatically considered to breach the right to legal protection. While investigating whether the right to legal protection was breached, the particular circumstances of the case had to be balanced, namely:

- under what circumstances the administrative body became familiar with the contents of the confidential correspondence which activity or inactivity of the undertaking under investigation took place when marking the documentation as confidential; and

- whether the contents of the correspondence were confidential (ie between a client and a lawyer) and whether the correspondence was marked as confidential

Nevertheless, this is being considered as an error of the proceedings, but it shall require further inquiry to determine whether the error is critical or crucial or significant and whether it had any impact upon the lawfulness of the decision of the Office. The error will be considered as critical or crucial or significant when the familiarisation with the correspondence between a lawyer and a client constituted such a breach of right to legal protection that it fundamentally impacted the investigation and decision making of the Office.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

N/A – already answered in the full legal professional privilege global guide. An attorney must follow all of the rules of the GDPR as any other processor of personal data.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

The litigation privilege commences at the moment, when the attorney has found out the fact, which is subject to the privilege.

c) Are communications to / by companies and in-house counsel protected by privilege?

Yes under the agreement.

d) Are there any specific requirements of a privileged incident response engagement letter?

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

The legal privilege includes all information the attorney has found out with regard to providing legal services.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

Already answered in the Legal professional privilege - Global Guide.

c) How are seized documents put into evidence in a criminal / civil procedure?

Already answered in the Legal professional privilege - Global Guide.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

The legal privilege may be waived by the client or after hers/his death or termination its legal successor. The legal privilege also continues after the case is terminated or the attorney is deleted from the bar's list.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

N/A.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

N/A

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last 5 years? If so, please provide details.

Yes.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/ cross-border scenario?

No, we are not aware of any.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Most likely not, but there is no specific explanation to the privilege obligation under Czech law nor any useful case law yet.

d) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

This would be considered a legal privilege, if falling under its scope.

Key contacts



Jan Rataj

Senior Associate

jan.rataj@dlapiper.com

T: +420 222 817 800



Jan Metelka

Associate

jan.metelka@dlapiper.com

T: +420 222 817 825



Denmark

Last modified 19 July 2021

Concept of legal professional privilege

According to The Code of Conduct for Danish lawyers, the concept of confidentiality is founded in the rule of law. It is a necessary part of legal practice and a fundamental duty and right to be respected, in the interests of individual clients as well as being a matter of public interest.

Confidentiality between lawyer and client is therefore a general principle of Danish law, but it is not a statutory privilege in all areas of the law. As regards the area of competition law, legal professional privilege is based on practices and soft law from the Danish competition authorities.

Legal professional privilege in the context of investigations by the Danish competition authority

In the context of competition law, legal professional privilege is subject to two different sets of rules, as competition law is enforced by two separate authorities. In criminal litigation, special rules regarding legal professional privilege apply. Within the area of administrative competition law, the principles of EU case law on legal professional privilege apply.

Competition law infringements in Denmark are subject to both criminal sanctions including fines and imprisonment and administrative fines. Following implementation of ECN+, the Danish Competition and Consumer Authority ("**DCCA**") has the authority to impose administrative fines, while individuals are prosecuted by the police.

The Danish concept of legal professional privilege in the context of competition law cases is therefore based on (1) legal professional privilege subject to EU case law and applied by the DCCA in administrative cases, and (2) confidentiality privilege under criminal law applied by the State Prosecutor for Serious Economic and International Crime ("**SEIC**") in criminal cases.

The DCCA has the power to acquire information pursuant to sections 17 and 18 of the Danish Competition Act (concerning requests for information and unannounced inspections, i.e. dawn raids). The authority's actions are administrative coercive measures and are regulated by the Danish Act for Administrative Coercive Measures supplemented by EU case law on legal professional privilege (*Lov om retssikkerhed ved forvaltningens anvendelse af tvangsindgreb og oplysningspligter*).

In complex cases, the DCCA will often choose to conduct its own investigation and issue behavioural orders concerning any infringement, e.g. cease-and-desist orders. Such orders are subject to appeal.

Legal professional privilege in administrative cases is not expressly set out in Danish legislation. However, the DCCA has issued guidelines on carrying out dawn raids and it follows from the guidelines that the DCCA recognises legal professional privilege. According to certain publications the DCCA adheres to EU case law on legal professional privilege.

If a dispute arises during an inspection as to whether a document is covered by legal professional privilege, the DCCA will act in accordance with its dawn raid guidelines. Contested documents are placed and sealed in a briefcase for individual evaluation after the dawn raid has taken place. For electronic documents, the DCCA will make copies and store them on special hard drives for later review. The hard drives containing the copied data are sealed and placed in a locked safe in a specially secured investigation room at the DCCA. The entity under investigation or its representative (e.g. an external lawyer) is invited to witness when the seal on the copied hard drives is broken and to attend the subsequent search. During the search, the entity or its lawyers can specify which electronic documents it

considers to be covered by legal professional privilege. These documents will be tagged and excluded from future searches. After completion of the search, the DCCA issues a report to the undertaking under investigation containing a list of documents tagged as potentially subject to privilege. The entity must explain the basis on which it claims privilege for such documents. If the entity and the DCCA are unable to agree on which documents are to be included in the case, the DCCA will issue a written decision on the matter. A party may apply to stay and appeal the DCCA's decision.

Legal professional privilege in the context of civil litigation

In Danish civil litigation it is generally a matter for the parties to decide what information they wish to disclose. If a party requests information to be disclosed, the other party is entitled to refuse the request and accept the procedural consequences of not submitting information.

For competition law cases, the damages directive has been implemented in Danish law. As a result, the provisions in The Administration of Justice Act regarding discovery of documents in civil litigation apply. Accordingly, all documents and information are exempt from disclosure if they originate from persons who are exempt from giving testimony in civil litigation under witness exemption rules in The Administration of Justice Act. This encompasses advice received from a lawyer including in-house counsel.

Scope of legal professional privilege

What is protected by legal professional privilege?

The scope of legal professional privilege in administrative investigations conducted by the DCCA mirrors the principles of EU case law on legal professional privilege.

Legal professional privilege in criminal investigations conducted by the SEIC protects the lawyer from being required to give testimony and protects the lawyer's written advice or the like from being searched or seized (Sections 794(3) and section 802(4) cf. section 170 of the Administration of Justice Act).

The lawyer's written advice encompasses correspondence from the lawyer or the lawyer's assistants to the suspect, including e-mails and telecommunications from a mobile phone. It does not cover the suspect's own notes of any meeting(s) with their lawyer. During any police investigation at the premises of a suspect, the SEIC must be on hand to determine whether a document contains written advice from a lawyer. Where there is any doubt, the SEIC may seize the documents in question in the first instance in order to refer the matter for decision by the court. Any interference with the confidentiality between a suspect and their lawyer always requires a prior court order.

Provided that documents are created in the lawyer's capacity as a lawyer they will fall under the scope of legal professional privilege. The court may, however, in special cases order a lawyer to disclose certain evidence, unless the lawyer is acting as criminal defence counsel. The lawyer is considered to be acting as criminal defence counsel from the moment the lawyer and the client could reasonably have known that the client would be charged with a crime. Note that this part only regards individuals as the DCCA will issue administrative fines for companies.

Are communications with in-house counsel protected by legal professional privilege?

Danish lawyers are allowed to keep the qualification of lawyer when they are employed as in-house counsel. However, as in-house lawyers take instructions from their employer they do not act independently, which means that communications made by in-house lawyers to their employers are not covered by legal professional privilege.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

EU lawyers are generally given the same rights as Danish lawyers, but they can only appear before the Danish courts if they represent their client alongside a lawyer admitted to the Danish Bar. Law degrees from outside the EU are not recognised in Denmark. Communications made by lawyers qualified within the EU are therefore covered by legal professional privilege in Danish proceedings. Lawyers who have qualified outside the EU cannot rely on legal professional privilege in respect of their communications.

How is legal professional privilege waived?

Legal professional privilege under Danish law follows EU case law on legal professional privilege and can only be waived with the client's

instructions.

Legal professional privilege in the context of merger control

Merger control cases falling within the remit of the DCCA are conducted according to EU case law on legal professional privilege.

Recent cases and/or other legal developments

There is no case law on legal professional privilege in Denmark. The latest legal development is the DCCA's dawn raid guidelines from 2016, in which the authority recognizes the concept of legal professional privilege and establishes a framework for dealing with disputes regarding legal professional privilege. The guidelines are expected to be revised in 2021.

Data privilege

Content to follow shortly.

Key contacts



Michael Klöcker

Partner

michael.kloecker@dk.dlapiper.com

T: +45 33 34 00 60



England and Wales

Last modified 07 March 2019

Concept of legal professional privilege

Legal professional privilege is a concept which protects certain documents from disclosure in the context of legal proceedings. Without the protection of privilege those documents may need to be disclosed to the other side in litigation / arbitration prior to trial or could be seized / inspected by investigators in most regulatory procedures and relied on as evidence at a trial.

The law of England and Wales recognises two main types of legal professional privilege:

- **Legal advice privilege** exists to protect confidential communications between a client and its lawyers, where the purpose of the communications is giving, seeking or receiving legal advice. It does not extend to communications with advisers who are not lawyers, for example tax advisers or accountants, and
- **Litigation privilege** protects confidential communications between a client and its lawyers, or either of them and a third party, where the sole or dominant purpose of the communications is giving, seeking or receiving legal advice in connection with adversarial proceedings, or collecting evidence for use in those proceedings, at a stage when they are reasonably contemplated

Other types of legal professional privilege which are occasionally asserted are joint privilege and common interest privilege.

Legal professional privilege is a substantive legal right (not a procedural rule). It enables a person to refuse to disclose certain documents in a wide range of situations. No adverse inference can be drawn from a valid assertion of legal professional privilege.

Legal professional privilege only protects confidential documents. If documents which would otherwise be privileged contain information which is already in the public domain or which has been shared with third parties, legal professional privilege will be lost.

The legal professional privilege belongs to the client, not the lawyer, and does not depend upon the document being in the lawyer's custody. Privileged documents can be (and frequently are) held by the client.

Scope of legal professional privilege

What is protected by legal professional privilege?

LITIGATION PRIVILEGE

Litigation privilege affords a wider protection than legal advice privilege since, where it applies, it can protect communications with third parties as well as those between a lawyer and their client. It applies where adversarial proceedings are existing or are reasonably in prospect (for instance, where negotiations over a contractual issue are breaking down or one party sends or receives a formal letter before action). Enquiries by regulatory authorities, requests for staff to give witness evidence, third party disclosure orders and other investigative processes may not be considered adversarial, although regulatory proceedings in which judicial powers are being exercised are likely to be considered adversarial for these purposes. A good approach to determining whether proceedings are in prospect is to consider whether there is a legal issue to be determined as between the parties to the relevant process.

If adversarial proceedings are existing or reasonably in prospect, a 'dominant purpose' test will apply to protect as privileged all

confidential documents prepared for the dominant purpose of giving or obtaining legal advice with regard to that litigation or aiding the conduct of that litigation. Determining the purpose of a document can be problematic, particularly as the test is one of dominance and not exclusivity. However, the court will assess the purpose of a document on an objective basis.

Litigation privilege has no retrospective effect.

Documents created before adversarial proceedings are reasonably in prospect will not attract litigation privilege (although they may attract legal advice privilege).

LEGAL ADVICE PRIVILEGE

If no adversarial proceedings are in contemplation, legal professional privilege will only attach to documents which constitute confidential communications between a lawyer and their client made for the purpose of giving or obtaining legal advice and documents which evidence such communications, including material forming part of the continuum of those communications. Each part of this test requires further explanation.

Communications

To attract legal advice privilege, a document must actually transfer information between a lawyer and their client or be intended for that purpose. A document which is not prepared for the purpose of being placed before a lawyer for the purpose of seeking legal advice or is not addressed and delivered to a lawyer specifically for advice may not constitute a communication. A statement prepared by an employee at the request of a manager to record the employee's recollection of events is unlikely to benefit from legal advice privilege – even if the employee believes that the document will be passed to lawyers for advice – since it is not a communication with a lawyer. The onward transfer of that statement by a client to their lawyer for advice would, however, benefit from legal advice privilege.

Lawyer

Includes all members of the legal profession: solicitors, in-house lawyers, barristers within the UK and duly accredited foreign lawyers (whether foreign in-house counsel who are not required to be a member of their local Bar would still qualify is currently untested). Where appropriate provisions for supervision are in operation, it can also include legal executives, paralegals and trainee solicitors.

A risk may arise in communications with in-house lawyers where the context of the communication relates to commercial rather than legal matters. Where that is the case, privilege will not apply. A further exception applies in relation to in-house lawyers, in that communications between them and their clients will not be protected by privilege in the context of European Commission competition investigations, on the basis that the in-house lawyers are not deemed to be sufficiently independent from their clients in those circumstances.

Client

Not every employee in a company will be the client for the purpose of attracting privilege. The 'client' will only comprise those few individuals who are authorised to obtain legal advice and who seek and receive legal advice from the lawyer, whether external or in-house. This might be an *ad hoc* committee or group formed to respond to a specific issue or incident, or it might be members of senior management. Often, however, those with direct knowledge of the facts or matters in issue will not fall within the concept of 'client' and particular care will therefore need to be exercised when interviewing or obtaining information from such employees.

Documents created for the purpose of giving or obtaining legal advice

Legal professional privilege only attaches to communications that give or seek legal advice as to what should prudently and sensibly be done in a relevant legal context. This includes advice on how best to present facts in light of legal advice given. In determining whether there is a relevant legal context, consideration should be given to whether the advice relates to 'the rights, liabilities, obligations or remedies of the client either under private law or under public law'. Privilege will not attach to advice which is purely commercial or strategic.

Difficulties arise when determining the status of copy documents and documents which are only privileged in part.

Further difficulties can arise if privilege has been impliedly or expressly waived. These issues are beyond the scope of this brief summary. Expert legal advice should be taken.

Legal professional privilege in the context of criminal investigations

Regulatory investigations in the UK are not automatically considered to be adversarial from the outset and hence litigation privilege may not arise. The result is that legal advice given in the context of such an investigation will attract legal advice privilege, but documents including notes, interview transcripts and / or expert reports for the purpose of giving advice or evidence may not always attract litigation privilege and could therefore be disclosable to a regulator or in subsequent litigation.

Litigation privilege will apply in any case once it is clear that some form of prosecution or litigation arising from the investigation is in reasonable contemplation. Whether prosecution will be in reasonable contemplation is a factual question in each case and does not require a formal criminal investigation to have commenced or a decision to prosecute to have been made. Nor does it require the defendant to have full details of what might emerge in the investigation or complete certainty that proceedings will be initiated. Litigation privilege may also apply at an earlier stage, if the investigation process itself has become sufficiently adversarial so that the company under investigation effectively stands accused of wrongdoing and should, therefore, be able to claim litigation privilege over witness evidence gathered for the purpose of obtaining advice to defend itself.

Legal professional privilege in the context of investigations by the antitrust / competition authority

Distinct from legal professional privilege, Part 9 of the Enterprise Act 2002 ('EA 2002') creates a statutory confidentiality regime covering most competition-related inquiries undertaken by domestic authorities within the UK. This regime can be significant in any litigation following a competition inquiry where disclosure of documents created during the inquiry is sought by a party to the litigation.

The relevant sections of EA 2002 prevent disclosure by any party of documents disclosed to it by an authority in the exercise of its legal functions (without consent from that authority). In practice, this means:

- Documents received from or authored by the authority itself cannot be disclosed
- Documents created by third parties which came to the authority during the investigation and were then disclosed to the company cannot be disclosed (this might include documents from another company subject to the same investigation)
- Documents created by the company under investigation before the investigation and provided to the authority in the course of the investigation may still be disclosed, and
- Whether documents created during the investigation relating to employee interviews and witness statements can be disclosed will depend on the author of the documents in question. If they were created by the company, then they may be disclosed. If they were created by the authority from interviews / transcripts with company witnesses, it is arguable that they will not be disclosable

Are communications with in-house counsel protected by legal professional privilege?

Yes, except in the context of an antitrust and competition investigation by the European Commission.

An in-house lawyer must, however, take particular care to ensure that they distinguish clearly between advice which is legal and that which is commercial in nature, since the latter will not attract legal professional privilege. The in-house lawyer must also take care when instructing external lawyers to clearly identify and effectively manage the relevant lawyer / client relationships.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Yes, where the question of disclosure is governed by the law of England and Wales. Legal professional privilege applies to advice given by all duly accredited members of the legal profession. It is not necessary for the lawyer to be qualified in England and Wales. The question of whether this extends to in-house counsel in European jurisdictions where those counsel are not required to be members of their local Bar and whose advice in their own jurisdictions would not be protected by local professional secrecy laws remains to be determined by the UK courts.

Where the question of disclosure is governed by European law (such as in the context of an antitrust and competition investigation within the UK by the European Commission), only the advice of an independent lawyer qualified within the EEA is protected by legal professional privilege.

How is legal professional privilege waived?

Legal professional privilege is waived if the relevant material is placed before a court. It is also lost if the material in the document loses confidentiality or if the document came into being for the purpose of furthering a criminal or fraudulent scheme. A lawyer has a duty to protect a client's legal professional privilege and cannot waive it without the client's express authority.

It is possible to waive legal professional privilege on a selective basis so that disclosure to a third party of a privileged document will not mean that it ceases to be privileged for any other purpose. However, for a waiver to be selective, the terms of the disclosure must be clearly established in advance. This is a complex area. Always seek legal advice.

Legal professional privilege in the context of merger control

It is usual for merging parties to engage in pre-notification discussions with the CMA during which it is the CMA's practice to send the parties detailed questions concerning the transaction. Further questions from the CMA are likely after the formal Merger Notice has been submitted, for example, to respond to information concerning the transaction that the CMA has received from third parties such as customers of the merging parties. Such requests for information supplement the information that the parties are required to submit under the terms of the Merger Notice. Once the filing is made, the CMA has wide statutory powers to require the parties to produce information and documents for the purpose of the investigation (section 109 of the Enterprise Act 2002). However, the parties are not required to disclose legally privileged documents. In the area of merger control (as in other areas of English law), privilege refers to legal advice privilege and litigation privilege discussed above.

Recent cases and/or other legal developments

In February 2017, the Law Society of England and Wales published a new guidance note on Legal Professional Privilege which was developed in consultation with the Law Society's LPP working group and reflects the Law Society's view of good practice in the area.

In *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* (see **footnote 1**), the Court of Appeal overturned a controversial first instance decision relating to the scope of litigation privilege, particularly in the context of criminal investigations. The Court of Appeal held that, on the facts of the case, litigation privilege did apply to certain categories of documents including notes of interviews with employees and former employees, and the work product of forensic accountants. The judge at first instance had concluded that documents brought into being for the purposes of avoiding litigation (in this case, by self-reporting the matter to the Serious Fraud Office) could not be privileged. However, this was squarely rejected by the Court of Appeal, and the judgment has established that documents brought into existence for the dominant purpose of not only defending, but also resisting or avoiding reasonably contemplated criminal proceedings, will be protected by litigation privilege.

Of further interest is that the Court indicated that it did not agree with a previous decision (which was binding on it, but which had been widely criticised) which restricts who the 'client' is for the purposes of legal advice privilege to the employees tasked with seeking advice on behalf of the company. The Court indicated that it would prefer to expand this narrow view of the client to take account of modern multinational companies in which many employees may be required to interact with the company's lawyers.

In *Sotheby's v Mark Weiss Ltd* (see **footnote 2**), the High Court held that communications between a lawyer and a client with two purposes 'of equal importance and relevance' would not satisfy the dominant purpose test used to establish litigation privilege. In this case, the claimant commissioned a series of reports to inform certain commercial decisions and legal decisions. However, the High Court held that neither the commercial nor the legal angle could be determined as the dominant purpose of consequent communications about the reports between the company and its lawyers. The High Court also confirmed that even if litigation is the 'inevitable' consequence of taking a particular commercial decision, it must be shown that the dominant purpose of documents produced for making that decision is necessarily their use in the contemplated litigation.

In *WH Holding v E20 Stadium LLP* (see **footnote 3**), the Court of Appeal confirmed that 'conducting litigation' (being one of the necessary elements comprising the test of litigation privilege) includes taking steps to avoid or settle litigation. However, to be covered by litigation privilege, the communications must have been made for the dominant purpose of obtaining advice or evidence in relation to the conduct of that litigation, rather than 'conducting litigation' in a broad sense. The Court of Appeal rejected the attempt to extend the scope of litigation privilege to cover purely commercial discussions, maintaining that the disputed documents (being emails between board members discussing a commercial proposal for the settlement of a dispute), were not covered by litigation privilege. The Court of Appeal did accept that litigation privilege could apply if advice or information obtained for the sole or dominant purpose of conducting litigation cannot be 'disentangled' from a broader document, or if it would otherwise reveal the nature of such advice or information.

Footnote 1: [2018] EWCA Civ 2006

Footnote 2: [2018] EWHC 3179 (Comm)

Footnote 3: [2018] EWCA Civ 2652

Data privilege

Content to follow shortly.

Key contacts



Paul Stone

Partner

paul.stone@dlapiper.com

T: +44 113 369 2700



Egypt

Last modified 18 September 2019

Concept of legal professional privilege

The Egyptian legal system is a civil law system and is based upon a system of codified laws. The Egyptian Civil Code combines Shari'a law (**"Islamic Religious Law"**) and Napoleonic Code (which forms the basis of the French Civil Code). Many civil codes of other Middle Eastern countries have modelled their legal system on the Egyptian Civil Code.

There is no established system of binding precedents in the Egyptian courts; previous judicial decisions do, however, have persuasive authority. In practice, the lower courts find themselves both morally and practically bound by the principles and precedents of the higher courts.

In many civil law jurisdictions in the region, including Egypt, the concepts of legal professional privilege and "without prejudice" communications do not exist *per se*. The parties therefore have the right to use any document which may support their position. Lawyers in Egypt, however, will be bound by duties of confidentiality; these duties in many cases incorporate concepts similar to legal professional privilege.

The common law concept of standard disclosure is not available in Egypt, which helps to protect internal confidential documents. A party can however request the court to order disclosure of a specific document, if it can be shown that the document in question is material and relevant to the dispute.

Scope of legal professional privilege

Legal professional privilege protects all communications between a professional legal advisor and their clients from being disclosed without the permission of the client. The privilege is solely for the benefit of the client, and not the lawyer. The objective of this legal principle is to protect one's access to the justice system by ensuring individuals can disclose all relevant information to their legal advisers without the fear that this disclosure may result in negative repercussions or prejudice them in the future.

A lawyer ceases to be bound by the requirements of legal professional privilege protection if the lawyer can demonstrate that documentation or information:

- was in the public domain at the time it was disclosed to the lawyer;
- entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer; or
- was in the lawyer's possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by contemporaneous records.

A lawyer may disclose certain documents / information that would otherwise be protected by lawyer-client privilege to the extent such disclosure is required by a valid order of a court of other governmental body having jurisdiction, provided that the lawyer provides the client with reasonable prior written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents / information so disclosed be used only for the purposes required by law.

It is advisable that if parties are attempting to settle their dispute in Egypt, they should qualify any form of communications with statements to the effect that any offer or communication does not constitute an admission of liability. Parties should also seek an

undertaking that any information contained within such communications will not be used as evidence.

It appears that the same privilege protections do not apply to in-house legal counsel advising officers, directors or employees of the company as they are not independent to the client. However, to protect this information, it is possible to enter into a confidentiality agreement between the employer and the employed in-house legal counsel.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Egypt.

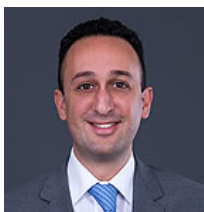
Recent cases and/or other legal developments

There do not appear to be any recent cases or other legal developments in Egypt regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts



Peter Anagnostou

Senior Legal Consultant

peter.anagnostou@dlapiper.com

T: +971 4 438 6392



Estonia

Last modified 23 June 2022

Concept of legal professional privilege

The concept of legal professional privilege in Estonia is mainly regulated by the Estonian Bar Association Act and the Code of Ethics of the Estonian Bar Association. These establish general principles for the activities of attorneys, associate members of the Bar and foreign attorneys practicing in Estonia.

Legal professional privilege consists of the following general rights and obligations:

- The right to be independent and to follow the law, the legal instruments and resolutions of the bodies of the Estonian Bar, the rules of professional ethics, good manners and their own conscience during the provision of legal services
- The obligation to maintain the confidentiality of information disclosed to an attorney in the course of provision of a legal service, the fact that an attorney has been consulted for the purpose of receiving legal services and the size of the fees paid for legal services. By way of derogation, the duty to maintain confidentiality in relation to the fact that an attorney has been consulted for the purpose of receiving legal services and the size of the fees do not apply to the provision of state-funded legal aid and the fee paid for it
- No questions may be asked or statements demanded from an attorney, an employee of the Estonian Bar or an employee of a law office interviewed as a witness about information gained by them in connection with the provision of legal services
- All data media related to the provision of legal services by an attorney is privileged; and
- Attorneys cannot be arrested, searched or taken into custody based on circumstances arising from their legal practice, except on the basis of an order issued by a county court. In addition, the attorney's law office cannot be searched either. Such operations are permitted only if they are justified by an overriding public interest and procedural guarantees provided by law are complied with.

Legal professional privilege does not have a time limit and remains in force after the attorney's legal practice has terminated. The privilege also applies to the employees of the law firm, to employees of the Bar and to civil servants who have learned information subject to the attorney-client privilege in the course of performing their duties.

Scope of legal professional privilege

What is protected by legal professional privilege?

Legal advice privilege

The scope of legal services is defined very broadly in the Estonian Bar Association Act, covering the legal practice of advising, representing or defending a client in court, in pre-trial proceedings or elsewhere, preparation of a document for a client and any other legal activities in a client's interest. Therefore, legal professional privilege applies to any kind of information and all data media created and/or obtained by any means in connection with the provision of legal services.

Litigation privilege

Since any kind of advice in legal proceedings (civil, administrative, criminal and misdemeanour matters) falls within the scope of legal services, legal professional privilege also applies.

In the context of civil litigation, the Estonian Code of Civil Procedure further stipulates that, regardless of any demands by the court, a document need not be submitted:

- By an attorney who has received the document in connection with the provision of legal services
- If the document contains information which the possessor of the document cannot be heard as a witness for, or which the possessor of the document has the right to refuse to give testimony as a witness for; and
- By a person who has the right to refuse to submit the document because of another reason arising from law.

Legal professional privilege in the context of criminal investigations

In the context of criminal investigations, general legal professional privilege also applies. However, the Estonian Code of Criminal Procedure further guarantees a higher standard of protection of privilege on the following occasions:

- Legal counsel (and their professional support staff) and others who are obliged to maintain professional secrecy have the right to refuse to give testimony as witnesses concerning the circumstances that have become known to them in their professional activities. However, those people do not have the right to refuse to give testimony if their testimony is requested by a suspect or accused
- A search of an attorney (including the attorney's office, home or vehicle) may be only conducted at the request of the Prosecutor's Office of Estonia on the basis of an order of a preliminary investigation judge or on the basis of a court order
- A search warrant must set out precisely the objective of the search, ensuring that arbitrary and extensive collection of evidence without a real cause is prohibited
- An attorney's law office must be searched in the presence of the attorney. If the attorney cannot be present the search must be conducted in the presence of another attorney from the same law office or, if this is impossible, another attorney; and
- Information communicated by attorneys or information communicated to attorneys by others which is subject to wire-tapping or covert observation cannot be used as evidence if such information contains facts which have become known to the attorney in their professional activities, unless such person has already given evidence on the same facts or has otherwise disclosed them.

Specific rules, together with the principles of criminal proceedings, may also apply to misdemeanour proceedings.

Legal professional privilege in the context of investigations by the antitrust/competition authority

There is no specific privilege arising in the context of investigations by the antitrust/competition authority. General legal privilege applies. In addition, the provisions in the context of criminal investigations also apply in the event of criminal proceedings on antitrust/competition matters.

Legal professional privilege in merger control procedure

There is no specific privilege arising in the context of merger control matters. General legal privilege applies.

Are communications with in-house counsel protected by legal professional privilege?

In the case of communications of any kind between an attorney and in-house counsel (as a recipient of a legal service), the general principles of legal professional privilege apply. However, if an in-house counsel communicates with a person who is not a neutral third party (e.g. documents are being transmitted within the company), legal professional privilege does not apply.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The Bar Association Act provides that legal professional privilege also applies to non-national attorneys who meet the following conditions:

- An associate member of the Estonian Bar, who is a citizen of another EU Member State, who has the right to act as a full attorney in that Member State and to whom the Estonian Bar Association has granted the right to operate permanently in Estonia; and
- A foreign attorney who has the right to practice as a fully fledged attorney in an EU Member State but is not a member of the Estonian Bar Association.

How is legal professional privilege waived?

There are several exceptions prescribed by law which are not considered as a violation of legal professional privilege:

- The client or their legal successor may exempt the attorney from the privilege by written consent
- The recovery of legal costs by the opposite party in the legal proceedings
- Disclosure of information to the board and ethics tribunal of the Estonian Bar Association regarding disciplinary offence cases
- To prevent a criminal offence of the first degree by submitting a reasoned written application to the relevant authority requesting to revoke the privilege; and
- Disclosure of information to the insolvency division in connection with regulatory enforcement in matters concerning the practice of a bankruptcy trustee.

Recent cases and/or other legal developments

Tallinn Circuit Court ordered^[1] that for legal privilege to be applicable, there does not necessarily have to be a contract between the attorney and the client. It is sufficient if the attorney has provided any legal services to the client.

In the context of criminal investigations, the Supreme Court of Estonia,^[2] held that the court has the competence to decide whether data gathered through wire-tapping or covert observation is protected by legal professional privilege, and consequently, assess the admissibility of the use of such information as evidence in criminal proceedings.

The Supreme Court of Estonia,^[3] clarified that the protection of legal professional privilege is essential in assessing the admissibility of a search of a law office. The need to protect legal privilege justifies a higher standard of procedural requirements when searching a law office. Therefore, law offices may be searched only if there is a judgment of a court to that effect. For example, one justification for the search of a law office would be the justified suspicion of a criminal offence. On a related subject, the European Court of Human Rights^[4] found that the regulatory framework regarding the search of a law office in Estonia did not provide sufficient procedural guarantees. The ECHR stated that there are no precise regulations governing the search of an attorney's data media outside the law office (e.g. their home and vehicle), although such an obligation may be indirectly derived from the Estonian Bar Association Act. The main complaint concerned the protection of legal professional privilege, whereas the issue of differentiation of digital data media is particularly complex, for example, how the information is selected from existing materials. In this respect, the current regulation in Estonia is insufficient. At present, there is no publicly available information on whether any legislative changes are expected on this issue.

Regarding waiver of legal professional privilege, the Tallinn Administrative Court^[5] held, that legal privilege is a statutory right which is intended to protect the client's interests in confidentiality of the information disclosed to the lawyer, not the attorney's interest in the confidentiality of the legal service provided to the client. Therefore, attorneys cannot insist that clients disclose (or not disclose) information relating to the provision of legal services.

Footnotes

[1] Judgment 1-18-7408

[2] Judgment 3-1-1-64-13

[3] Judgment 3-19-467

[4] *Sārgava vs. Eesti* (698/19)

[5] Judgment 3-19-2304

Data privilege

Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

There is no specific legal privilege arising in the context of internal investigations or data protection matters. General legal privilege is applicable to client-attorney communication also in the context of internal investigations and data protection matters.

Generally, a lawyer is required to maintain the confidentiality of the information which has become known to the lawyer in the provision of legal services. Communication between the client and legal counsel is protected from investigations by the authorities.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

Generally, a provider of legal service has an obligation to keep the information related to the provision of legal services confidential indefinitely, including after the termination of the provision of legal services. The same rules applies to legal advice and litigation. Litigations are generally public and can be closed only in case of overriding reasons (eg private life and commercial secrecy). Information and documents disclosed in the course of the public litigation are not privileged.

c) Are communications to/by companies and in-house counsel protected by privilege?

As stated above, the information related to the provision of legal services is protected by legal privilege. However, if a party to the communication in regard to the provision of legal services is not an independent outside counsel, such legal privilege does not apply. "In-house communications do not merit the protection afforded by legal professional privilege as it is not ultimately communicating with a neutral third party but with a person who is a member of its own staff."

d) Are there any specific requirements of a privileged incident response engagement letter?

There are no specific requirements of a privileged incident response engagement as the principles of general legal liability apply.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

All the relevant documents and other information related to the provision of legal services by a provider of a legal service are intact under legal privilege. To assure the protection, gathering of such evidence should be performed by independent outside counsel, as in-house documents and communication generally are not privileged.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No, the location of the documents does not affect the applicability of legal privilege, rather it is the nature of the communication. However, documents located in the premises of the lawyer are generally better protected, as conducting searches in the premises of lawyers is strictly regulated and possible only on exceptional grounds.

c) How are seized documents put into evidence in a criminal/civil procedure?

In general, artefacts reflecting legally privileged communication cannot be seized, collected or used as evidence in criminal procedure, unless the client consents to such disclosure. In the pre-court phase of the criminal procedure the prosecutors' office together with the relevant investigative body collects evidence. Also, people under investigation or other interested parties may submit evidence supporting their position. In the court-phase of the criminal investigation, the prosecutors' office submits the case file to the court, and other parties may submit additional evidence.

The Estonian pre-court criminal procedure introduces a vulnerability to strict client-attorney privileged. In seizures at the client's premises, especially if e-evidence is gathered, the prosecutors' office prefers to collect documents and evidence in bulk (eg copying of hard drives). In processing the evidence gathered this way, the authorities may accidentally review privileged documents and obtain information that can be later confirmed via non-privileged communication.

In Estonian civil procedure, the parties to the proceedings have to obtain the evidence themselves pursuant to the principle of adversarial court proceedings. Court orders on disclosure are exceptional, limited to specific documents and should not breach legal privilege. Discovery-type of evidence production processes are not recognised in Estonian legal proceedings. For these reasons, privileged documents are rarely encountered in litigations without express consent of the privileged communication.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish

these and are there practical steps that can be taken to ensure that privilege is not lost?

There are several exceptions prescribed by law which are not considered as a violation of legal privilege:

- a recipient of legal service exempts the provider of a legal service from the obligation to maintain confidentiality;
- to prevent a criminal offence in the first degree by submitting a reasoned application to the relevant authority for the exemption from the obligation;
- the obligation of confidentiality is not extended to the collection of costs for legal services provided by a lawyer who participated in the matter;
- by disclosing the information to the Board of the Estonian Bar Association in the exercise of supervision over the activities of a lawyer or to the court of honour concerning a disciplinary offence; and
- by disclosing information to the Ministry of Justice relating to supervision in the matters of acting as a trustee in bankruptcy.

The requirements for waiver under the first exception above are not established, but it must be express and we recommend to obtain it in writing.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

In general, the findings of internal investigations are not protected by legal privilege. Use of evidence protected by legal privilege in open court process waives legal privilege. If a party wants to maintain the confidentiality of the privileged document, the party must try to declare the judicial review or specific document confidential. This is done on exceptional grounds.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

In general, the findings of internal investigations are not protected by legal privilege. If the findings are established in a manner which grants legal privilege (eg established by outside legal counsel), the information disclosed to affected or third parties is not privileged, unless such disclosure could be regarded as provision of privileged legal advice to same persons.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

In the last five years, there have not been any data breach privilege cases before the national courts; however, such cases have been discussed before the court of honour of the Estonian Bar Association. The court of honour identified one violation of legal privilege; however, no further proceedings were initiated as the lawyer did not disclose the data intentionally and apologised to the client.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

There are neither rules nor cases that specifically deal with legal privilege in a multi-state scenario.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

It is not explicitly provided by the law. In principle, legally privileged data outside Estonia should be treated in the same manner as legally privileged data in Estonia. However, the scope of the legal privilege may vary.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

There are no specific national regulations on this matter. Generally, the courts and investigative bodies should not possess or demand disclosure of privileged data and thus the question of its transfer to other jurisdictions should not emerge.

Key contacts



Kaupo Lepasepp

Country Managing Partner

kaupo.lepasepp@sorainen.com

T: +372 6 400 939



Mihkel Miidla

Partner

mihkel.miidla@sorainen.com

T: +372 6 400 959



Jürgen Adamson

Assistant Lawyer

jurgen.adamson@sorainen.com

T: +372 6 400 900



European Union

Last modified 01 April 2019

Concept of legal professional privilege

The laws of legal professional privilege are not harmonised throughout the European Union, but are instead governed by the national law of individual EU Member States. However, EU rules on legal professional privilege do exist and these apply in the context of the enforcement by the European Commission of EU competition law.

EU legal professional privilege must therefore be considered in competition law matters involving, or possibly involving, the European Commission. The rules on EU legal professional privilege apply in that context, irrespective of any national rules on legal professional privilege.

EU legal professional privilege applies only where the investigation is carried out by the European Commission (including where the European Commission is assisted by a national competition authority of an EU Member State). An investigation by a national competition authority of an EU Member State is subject to the applicable national rules on legal professional privilege, including in cases where the national competition authority of an EU Member State investigates possible infringements of EU competition law.

EU legal professional privilege serves as an exception to the European Commission's investigatory powers. Documents covered by EU legal professional privilege are both protected against seizure during a dawn raid conducted by the European Commission and exempted from disclosure in response to a request for information by the European Commission.

There are no statutory provisions clearly establishing EU legal professional privilege. In the absence of these, the Court of Justice of the EU recognised EU legal professional privilege as a fundamental right in 1982, in the landmark case of *AM & S v. European Commission* (Case C-155/79). The Court of Justice of the EU held that EU legal professional privilege was necessary so that any person is able to consult a lawyer without constraints. EU legal professional privilege is an essential corollary to the full exercise of the rights of defence.

While the judgments of the Court of Justice recognising EU legal professional privilege relate to investigations by the European Commission into anti-competitive behaviour, EU legal professional privilege is presumed to apply also where the European Commission exercises its investigatory powers in relation to merger control and state aid matters.

Scope of legal professional privilege

There are two conditions that must be satisfied in order for a written communication to be protected by EU legal professional privilege:

1. The written communications must be made for the purposes and in the interests of the client's rights of defence.
2. The written communications must emanate from an independent lawyer qualified to practise in a jurisdiction of the European Economic Area (EEA), that is to say a lawyer who is not bound to the client by a relationship of employment.

Communications with in-house counsel are thus not protected by EU legal privilege, even where the in-house lawyer is a member of the relevant bar association or law society, and irrespective of in-house counsel's status under national law. The Court of Justice of the EU held that an in-house counsel's relationship as an employee of the company by its very nature does not allow them to ignore the commercial strategies pursued by their employer. Communications with lawyers qualified outside the EEA are not protected.

In applying the two conditions set out above, the Court of Justice of the EU has recognised three categories of documents protected by EU legal professional privilege:

1. Written communications emanating from an independent EEA-qualified lawyer to their client exchanged after the initiation of an administrative procedure by the European Commission. This category also covers earlier written communications which have a relationship with the subject matter of the administrative procedure.
2. Notes internal to the client which report or reproduce the advice given to them by an independent EEA-qualified lawyer. The advice needs to be given for the purposes and in the interests of the client's rights of defence (ie after the initiation of an administrative procedure by the European Commission, or having a relationship with the subject matter of the administrative procedure).

The client should be cautious not to include in the internal notes their opinions on or amendments to the legal advice provided by the external EEA-qualified lawyer. These will not be protected by EU legal professional privilege.

3. Preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, provided they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of defence.

Such preparatory documents may include, for example, working documents or summaries prepared as a means of gathering information which will be useful, or essential, to the external EEA-qualified external lawyer for understanding the context, nature or scope of the facts for which their assistance is sought.

This category of documents is construed restrictively. EU legal professional privilege will apply to such preparatory documents only where they were drawn up exclusively for the purpose of seeking legal advice from an external EEA-qualified lawyer in exercise of the rights of defence. It is for the client relying on EU legal professional privilege to prove that the document in question was drawn up with the sole aim of seeking legal advice from a lawyer. This must be unambiguously clear from the content of the document itself or the context in which the document was prepared and found.

As explained in the EU submission to the OECD paper on the "Treatment of legally privileged information in competition proceedings" from November 2018, the protection may even apply in cases where the documents were not exchanged with a lawyer at the time of the request by the Commission or were not created for the purpose of being sent physically to a lawyer.

Further, the EU's submission to the OECD paper adds that merely marking a document as "Legally privileged" does not mean that the document is actually protected by legal professional privilege. A justification as to why the document is protected will still be required.

EU legal professional privilege does not prevent a lawyer's client from disclosing the written communications between them if the client considers that it is in their interest to do so. Waiving EU legal professional privilege vis-à-vis the European Commission while reserving it vis-à-vis others is possible.

The protection of EU legal professional privilege may thus differ substantially from legal professional privilege protection under national laws. For example, EU legal professional privilege does not protect legal advice emanating from in-house counsel. This is in contrast to national rules on legal professional privilege protection in Belgium, Greece, the Netherlands, Norway, Portugal, England and Wales and other jurisdictions. EU legal professional privilege protects only correspondence made for the purposes and in the interests of the client's rights of defence. In some jurisdictions, the protection of legal professional privilege covers a wider range of legal advice. EU legal professional privilege protects communications with EEA-qualified lawyers only, while the national rules in England and Wales protect communications with any lawyer. In some jurisdictions, the national rules offer a narrower protection than EU legal professional privilege.

For example, under national legal professional privilege rules in Germany, only communications created after the initiation of an investigation are protected.

Companies and their lawyers need to be aware of these differences and understand the risks they are exposed to in their jurisdictions of operation. It is therefore of utmost importance to have correct internal procedures dealing with legal professional privilege and to appreciate the differences between the various regimes of legal professional privilege.

Recent cases and/or other legal developments

How to proceed when EU legal professional privilege is disputed during a dawn raid conducted by

the European Commission investigating possible breaches of EU competition law?

The European Commission's powers in investigating anti-competitive behaviour include the power to conduct dawn raids to examine and copy books and other records found at the premises. Documents protected by EU legal professional privilege are an exemption to the European Commission's powers.

In the course of a dawn raid, if a document is protected by EU legal professional privilege, the person claiming EU legal professional privilege protection should give the European Commission's inspectors a cursory look at the headings of the document to demonstrate that the document is indeed protected by EU legal professional privilege. The person is entitled to refuse to allow the European Commission's inspectors to take a cursory look where the person believes a cursory look is impossible without revealing the content of the documents, and provides the European Commission's inspectors with appropriate reasons for this belief.

Where the protection of EU legal professional privilege is disputed during a dawn raid by the inspectors of the European Commission, the following procedure is to be followed:

1. The disputed document is placed in a sealed envelope.
2. The European Commission's inspectors may remove the sealed envelope from the premises.
3. If the matter cannot be resolved directly with the European Commission, the person claiming EU legal privilege protection may ask the Hearing Officer to examine the claims of EU legal professional privilege. The Hearing Officer may inspect the document and will communicate their preliminary view and take appropriate steps to propose a mutually acceptable decision.
4. Where no resolution is reached, the Hearing Officer will formulate a reasoned recommendation and deliver it to the European Commission, which is not binding on the European Commission but which the European Commission will examine.
5. The European Commission then takes a decision on whether or not to grant EU legal professional privilege protection to the document. The person claiming EU legal professional privilege may apply to the General Court of the EU to annul a negative decision by the European Commission.
6. The European Commission will not look at the document before the deadline for seeking annulment of the decision by the General Court of the EU has passed, or, if seeking annulment, before the annulment proceedings are closed.

Companies should exercise caution when making claims of EU legal professional privilege, as unwarranted and deceitful claims are prohibited and may be punishable by a fine.

Exchange of information within the European Competition Network

The European Competition Network consists of the European Commission and the national competition authorities of the 28 EU Member States, and allows them to cooperate on competition matters. The members of the European Competition Network have the power to exchange and use information collected for the purpose of applying EU competition law, including confidential information. National competition authorities may use information exchanged within the European Competition Network in order to enforce EU law, or to enforce their national competition law when it is applied in parallel with EU law and does not lead to a different outcome.

This has implications on the treatment of legal professional privilege. A national competition authority in one Member State (eg the UK) is able to obtain a document from an authority in another EU Member State which is subject to more relaxed legal professional privilege rules (eg Germany). A national competition authority, in this case, is thus able to obtain and use documents even if they were collected under rules which are less protective than its own. Companies, particularly large multinationals, must therefore ensure they have adequate and efficient policies to ensure that legal professional privilege protection is most effectively used.

Private damages actions for breaches of EU competition law

Natural and legal persons that have suffered damage due to breaches of EU competition law have a right to obtain damages from those found to have breached EU competition law. Private damages actions are brought in national courts of EU Member States. In order to increase the possibility of bringing private damages actions for breaches of EU competition law, an EU Directive has been adopted. The Directive requires all EU Member States to allow for courts to impose disclosure obligations in private damages actions for breaches of EU competition law. As regards such disclosure, the Directive requires EU Member States to '*ensure that national courts give full effect to applicable legal professional privilege under (European) Union or national law when ordering the disclosure of evidence*'. It remains to be seen how EU Member States will implement that provision and when the EU or national legal professional privilege regime will apply in private damages actions for breaches of competition law. EU Member States have until approximately December 2016 to implement the Directive.

Legal professional privilege in the context of merger control

Due to rapid technological development in the past few years, the merger control landscape has made room for complex highly technical mergers. A lack of understanding of certain sectors or the level of complexity of some transactions can create uncertainty as to the potential theory of harm put forward by a competition authority.

This lack of understanding around new sectors has in turn led to substantial requests for information from competition authorities. In the past, the number of requested documents from the Commission were of several hundred, whereas now the number has increased to several hundred thousand. The Commission relies heavily on internal documents to assess the markets and the strategy of the parties involved.

Deadlines might not be proportionate to the volume and complexity of the information requested. Responding to an RFI that corresponds to thousands of documents requires having access to resources that some respondents might not have access to. Considering the above, it is evident that an undertaking that wishes to make any claims of legal privilege will be in a difficult position. Therefore, the excessive amount of information requested by the Commission effectively undermines the concept of legal professional privilege. However, the Commission may decide to stop the clock in merger control proceedings until the request for internal documents has been complied with, so as to avoid the withholding of internal documents by merging parties.

Evidently, legal professional privilege plays a more significant role in complex merger cases than it used to.

Legal professional privilege has not been clearly defined within the context of merger control. EU case law on legal professional privilege relates to cartel proceedings and there is no EU case law on merger cases so far. Nevertheless, legal professional privilege has been recognized as a fundamental right and therefore it cannot be disregarded within the context of merger control proceedings. Furthermore, the EU's submission to the OECD paper (mentioned in the 'scope' section above) put forward that the Commission typically applies the same principles derived from the existing case law also in merger control proceedings.

Given that there is lack of jurisprudence for legal professional privilege in the context of merger control, we would have to look at the past behaviour of the Commission which indicates a narrow interpretation of the EU case law relating to legal professional privilege. In practice, case teams can be more flexible in light of the increased volume of documents. This does not preclude the Commission from examining legal professional privilege claims more closely nowadays. Claims of legal professional privilege claims add a significant administrative burden of work on the parties. Legal professional privilege claims are submitted in privilege logs, which must set out the reason why a document or part of it is protected by legal professional privilege.

There are two practical aspects that need to be considered having to do with responsive documents covered by legal professional privilege and responsive documents covered by legal professional privilege rules of a third country.

Responsive documents covered by the EU legal professional privilege rules

Written communications emanating from an independent EU qualified lawyer to their client within the context of a merger control proceeding are protected by legal professional privilege. Communications that are not related to competition law proceedings, eg communications in relation to other areas of law such as employment or tax, are not covered by legal professional privilege. Additionally, communications dated before the competition law proceedings might be considered not to be covered by legal professional privilege, given that they are not connected to the proceedings.

Company documents that reflect the legal advice obtained by external counsel are covered by legal professional privilege. However, it is quite common for company documents containing legal advice to also deal with other non-legal issues as well. In such cases, the documents will be partially redacted.

Responsive documents covered by *third country* legal professional privilege rules

When legal advice is being obtained by external counsel that are not EU qualified, this advice is not covered by EU legal professional privilege rules. The issue becomes more complex for transactions that have an international dimension, in which multiple competition authorities investigate a transaction.

It is quite common that authorities will ask for confidentiality waivers from the parties, in order to be able to exchange information with other competition authorities. If that is the case, the different ways in which legal professional privilege rules around the world apply can become problematic, given that some are less strict than others. Where this is the case, a document obtained by one competition authority can be disclosed to another competition authority, which the latter would not normally have access to under the legal professional privilege laws of its jurisdiction. In that regard, it is quite common that documents requested by the Commission are covered

by US legal professional privilege but not EU legal professional privilege (eg in-house counsel communications), which can amount to a waiver of US legal professional privilege.

Below we set out some examples of communications and documents, and their respective treatment from the Commission in relation to legal professional privilege.

- Correspondence between client and external lawyer: Correspondence that emanates from an external legal counsel to the client is covered by legal privilege. However, the same does not necessarily apply for correspondence from the client to the external legal counsel. Such correspondence would have to be justified in the privilege log.
- Internal notes reflecting external legal advice: In *Hilti* the Court found that '*internal notes which are confined to reporting the text or content of those communications*' with an independent lawyer containing legal advice are covered by legal professional privilege. The Commission sometimes interprets the reading of *Hilti* very narrowly as to consider only documents containing exclusively legal advice to be protected by legal professional privilege. However, the key message from *Hilti* is that the content of legal advice needs to be protected irrespective of the form of the communication that contains it. In practice, the Commission will ask for a partial redaction of documents that are partially covered by legal professional privilege.
- Legal advice not related to competition proceedings: The decisional practice in cartel cases indicates that legal professional privilege covers written communications between the client and their lawyer, after the initiation of a proceeding, and it can also extend to earlier communications if there is a link with the subject matter of the proceeding. Within the context of merger control, earlier communications between a lawyer and their client are protected by legal professional privilege if there is a link with the subject matter of the proceeding for a specific transaction. Legal advice that refers to alternative transactions would therefore not be covered by legal professional privilege.
- Correspondence with economists: legal professional privilege is limited to communications with lawyers. There is no EU case law dealing with communications with economists in merger cases. Moreover, the Best Practices Notice of the Commission clearly indicates that legal professional privilege does not extend to other professions, therefore it would be hard to make a legal professional privilege claim for correspondence with economists. However, advice obtained from economists, but vetted through an external lawyer, would likely be covered by legal professional privilege. The content of the correspondence with economists could be incorporated within the legal advice obtained by an external lawyer, which is evidently covered by legal professional privilege.

In a nutshell, legal professional privilege in merger control proceedings has acquired a new importance. It is imperative that companies have set up beforehand adequate mechanisms to respond to potential document requests from competition authorities in order to ensure that legal professional privilege in documents or communications is not undermined by the vast number of documents requested. In addition, even in circumstances where legal professional privilege would normally not be applicable, there might be ways to prevent documents from being disclosed. Communications emanating from EU qualified external lawyers are presumably covered by legal professional privilege. By incorporating within these communications information obtained by other professionals, there is the potential to extend the application of legal professional privilege to advice obtained from other professionals. However, this requires that no communications take place directly between the undertaking and the other professionals.

Data privilege

Content to follow shortly.

Key contacts



Andreas Politis

Lawyer

andreas.politis@dlapiper.com

T: +32 2 500 1500



Finland

Last modified 19 November 2021

Concept of legal professional privilege

Legal professional privilege in the context of civil litigation and criminal proceedings

Legal professional privilege in Finland is embodied in the provisions of the Code of Judicial Procedure (4/1734), Advocates Act (496/1958) and the Licensed Legal Counsel Act (715/2011), each as amended, concerning legal advisors' confidentiality obligations and evidence production in legal proceedings. The extent of confidentiality obligations and prohibitions to testify vary depending on the lawyer's tasks in connection with which confidential information has been obtained. There also exists a differentiation between advocates, licensed legal counsel and other lawyers. However, this differentiation is of minor importance in the context of civil and criminal litigation as principally only advocates and licensed legal counsel may act as attorney or counsel in legal proceedings.

CONFIDENTIALITY

Section 5c of the Advocates Act provides that an advocate or their assistant shall not without due permission disclose the secrets of an individual or a family or a business, or professional secret which has come to their knowledge in the course of the advocate's professional activities. Any information thereby obtained shall be kept secret regardless of whether or not it has been acquired in connection with tasks relating to legal proceedings. A similar provision is included in the Licensed Legal Counsel Act.

According to chapter 15, section 17 of the Code of Judicial Procedure, an attorney or counsel or an assistant thereof or an interpreter may not without permission disclose the secrets of an individual or a family or a business or professional secret that they have obtained:

- in handling a task related to legal proceedings;
- in providing legal advice on the legal position of their client in a criminal investigation or in other proceedings prior to legal proceedings; or
- in providing legal advice on the initiation of or the avoidance of legal proceedings. Furthermore, chapter 2, section 8 of the Criminal Procedure Act (689/1997) extends this rule to defence counsel and counsel for the injured party in criminal proceedings.

Breaches of statutory confidentiality obligations are punishable by law.

PROHIBITION TO TESTIFY

Chapter 17, section 13 of the Code of Judicial Procedure stipulates that an attorney, a counsel or an interpreter may not without permission testify regarding to what they have learned:

- in carrying out a task related to legal proceedings
- in providing legal advice regarding the legal status of the client in a criminal investigation; or in another procedure prior to legal proceedings, or
- in providing legal advice regarding the initiation or the avoidance of legal proceedings.

However, the court may oblige such person to testify if the prosecutor has brought charges for an offence for which the maximum sentence is imprisonment for at least six years. This exception does not apply to the defendant's attorney, counsel or interpreter.

Furthermore, an advocate, a licensed legal counsel or a public legal aid attorney may not without permission testify on a personal or a family secret or a business or professional secret which they have learned also when carrying out other tasks not related to those mentioned above. Nonetheless, the court may obligate them to testify if the prosecutor has brought charges for an offence for which the maximum sentence is imprisonment for at least six years, or if very important reasons, taking into account the nature of the case, the significance of the testimony for delivering judgment and the consequences of presenting the testimony as well as other circumstances, require testifying.

The obligation to refuse to testify is in force even where the person in question is no longer in the position in which they learned of the circumstance at issue in the testimony.

Where a lawyer would have the right or the obligation to refuse to testify in criminal proceedings, the lawyer also has an equal right or obligation in relation to the criminal investigation concerning the matter. Furthermore, a document may not be confiscated or copied for use as evidence provided that the document can be assumed to contain material on which a lawyer may refuse to testify and the document is in the possession of that lawyer or the person for the benefit of whom the obligation or the right to remain silent has been provided for.

Legal professional privilege in the context of investigations by the antitrust / competition authority

According to section 38 subsection 3 of the Competition Act (948/2011), an undertaking subject to investigation has no obligation to deliver documents to the Finnish Competition and Consumer Authority (the FCCA) which contain confidential correspondence between an external legal consultant and the client. The preparatory works of the Competition Act further clarify that the correspondence must be such that it may have relevance in connection with the fulfilment of the rights of defence of the undertaking. It can be found also in 'FCCA brochure on the inspection of business premises under Section 35 of the Competition Act (2017)' that the above mentioned correspondence must have been exchanged for the purpose of defending the company concerning the restriction of competition under investigation.

According to the preparatory works of the Competition Act, the provision is of an informative nature and corresponds to the principle of legal professional privilege enshrined in the case law of the European Court of Justice which, according to the preparatory works, can be deemed applicable in national investigations concerning competition law infringements. The FCCA has confirmed in the 'FCCA brochure on the inspection of business premises under Section 35 of the Competition Act (2017)' that it takes into account the decisional practice of the courts of the European Union regarding the legal professional privilege.

The Supreme Administrative Court confirmed in its ruling KHO:2019:98 that in an unclear situation the undertaking's right of defence should be interpreted in a broad manner. The FCCA had attached an e-mail chain from the undertaking responding to the FCCA's penalty payment proposal, and one of the emails referred to a legal recommendation issued by a law firm. The message also contained a statement from a company representative regarding the recommendation. The e-mail had been forwarded both within the undertaking and to an external party. Despite the fact that the legal recommendation given by external legal counsel to the undertaking (with the purpose of using its right of defence) was forwarded to a third party, the Court concluded that it was protected by legal professional privilege.

Scope of legal professional privilege

What is protected by legal professional privilege?

The scope of protection is to some extent dependent on whether the information has been obtained in connection with legal proceedings or other advisory tasks. Subject to these prerequisites, there are no general limitations as to the types of documents and correspondence that fall within the scope of protection. Information which must be kept confidential covers nearly any piece of information that is not known to public.

Likewise, the point of time on which the documents were prepared or sent by the client is not as such relevant as long as there is a connection to legal proceedings (unlicensed non-advocate lawyers or licensed legal counsel and advocates) or other advisory tasks (licensed legal counsel and advocates only) and the information has been obtained in the lawyer's capacity as a legal advisor.

Are communications with in-house counsel protected by legal professional privilege?

This is not entirely clear. The preparatory works of the Code of Judicial Procedure maintain that the above-described prohibition for advocates and licensed legal counsel to testify regarding information obtained in connection with other tasks than legal proceedings must be interpreted in line with the judgment of the European Court of Justice in case C-550/07 P, which clarified that only independent, non-employee lawyers are protected. However, it is unclear whether the same applies to information obtained by in-house lawyers in their capacity as attorney or counsel of the employer in legal proceedings.

In the field of competition law, section 38 subsection 3 of the Competition Act maintains that communications with in-house lawyers within a company or group do not fall within the scope of protection as section 38 subsection 3 only covers correspondence between an external counsel and the client. Furthermore, the preparatory works of the Competition Act specifically maintain that legal professional privilege does not cover advice provided by in-house counsel.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

As far as information related to legal proceedings is concerned, Finnish legislation does not differentiate between national and non-national lawyers in terms of protection as long as the lawyer has obtained the information in their capacity as an attorney or counsel.

Protection of information obtained in connection with other advisory tasks is more equivocal as the rules are linked to the adviser's professional status stipulated by Finnish legislation. According to the Advocates Act, anyone entitled to practice advocacy in one of the member states of the European Economic Area (EEA) is, when representing a client before a court of law or an authority or when pursuing other activities in Finland, bound to observe the rules of professional conduct in force in Finland, including its obligations relating to professional secrecy. Similarly, the provisions concerning advocates in Finnish law and the Decision of the Ministry of Justice on the by-laws of the Finnish Bar Association apply to an advocate registered in the EU register (see **footnote 1**). Therefore, legal professional privilege applies at least to non-national advocates registered in the EU register as well as other qualified EEA lawyers pursuing activities in Finland. For other situations the legal status is not as clear and the limits of the personal scope of privilege have not to our knowledge been tested in legal praxis.

Privilege of communications with a non-EEA adviser is likewise uncertain in Finland as applicable legislation only refers to an advocate in the meaning of a member of the Finnish Bar Association or an advocate qualified within the EEA.

Footnote 1: The EU register is administered by the Finnish Bar Association. A lawyer qualified to practice advocacy in another EU member state may enter the EU register to practice advocacy in Finland by using the professional title afforded by that other member state.

How is legal professional privilege waived?

The privilege may be waived by the client or another party, whose interests are protected by the rules. There are no requirements as to the form of the permission.

There are also certain statutory exceptions to the protection of legal professional privilege. Chapter 15, section 10 of the Finnish Criminal Code (39/1889) lays down a duty to report to authorities or to the person in danger a serious offence the preparation of which the person with the duty to report has knowledge of. Likewise, the Act on Detecting and Preventing Money Laundering and Terrorist Financing (503/2008) includes disclosure duties which may override lawyers' confidentiality obligations. Also, the Advocates Act provides that an advocate must openly and truthfully supply the information required by the Disciplinary Board of the Finnish Bar Association in supervisory matters regardless of the possible confidential nature of the information.

Legal professional privilege in the context of merger control

Everything stated in the section 'Legal professional privilege in the context of investigations by the antitrust / competition authority' applies also to merger control investigations.

Recent cases and/or other legal developments

In terms of legislative changes, the Finnish provisions regarding production of evidence were reformed during 2014 and 2015. Most importantly the amendments (which entered into force in the beginning of 2016), extended the prohibition on advocates and licensed

legal counsel giving testimony.

The Finnish Parliament approved a government bill implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive) on 16 December 2019. The legislation entered into force on 1 January 2020 and is effective from 1 July 2020. The final Finnish legislation exempts certain intermediaries (attorneys, public legal aid counsels and licensed legal counsels) from applicable reporting obligations on the basis of legal professional privilege. However, the exemption only applies to certain categories of information, and intermediaries must comply with the requirements on reportable arrangements in respect of non-exempt information. Intermediaries that are exempt from reporting due to legal professional privilege are also required to inform other intermediaries or relevant taxpayers of their obligations to report.

There have been two recent Supreme Administrative Court decisions of significance. As noted above (see [Legal professional privilege in the context of investigations by the antitrust / competition authority](#)), the Supreme Administrative Court confirmed in its ruling KHO:2019:98 that in an unclear situation the undertaking's right of defence should be interpreted in a broad manner. The FCCA had attached an e-mail chain from the undertaking responding to the FCCA's penalty payment proposal, and one of the emails referred to a legal recommendation issued by a law firm. The message also contained a statement from a company representative regarding the recommendation. The e-mail had been forwarded both within the undertaking and to an external party. Despite the fact that the legal recommendation given by external legal counsel to the undertaking (with the purpose of using its right of defence) was forwarded to a third party, the Court concluded that it was protected by legal professional privilege.

Another recent ruling by the Supreme Administrative Court (KHO:2019:83) concerns legal professional privilege in the context of state-owned companies. Despite the importance placed on right of access to documents, the Court concluded that the National Audit Office of Finland could refuse to grant access to an audit memorandum concerning a state-owned company to the extent that it contained business secrets. The memorandum contained information on assessments and views given by attorneys acting as the company's legal advisers. The Court considered these parts of the memorandum to be covered by legal professional privilege under section 5c of the Advocates Act as the company had not waived its privilege. Therefore, the information also constituted a business secret under section 23 subsection 1 paragraph 20 of the Act on the Openness of Government Activities and access could be refused.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

Internal investigations are generally not protected by attorney-client privilege in Finland and there are no directly applicable laws on internal investigation, except for the Finnish Auditing Act (1141/2015, as amended). Chapter 8, section 4 of the Auditing Act sets out a derogation from the provisions on the right to obtain information and carry out inspections concerning advocates, legal counsels, and attorneys. The Auditor Oversight Unit does not have the right to obtain information, documents, or records from the advocate concerning the advocate's client or inspect them. This covers both legal advice and litigation privilege. Notwithstanding the exception to preserve privilege in general, it is advisable that an external counsel is involved.

According to Chapter 15, section 17 of the Finnish Code of Judicial Procedure, an attorney or a legal council may not without permission disclose privileged information that they have obtained in providing legal advice on the legal position of their client in a criminal investigation or in other proceedings prior to legal proceedings.

The elements, as set above, to establish legal privilege also apply to civil matters.

Chapter 6, section 35 of the Finnish Data Protection Act incorporates a separate professional secrecy obligation for information acquired in connection with processing that takes place under the authority of a data controller or data processors.

Furthermore, Chapter 6, section 36 of the Finnish Data Protection Act provides an obligation for the supervisory authority to keep the identity of a natural person, who has notified the authority on possible breaches of data protection laws, in secrecy where the circumstances warrant it.

Breach of either one of the sections in the Finnish Data Protection Act is punishable under the Finnish Criminal Code (39/1889, as amended).

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

In principle, documents in the possession of outside counsel are protected by attorney-client privilege. For instance, documents and communications containing general advice provided by an outside counsel prior to any investigation by the authorities enjoy attorney-client privilege protection.

In general, legal privilege only applies to information disclosed after the establishment of an assignment between the client and the counsel. However, information provided by the client, prior to establishing an attorney-client relationship, may still be regarded as privileged information if the nature of such information warrants it. For example, information disclosed to a counsel per said counsel's request to decide whether to accept an assignment, would be considered privileged information.

c) Are communications to / by companies and in-house counsel protected by privilege?

Legal privilege only applies to documents in the possession of an outside counsel. Therefore, it is recommended that during criminal investigation, an outside counsel is sought to ensure the protection of legal privilege.

d) Are there any specific requirements of a privileged incident response engagement letter?

Not to our understanding.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

In general, documents are protected by legal privilege if the purpose of such documents relates to the provision of legal advice provided by an attorney. The content of legal professional privilege is in general determined by the prohibitions on evidence laid down in Chapter 17 of the Code of Judicial Procedure. Furthermore, the corresponding exceptions on the legal privilege are described in Chapter 7, section 3 and 4 of the Finnish Coercive Measures Act (806/2011, as amended). For example, under chapter 7, section 3, there is no prohibition on seizure or reproduction if the person in respect of whom the obligation of professional secrecy has been imposed consents to the seizure or reproduction. The other exceptions on prohibition on seizure or reproduction cover, for example, offences with a certain maximum term of imprisonment.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

In general, it does not matter where the documents are located.

c) How are seized documents put into evidence in a criminal / civil procedure?

Conditions for seizing documents are set out in Chapter 7, section 1 of the Finnish Coercive Measures Act. Accordingly, documents may be seized if they can be used as evidence in a criminal procedure. The evidence (ie the seized document) is named by the party and if necessary, the court decides whether it can be used and whether it should be kept secret.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Privilege may be waived in three different situations:

- The person whose privilege is at hand waives their right to privilege.
- Privilege yields to a provision of the law.
- Legal protection of the lawyer requires them to be released of privilege.

In addition, the protection of legal professional privilege is under statutory exception of Chapter 15, section 10 of the Finnish Criminal Code (39/1889, as amended), which establishes a responsibility to report to authorities or to the person in danger a serious offence the preparation of which the person with the duty to report has knowledge of.

Furthermore, the Act on Detecting and Preventing Money Laundering and Terrorist Financing (503/2008, as amended) includes disclosure duties which may override lawyers' confidentiality obligations. Also, section 7 d of the Advocates Act (496/1958, as amended) provides that an advocate must openly and truthfully supply the information required by the Disciplinary Board of the Finnish Bar Association in supervisory matters regardless of the possible confidential nature of the information.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

To our understanding, this has no effect on the confidentiality of the attorney or the legal counsel or the prohibitions on evidence laid down in Chapter 17 of the Code of Judicial Procedure. However, this issue has not been addressed in case law.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

In principle, no. However, there are no explicit rules on this and the question of whether a notification or sharing of the findings mean a waiver needs to be assessed on case-by-case basis.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

Not to our understanding.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/ cross-border scenario?

Not to our understanding.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

In general, it does not matter where the documents are located.

d) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

This needs to be addressed on a case-by-case basis.

Key contacts



Jussi Savonen

Partner, Head of Litigation and Arbitration in Finland
jussi.savonen@fi.dlapiper.com
T: +358 9 4176 0455



Mika Oinonen

Head of Competition and Regulatory, Finland
mika.oinonen@fi.dlapiper.com
T: +358 9 4176 0418



France

Last modified 01 July 2021

Concept of legal professional privilege

Under French law, professional secrecy is a general obligation, imposed on persons because of their state or profession, not to disclose any secret information they may have access to due to their function or mission (e.g. lawyers, judges, doctors, journalists etc.). This obligation is sanctioned both under criminal law (art. 226-13 of the French Criminal Code) and by disciplinary measures that may apply to these different professionals.

Definition of legal privilege under French law

The concept of legal professional privilege has no exact equivalent under French law. However, legal advice provided by lawyers to their clients as well as their communications are protected by the lawyer's professional secrecy (*secret professionnel de l'avocat*), as provided by Article 66-5 of Law No 71-1130 of 31 December 1971:

"in all matters, whether it is advisory work or litigation, the legal opinions addressed by a lawyer to their client, or intended to be for their client's benefit, the communications exchanged between a lawyer and their client, between lawyers (with the exception of communications identified as 'official'), the meeting notes and more generally all the documents of the case are protected by lawyer's professional secrecy".

Furthermore, Article 2 of the National Rules of Procedure (*Règlement Intérieur National*, RIN) of the French Bar Council provides:

"The lawyer is the necessary trusted advisor of the client.

The lawyer professional secrecy is of public order. It is general, absolute and unlimited in time.

Subject to the strict requirements of his own defence before any court and to the cases of declaration or disclosure provided for or authorized by law, the lawyer shall not, in any matter, make any disclosure contrary to lawyer's professional secrecy.

French lawyer's professional secrecy covers all matters, whether advisory or contentious and regardless of the medium, material or immaterial (paper, fax, electronic means etc.):

- legal opinions addressed by lawyers to their clients or intended for their clients;
- correspondence between lawyers and their clients, and between lawyers – except correspondence marked as 'official';
- meeting notes and, in general, all the elements of lawyers' files, including all information provided to lawyers in the exercise of their profession;

- clients' names and lawyers' agendas;
- payment of fees and all operations involving funds carried out in application of Article 27 §2 of Law No 71-1130 of 31 December 1971; and
- information required by statutory auditors or any third party (information that can only be communicated by the lawyer to his client)."

Legal professional privilege in the context of civil litigation

Pursuant to the lawyer's professional secrecy, all documents and communications exchanged between a lawyer and his/her client are, as a principle, protected by secrecy and cannot be communicated to a third party, may not serve as evidence and their production cannot be compelled by a court.

In application of this principle, a lawyer cannot disclose the content of communications sent to a client or addressed to him/her by a client. The French Court of cassation (*Cour de cassation*) has for example ruled that a lawyer cannot in any case disclose the content of a letter addressed to him/her by the client even with the client's authorization (Court of Cassation, 6 April 2004, n° 00-19.245).

However, the client not being bound by professional secrecy, he/she can use exchanges or documents covered by professional secrecy. The French Court of Cassation has for example ruled that a lawyer's client can communicate a copy of a letter he/she has sent to his/her lawyer in the interest of his/her defence (Court of Cassation, 26 March 2008, n° 06-88.674).

Legal professional privilege in the context of criminal investigations

In the context of criminal litigation, the same rule applies. Moreover, Article 432 of the French Code of Criminal Procedure expressly forbids the use of correspondence exchanged between the defendants and their lawyers as evidence. However, if a lawyer is suspected of committing a crime or being an accomplice to a crime, client exchanges may be used as evidence before the French criminal courts for the strict requirements of the lawyer's own defence.

Note that, in addition, when (i) acting in a fiduciary capacity, participating on behalf of their client in any financial or real estate transaction or (ii) assisting their clients in the preparation or execution of specific transactions or (iii) providing, directly or through any intermediary, advice on tax matters, French lawyers are required to disclose their suspicions of tax fraud or financial offences to the authorities (Tracfin) via their Bar President (Articles 561-2 and following of the French Monetary and Financial Code, CMF).

Legal professional privilege in the context of investigations by the antitrust / competition authority

The above-mentioned principles also apply in the context of investigations by the antitrust / competition authority.

Scope of legal professional privilege

What is protected by legal professional privilege?

As stated before, lawyer's professional secrecy applies to all documents and communications exchanged between a lawyer and his/her client regardless of the medium, whether physical or electronic (paper, fax, email, etc).

To ensure lawyer's professional secrecy applies, it should be stated clearly that the document has been drafted by or is intended for a lawyer: "*Confidentiel – Communication avocat/client*".

Are communications with in-house counsel protected by legal professional privilege?

Under French law, in-house counsels (*juristes d'entreprise*) are considered to be a separate profession and are not lawyers. Therefore, they do not benefit from the same status as lawyers members of the Bar (*avocats*). This position is approved by the European Court (Court of Justice of the European Union, 14 September 2010, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission, Case C550/07 P).

As a result, French authorities can make use of internal legal advice made by in-house counsels as they are not protected by the lawyer's professional secrecy. The French Court of Cassation has for example ruled that communications between in-house counsels will not be protected by the lawyer's professional secrecy (Court of Cassation, 3 November 2016, n° 15-20.495).

In-house counsels are nonetheless subject to a general professional secrecy obligations regarding information they may obtain due to their mission within the company that can be characterized as "business secrets". Therefore, such as other professionals bound by secrecy (either because of their profession or mission), in-house counsels are prohibited from voluntarily sharing secret information with non-authorized third parties. A breach of this obligation is a criminal offence and is sanctioned under Article 226-13 of the French Criminal Code. Disciplinary measures may also be imposed to the in-house counsels by their company.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Communications between French lawyers and foreign lawyers will be subject to lawyer's professional secrecy only if certain precautions are taken (Article 3 of the RIN).

For communication between EU lawyers, such precautions shall consist for the sender to clearly express his/her wish for the communication to remain confidential or without prejudice prior to communicating the first documents. If the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he/she should inform the sender accordingly without delay (Articles 3.3 of the RIN and 5.3 of the Code of Conduct for Lawyers in the European Union). Then, the lawyers' communications should be marked as "confidential" or "without prejudice".

For communication with non-EU lawyers, such precaution shall consist for the sender to make sure that, before exchanging confidential information, the country where the foreign fellow lawyer practices has rules that ensure the confidentiality of the correspondence. If not, the lawyer shall enter into a confidential agreement covering any, or specified types of, communication with the non-EU lawyer or ask his/her client if he/she accepts the risk of exchanging non-confidential information (Article 3.4 of the RIN).

How is legal professional privilege waived?

As mentioned before, under French law, the lawyer's professional secrecy is of public order. As the lawyer's obligation of professional secrecy is general and absolute, a client cannot release him/her from this obligation.

However, a client can use a document covered by professional secrecy and communicate a copy of a document sent to or received from his/her lawyer in the interest of his/her defence.

Lawyer's professional secrecy in the context of seizure by certain administrative authorities

When an administrative authority such as the French Market Authority (*Autorité des Marchés Financiers*, AMF) or the French Competition Authority (*Autorité de la Concurrence*, ADLC) proceeds to a documents request or a seizure of documents, notably within a company, the rules applicable to the lawyer's professional secrecy must be applied so that the protected documents and communications cannot be seized by the authority.

Lawyer's professional secrecy in the context of a documents request by the AMF

Pursuant to Article L-621-10 of the CMF, the AMF can request any document, regardless of its format, for the purposes of an investigation or an audit. With regard to lawyer's professional secrecy, the AMF has created a protocol that explains how the audited person may exclude certain emails from the general documents communication requested by the authority.

Indeed, to be excluded from a documents request by the AMF, an email has to meet all the following conditions: (i) be sent or received by a lawyer of the company (the lawyer cannot be solely in copy), (ii) be sent or received by a person inside the lawyer's client company, and (iii) a person outside the company shall not have been the sender, the recipient or in copy of the email. However, the AMF retains the possibility of carrying out verifications on all emails to ensure the privileged nature of its emails.

Regarding these documents requests, the French Court of Cassation approved this position by ruling that consultations addressed by a lawyer to his/her client or intended for his/her client and correspondence exchanged between the client and his/her lawyer are covered by professional secrecy (Court of Cassation, 4 November 2020, n° 19-17.911).

Lawyer's professional secrecy in the context of visits and seizures of documents by the ADLC

Pursuant to Article 450-4 of the French Code of commerce, agents of the ADLC may proceed to documents seizure after the authorization by an order of a judge (*Juge des libertés et de la détention*, JLD).

As already explained before, all documents and communications exchanged between a lawyer and his client are protected by secrecy and cannot be communicated to a third party. The French Court of Cassation ruled that, in specific matters of documents seized by the ADLC, the protection covers all communications exchanged between a lawyer and his/her client and that is related to the exercise of the rights of defence. This requirement induces a control of the content of the email and not simply the control of the recipients or senders. However, the court also held that the meaning of the right of defence is general and not specific to the case disputed before the court (Court of Cassation, 20 January 2021, n° 19-84.292).

Lawyer's professional secrecy in the context of internal investigations

Since the practice of internal investigation is recent in France, French law does not provide for any specific rules as regard to the protection of the lawyer's professional secrecy in the context of such investigations, and there is almost no case law on the subject so far. Nevertheless, some guidelines provide clarifications on the subject including but not limited to the following:

Since the internal investigation is a defence strategy of the lawyer, all exchanges between the lawyer and his client related to the internal investigation are protected under the lawyer's professional secrecy (Guide of the French Bar, the French lawyer and the internal investigations, June 2020).

Lawyer's professional secrecy in an international internal investigation

If the internal investigation is multi-jurisdictional, the national notion of lawyer's professional secrecy might not be enforced before courts of another country. It is then crucial for the lawyer in charge of the investigation to make sure of the rules applicable before every jurisdiction in order to control the scope of the applicable lawyer's professional secrecy.

Lawyer's professional secrecy in an internal investigation led by in-house counsels

It should be noted that when the company carries out the internal investigation itself, via its in-house counsels, without having recourse to lawyers admitted to practice at the bar, the content of the internal investigation will not be protected by the lawyer's professional secrecy. An exception may arise in the context of an investigation led by the ADLC: the Paris Court of Appeal has ruled that exchanges between in-house counsels could be protected by lawyer's professional secrecy when these exchanges take up a defence strategy put in place by the lawyer of the company (Paris Court of Appeal, 8 November 2017, n° 14/13384). Please note that, at this stage, the abovementioned decision remains isolated.

Waiver of the lawyer's professional secrecy in the French equivalent of a deferred prosecution agreement (*Convention judiciaire d'intérêt public*, CJIP)

As already mentioned, under French law, the lawyer's professional secrecy is of public order. As the lawyer's obligation of professional secrecy is general and absolute, a client cannot release him/her from this obligation.

Regarding the possibility for a client to waive the lawyer's professional secrecy, the French Anti-corruption Agency (*Agence Française Anticorruption*, AFA) and the Financial Prosecutor (*Procureur National Financier*, PRF) recall that lawyer's professional secrecy is not imposed on the client, who is free to hand over the documents covered by such secrecy (PRF and AFA, Guidelines on the implementation of the CJIP, 26 June 2019). However, these guidelines are only recommendations from these authorities and are not legally binding.

Recent cases and/or other legal developments

The French *Cour de Cassation* has held that a seizure of documents *en masse* is valid despite the fact that it includes legally privileged documents (27/11/2013; 12-80336). However, the Court has also held that documents covered by professional secrecy must be returned (24/04/2013; 12-80336).

Data privilege

The concept of legal professional privilege as such does not exist in France because disclosure requirements in French litigation are extremely narrow. As a result, rules of legal professional privilege protecting documents from disclosure have not developed in France like they have in England and Wales, the US and other common law jurisdictions. Legal advice provided by a lawyer to their client is, instead, protected by professional secrecy.

Professional secrecy is a general obligation not to disclose secrets, imposed on all persons who, in light of their professional status, have access to such secrets. The obligation is sanctioned both by criminal law (art. 226-13 Criminal Code) and by disciplinary measures.

The question of whether a document is protected by professional secrecy in France is determined not by the content of the communication, but by the role of the author and/or of the recipient. In essence, a lawyer is prohibited from communicating information acquired in the course of assisting a client. This obligation is of public order. It is general, absolute and unlimited.

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

Professional secrecy applies to any information disclosed by client to their lawyer during an internal investigation. Even though the client may subsequently freely disclose the lawyer conclusions to third parties, such conclusions are covered when they relate to information communicated by the client to their attorney.

However, professional secrecy will not apply to information communicated by third parties to an attorney during an internal investigation. In this context, an attorney has to inform said third parties before any communication that their exchanges will not be covered by professional secrecy of the attorney and thus may be disclosed in all or part.

French professional secrecy applies in the context of criminal investigations. Moreover, Article 432 of the French Code of Criminal Procedure expressly forbids the use of correspondence exchanged between the defendants and their attorney(s) as evidence. However, if an attorney is suspected of committing a crime or being an accomplice to a crime, client exchanges may be used as evidence before the French criminal courts for the strict requirements of the attorney's own defense.

Please note that the French law No. 2021-1729 of December 22, 2021 "for confidence in the judicial institution" has created exceptions to the French attorneys professional secrecy. Article 3 of that law provides that legal privilege is not opposable to the police and judicial investigations measures relating to offences of tax fraud, corruption and the financing of terrorism as well as the laundering of these offences. However, in such cases, the competent Bar Head (*Bâtonnier*), its representative or the person at whose premises the search of investigation measures take place may object to the seizure of a document and require that this objection be examined by the Judge of Liberty and Custody (*Juge de la détention et des libertés*). According to Articles 18 and 19 of Law No 78-17 on information technology, data files and freedom, professional secrecy can be opposed to a request from the French Supervisory Authority (*Commission Nationale de l'Informatique et des Libertés* (CNIL)) to provide information or documents that are covered by such professional secrecy.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

Professional secrecy applies from the beginning of the exchange between an attorney and the client.

Pursuant to Article 2 of the *Règlement Intérieur National* (RIN) of the French Bar Council, French professional secrecy applies in all matters, whether it be legal advice or litigation. Secrecy applies no matter when a document was created and regardless of the support, whether physical or electronic (eg paper, fax, email).

Professional secrecy covers, notably:

- legal opinions addressed or meant to be addressed by lawyers to their clients
- correspondence between lawyers and their clients, and between lawyers – except correspondence identified as "official"
- meeting notes and, in general, all the elements of lawyers' files, including all information provided to lawyers in the exercise of their profession
- clients' names and lawyers' agendas
- payment of fees
- information required by statutory auditors

c) Are communications to / by companies and in-house counsel protected by privilege?

As a matter of French law, in-house counsel (*juristes d'entreprise*) are considered to be a separate profession and do not enjoy the same status as attorneys who are members of the Bar (*avocats*). Under French law, in-house counsel are subject to professional secrecy obligations regarding information that can be characterized as “business secrets” received within the framework of their position in the company. In-house counsel are also prohibited from voluntarily sharing with non-authorized third parties legal advice they provide to the company they work for. A breach of this obligation is deemed a criminal offence (Article 226-13 of the French Criminal Code).

Nonetheless, French courts do not extend the full professional secrecy coverage to communications between in-house counsel and employees, officers or directors of a company in the context of obtaining legal advice. The European Court of Justice confirmed this principle in the *Akzo Nobel* judgment in an EU competition context. As a result of the French courts' position and the *Akzo Nobel* judgment, French authorities investigating antitrust and competition law issues can make use of internal company legal advice.

Furthermore, in-house counsel (unlike external lawyers) are obliged to testify if called or to provide evidence regarding their employers.

Lastly, the French *Cour de Cassation* recently decided that French law will be applicable to determine whether legal professional privilege applies to communications with in-house counsel from other jurisdictions, not the local law of the country in which the communication was made.

d) Are there any specific requirements of a privileged incident response engagement letter?

In practice, to ensure professional secrecy applies, it should be made clear that the document has either been drafted by or is intended for a lawyer, and has been prepared in connection with the request for or provision of legal advice.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, according to Article 2.2 of the National Rules of Procedure (*Règlement Intérieur National* (RIN) of the French Bar Council, professional secrecy applies to interview notes and more generally to each element of the file, information and confidence received by the attorney who is a member of the Bar (*avocat*) in the performance of their position.

Regarding experts, unlike attorneys who are members of the Bar (*avocats*), such third parties are not subject to professional secrecy. They may, however, be subject to professional secrecy obligations regarding information that can be characterized as “business secrets” received in the framework of their position.

Furthermore, the client, not being bound by professional secrecy, can use exchanges or documents covered by professional secrecy. Therefore, any document, such as the final report, employee interviews or expert reports may be communicated by the client and will thus no longer be protected by professional secrecy.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No, the location of the documents does not affect the application of professional secrecy.

c) How are seized documents put into evidence in a criminal / civil procedure?

Documents covered by professional secrecy cannot be seized during a criminal procedure, unless such seizure is expressly authorized by a judge (for instance, when the documents concerned reveal the participation from an attorney to a criminal activity).

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Response to the first question regarding the waiver:

A client can opt to use a document covered by professional secrecy, but the client cannot release the attorney from their professional

secrecy obligations. Professional secrecy may, however, be waived in the interest of the defense of the client or in the interest of the defense of the attorney where they are personally facing judicial proceedings.

In the latter circumstance, the production of protected documents must be essential to the attorney's defense.

Response to the second question:

The client should make sure to inform its employees (if any) of the confidential nature of the document. The concerned file(s) on the client's computer (if any) should indicate that the information contained in it is covered by professional secrecy.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

A company cannot be required to disclose the content of an internal investigation in civil litigation if this investigation is protected by professional secrecy.

A company may, however, choose to disclose the content of an internal investigation that is protected by professional secrecy. In this case, the disclosed content of the internal investigation will no longer be protected by professional secrecy.

In addition, it must be noted that where information covered by professional secrecy (in the specific case, medical secrecy) might be disclosed during a public hearing, the CNIL has already granted a request for a closed hearing (Deliberation of the CNIL No SAN-2020-015 of 7 December 2020).

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

The sharing of the content of an internal investigation that is protected by professional secrecy to third parties or affected individuals means the company waives professional secrecy in regards to the disclosed content of the investigation. Thus, the disclosed content of the internal investigation will no longer be protected by professional secrecy but the remaining information that was not disclosed remains covered by professional secrecy.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

To the best of our knowledge, there has not been any published case of civil litigation in regards to GDPR in France as of the date of this report.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/ cross-border scenario?

Communications between French lawyers and foreign lawyers will be subject to professional secrecy only if certain precautions are taken (Article 3 RIN).

For EU lawyers, such precautions may consist of clearly marking communications as "confidential" and/or entering into a confidential agreement covering any, or specified types of, communication (Article 5.3.1 of the Code of Conduct for Lawyers in the EU).

The French *Cour de Cassation* has ruled that whether professional secrecy covers communications between lawyers registered in two different countries will depend on an analysis of the provisions of the applicable foreign laws.

From a data protection standpoint, to the best of our knowledge, there has not been any rules and/or cases in France that deal specifically with privilege in a multi-state/cross-border scenario.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Communications between French lawyers and foreign lawyers will be subject to lawyer's professional secrecy only if certain precautions are taken (Article 3 of the RIN), as applicable provisions in other jurisdictions regarding lawyer's professional secrecy may not be enforced before French courts.

As already mentioned, for communication between EU lawyers, the precautions must include the sender clearly expressing their wish for the communication to remain confidential or without prejudice before communicating the first documents. If the prospective recipient of

the communications is unable to ensure their status as confidential or without prejudice they should inform the sender accordingly without delay (Articles 3.3 of the RIN and 5.3 of the Code of Conduct for Lawyers in the EU). Then, the lawyers' communications should be marked as "confidential" or "without prejudice."

For communication with non-EU lawyers, the precaution must include the sender making sure that, before exchanging confidential information, the country where the foreign fellow lawyer practices has rules that ensure the confidentiality of the correspondence. If not, the lawyer must enter into a confidential agreement covering any, or specified types of, communication with the non-EU lawyer or ask their client if they accept the risk of exchanging non-confidential information (Article 3.4 of the RIN).

d) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

The French notion of lawyer's professional secrecy might not be enforced before courts of another country. It is then crucial for a lawyer to make sure of the rules applicable in every jurisdiction to control the scope of each national lawyer's professional secrecy.

Key contacts



Fabien Ganivet

Partner

fabien.ganivet@dlapiper.com

T: +33 1 40 15 24 82



Germany

Last modified 15 March 2019

Concept of legal professional privilege

Legal professional privilege in the context of civil litigation

Civil litigation in Germany is based on the principle of production of evidence (*Beibringungsgrundsatz*), which means that each party has to submit facts and means of evidence in support of its claim or defence. In consequence, there is, with very limited exceptions, no system of document discovery in civil litigation and thus no need for the development of specific rules of 'privilege' protecting documents from discovery in general.

Rather, Germany adopted a professional secrecy obligation for both general advice and litigation which applies to all members of the Bar. Pursuant to section 43a (2) Federal Attorney Regulation (*Bundesrechtsanwaltsordnung* — BRAO), this obligation relates to everything that has become known to the lawyer in professional practice. Furthermore, if a lawyer is summoned as a witness, they have a right to refuse testimony pursuant to section 383 (1) no. 6 Code of Civil Procedure (*Zivilprozessordnung* — ZPO) with regard to all facts which fall under the scope of their secrecy obligation. Therefore, the secrecy obligation creates somewhat a functional equivalent to legal professional privilege, at least in so far as it relates to documents and information in the possession of the lawyer.

As mentioned above, there are limited discovery obligations which parties have to comply with in civil litigation. These exceptions are not of great significance in practice. However, pursuant to section 142 ZPO, the court may, at its own discretion, direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference. In exercising its discretion, the court has to take into account whether the respective documents could contain any confidential correspondence between one party and its lawyer within the meaning of section 43a (2) BRAO. Subject to exceptional circumstances, such as deliberate abuse of this principle, any direction for submission of such documents would not be permissible. Similar restrictions can be derived from Articles 6 and 8 of the European Convention on Human Rights.

Additionally, pursuant to section 421 *et seq.* ZPO, a party may request the court to direct the other party to produce a record or document. This, however, can only be requested if the party tendering evidence alleges that the record or document is in the hands of the opponent and, pursuant to the stipulations of civil law, the party tendering evidence may demand the surrender or production of the record or document, or the opponent has referred to the said record or document during the proceedings.

Legal professional privilege in the context of criminal investigations

Communication between the lawyer and their client is protected by several seizure prohibitions based on the following principles:

EFFECTIVE RIGHT OF DEFENCE

This is protected by Article 6(3) of the European Convention on Human Rights as well as Articles 2(1) and 20 (3) of the German Constitution (*Grundgesetz*— GG). It protects correspondence and private notes from being seized if they relate to the client's defence, regardless of whether they are in the lawyer's or the client's possession.

RIGHT TO REFUSE TESTIMONY

This is the right of certain persons to refuse testimony. Pursuant to section 53 (1) no. and no. 2 of the Code of Criminal Procedure (*Strafprozessordnung* — StPO), a lawyer has the right to refuse testimony as to matters they are entrusted with in their capacity as defence lawyer. In connection with this, section 97 (1) no. 1 StPO provides that correspondence between the defendant and the persons entitled to refuse testimony shall not be seized ('defence correspondence'). Pursuant to section 97 (2) StPO, this prohibition does, generally, only apply if the person in question is in the possession of the respective documents.

Legal professional privilege has been only recently extended to apply in cases of criminal investigations against a lawyer. This legal change was brought by a recent amendment of section 160 a StPO. Accordingly, criminal investigations can no longer be conducted against lawyers in order to attain information that would be covered by the lawyer's right to refuse testimony.

There is, in general, no legal professional privilege protection applicable to in-house lawyers.

Legal professional privilege in the context of investigations by the antitrust / competition authority

Within the scope described below, legal professional privilege exists in the context of investigations by the competition authority. With regard to the effective right of defence and the seizure prohibition based on the right to refuse testimony, correspondence that relates to the client's defence shall not be seized. However, therefore, unlike under EU law principles, outside counsel work products are only protected if they are produced as defence correspondence. General outside counsel advice, specifically advice relating to the lawfulness of an agreement and the like, can be seized and used against the company, eg in order to prove intent. For details see below the 'Jones-Day-Decision' passages that do refer to anti-trust proceedings accordingly.

Communications between employees and in-house counsel or between a company and non-German authorised lawyers are not protected by legal professional privilege.

Scope of legal professional privilege

What is protected by legal professional privilege?

CIVIL LITIGATION

Since the protection of documents in civil litigation is mainly based on professional secrecy obligations pursuant to section 43a (2) BRAO, the scope of legal professional privilege mirrors the scope of application of the professional secrecy provisions and therefore covers any document or other material that has become known to the lawyer in their professional relationship with the client, irrespective of its specific type or content.

In civil litigation, the general distinction between lawyers and in-house counsel must be borne in mind, too. The professional secrecy obligation pursuant to section 43a (2) BRAO is not applicable to in-house counsel and therefore cannot prevent the production of documents if ordered. Exceptions may exist where it can be shown that the in-house counsel acts independently from their employer.

As regards foreign qualified lawyers, only correspondence with lawyers enrolled at the German Bar is protected. Lawyers from other jurisdictions within the European Union are deemed equivalent as far as they meet the prerequisites set out in the German European Attorney Act (*Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* — EuRAG). Correspondence with other foreign lawyers does not, in general, fall within the scope of the protection.

CRIMINAL LAW / INTERNAL INVESTIGATIONS

As regards the effective right of defence and the seizure prohibition based on the right to refuse testimony, the correspondence which shall not be seized must relate to the client's defence. Investigation proceedings must be initiated, the suspected person (ie the client) must be aware of those proceedings and the correspondence must be prepared and / or exchanged within the scope of an existing instruction with regard to the respective proceedings.

As regards correspondence which has been prepared and / or exchanged before the initiation of the respective proceedings, there is in general, under German law, no seizure prohibition, even if the correspondence relates to the subject matter of the procedure.

As regards the seizure prohibition based on the right to refuse testimony, section 97 (2) StPO provides that the person who is entitled to refuse testimony must be in the possession of the correspondence in question. According to legal practice, section 148 StPO has to be

taken into account if the entitled person is the defence lawyer. It provides that the suspected person must be freely permitted to correspond with their defence lawyer. In view of this provision, seizure of correspondence is, in deviation from section 97 (2) StPO, even prohibited if the respective correspondence is in the client's possession, as long as it concerns the client's defence. It is also prohibited to seize documents which are in the possession of the client and recognisably prepared by the client for the purpose of defence.

The seizure prohibition does not apply if the lawyer is suspected of having participated in the infringement. Legal professional privilege, in general, only applies to lawyers enrolled in the German Bar. Exceptions only apply to lawyers from other EU Member States if they meet the prerequisites of the German European Attorney Act.

More complex is the situation with regard to internal investigations of a company. There are no explicit provisions for internal investigations, but there are a number of contradictory regional court decisions. Mid of 2018 the Constitutional Court in Germany clarified at least to some extent if a Public Prosecutor's Office can reach out to attorney work products in the context of an internal investigation (for details please see below). In addition, the legislator is currently planning new legislation covering *inter alia* legal standards and safeguards for internal investigations.

COMPETITION LAW

The rules set out above for criminal law apply also to competition law investigations.

Legal professional privilege in the context of merger control

In essence there is no legal privilege concerning documents produced by outside counsel in merger control proceedings. Merger control in Germany is an administrative procedure. Based on Section 57 *et seq* Act on Restraints of Competition (ARC), the German Federal Cartel Office (FCO) may require information from the parties to the merger. In addition to the obligatory information required for a filing (Section 39 ARC), the FCO may collect any evidence gathered pursuant to an investigation, (Section 57 ACR). The FCO has the power to conduct investigations, send RFIs and require submission of documents relating to the economic situation of the undertakings concerned (Section 59 ACR) and seize documents (Section 58 ACR).

However, the applicability of privilege when answering questions, RFIs or producing documents related to the proceedings (eg management presentations, emails etc) is limited and has not yet been fully tested before the courts. There have been suggestions to extend the EU concept of Legal Professional Privilege to German merger control (and other administrative) proceedings. However, in practice, as described above, correspondence with external counsel is not protected from seizure and, therefore, may legally be subject to a request for disclosure if such correspondence is in the possession of the person concerned. If the correspondence is only in the possession of the external counsel, there is arguably no obligation to submit those documents.

Any request by the FCO is, however, subject to the concept of proportionality. Thus, it may not be appropriate to require the disclosure of correspondence with external counsel if the information can be obtained in a comparable way by other means or if the reason(s) for requiring the information do not justify the request.

A party may refrain from giving responses which may be self-incriminating when responding to FCO requests (Section 55 StPO).

Recent cases and/or other legal developments

'Jonas Day'-Decision of the German Constitutional Court on attorney-client privilege in internal investigations, dated 6 July 2018

The attorney-client privilege in Germany follows different concepts than in the US or the UK. The current legislation and jurisprudence regarding information and documents derived from internal investigations is ambiguous. The German Constitutional Court decided on 6 July 2018 on the seizure of documents at the office of Jones Day in Munich in connection with the Diesel-investigation of Volkswagen and its subsidiaries.

The Constitutional Court decided that in the case at hand the seizure of the documents did not violate constitutional rights of Volkswagen and allowed the review of the seized investigation documents. Further, the Constitutional Court pointed out that Jones Day, as non- EU based law firm cannot rely on constitutional protections regarding seizure of documents. On the other hand, the Constitutional Court ruled that a legal entity can rely on seizure protection even if the entity is not yet under investigation as long as the internal investigation is for concrete defence purposes which has to be decided on a case to case basis.

Based on the legislation and jurisprudence so far the following principles apply:

- Defence correspondence and defence documents and any work products of an internal investigation conducted by outside counsel, eg protocols of witness interviews, summary of results of review of documents, legal assessments, are privileged under German law and may not be seized.
- This applies also in case that the corporation is not yet formally investigated, but the internal investigation conducted by outside counsel serves the purpose to prepare the potential up-coming defence of the corporation (if this is the case has to be decided on a case to case basis).
- The results of an internal investigation conducted by in-house counsel or auditors is not protected, the authorities may seize these documents.
- If the internal investigation serves other purposes than the defence of the corporation, eg the preparation of claims against or the defence against claims of third parties, assessment of claims against (former) board members or to inform regulators abroad, it may be disputed whether a general attorney-client privilege applies to these documents.

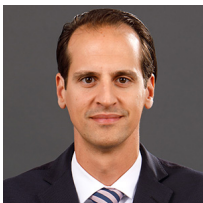
Therefore, we made the following conclusions from the decision of the Constitutional Court:

- In the engagement letter it should be clearly stated to what extent the investigation is conducted for defence purposes and in the context of a corporate structure who the client is.
- The investigation should be performed by EU based law firms and by specialized corporate defence counsels.
- Those defence documents should be marked as such and be stored in custody of the mandated law firm.
- Documents and work products for other purposes, eg for remedial actions, civil litigation or for disclosure to foreign authorities, should be separated from purely defence documents.
- Those other purposes should also be clearly stated in the engagement letter in order to try to claim attorney-client privilege based on the relationship of trust.

Data privilege

Content to follow shortly.

Key contacts



Dr Emanuel H. F. Ballo

Partner

emanuel.ballo@dlapiper.com

T: +49 69 27133349



Dr Jan Joachim Dreyer

Partner

jan.dreyer@dlapiper.com

T: +49 221 277 277 334



Dr Frank Roth

Partner

frank.roth@dlapiper.com

T: +49 221 277 277 270



Dr Christian Schoop

Partner

christian.schoop@dlapiper.com

T: +49 69 271 33 0



Jürgen Taschke

Senior Counsel

juergen.taschke@dlapiper.com

T: +49 69 271 33 481



Greece

Last modified 02 March 2015

Concept of legal professional privilege

Legal professional privilege is fundamental to the proper practice of the legal profession. It is recognised and protected by the Constitution, the Attorneys' Code of Conduct, the Code of Civil Procedure, the Code of Criminal Procedure and the Criminal Code and it is broadly defined as the obligation of the lawyer to keep confidential in favour of their client whatever information has been entrusted to them by the client.

Legal professional privilege derives from the special relationship of trust between the lawyer and the client. It is an institution that serves the public interest and, for this reason, it covers all aspects of communication between the parties. It survives the termination of the lawyer-client relationship and it even survives the death of the client. Breach of the lawyer's respective obligations as against the client constitutes a serious disciplinary as well as a criminal offence.

Important exceptions to the legal professional privilege protection are found in Law 3691/2008 on money laundering as well as in Law 3213/2003, as amended, on the obligations of particular categories of persons (eg judges, MPs, owners of sports companies, etc.) to submit to the tax authorities statements of origin of their ownership on assets (the doctrine of '*pothen eshes*' – 'where from'). Both pieces of legislation contain similar provisions, provided that lawyers are obliged to inform the authorities of any violation of the respective legislation if such information is acquired in the context of a particular course of dealings, involving the provision of legal advice, with their clients.

Legal professional privilege in the context of civil litigation and criminal investigations

The general rule is that legal professional privilege applies to all information communicated by the client to the lawyer and any exceptions to this rule are specifically prescribed by provisions of law. Therefore, legal professional privilege applies to both civil and criminal litigation. In relation to civil litigation, more specifically, it should first of all be noted that in the Greek jurisdiction there is no obligation for disclosure of documents as this is perceived in the context of English civil litigation proceedings. Disclosure of documents is understood as a procedural burden rather than a legal obligation. Evidence, including documents, not produced within the time frame provided by the Code of Civil procedure is inadmissible at a later stage without further consequences. In any case, the legal professional privilege exists and is protected in the context of the civil litigation and any submission of documents to the court is subject to the general rule above.

Similarly, legal professional privilege is protected in the context of criminal investigations.

Legal professional privilege in the context of investigations by the antitrust / competition authority

Legal professional privilege also retains its status during investigations conducted by the Hellenic Competition Commission ('Commission'). Although the Commission has broad investigation powers and extensive rights of access to documents of the business, resembling those of interrogating officers, the law providing for the powers and procedures of such investigations does not contain any specific exception to the protection of legal professional privilege. Therefore, documents protected by legal professional privilege should not be provided to the officers of the Commission for inspection. It should be noted that, in the context of competition law, the correspondence between the business and its in-house lawyers is not covered by the legal privilege protection (ECJ C-550/07) and

therefore only correspondence with external lawyers is excluded from inspection by the Commission. Nevertheless, it is recommended practice that, in case the officers of the Commission insist on obtaining such documents, the business under investigation should provide those in a closed sealed envelope before a notary public, expressing its disagreement with the right of the Commission to access them.

Scope of legal professional privilege

What is protected by legal professional privilege?

According to Article 38 of the (new) Code of Lawyers, lawyers should keep in confidence anything entrusted to them by their clients at the time of their engagement as well as in the course of the execution of their clients' mandate or whatever comes to their knowledge while dealing with their clients' cases.

All data (verbal, written, electronic, etc.) obtained in the course of legal practice and the correspondence between the lawyer and the client is treated by the law as privileged – unless such data is in the public record – even after the termination of the lawyer-client relationship, and cannot be used even for the purposes of judicial proceedings.

Are communications with in-house counsel protected by legal professional privilege?

The legal professional privilege protection applies equally to the communications with in-house counsel as there is no specific legislation on the matter and the Code of Lawyers does not distinguish between in-house counsel and independent lawyers. In principle, they are all subject to the local Bar and fall under the same ethical and disciplinary rules. It should be noted that lawyers in Greece are not considered to be 'employees'.

Even as in-house counsel, they remain independent legal professionals providing legal services against 'remuneration' even if such remuneration is monthly and of a fixed amount. However, and under the impact of EU jurisprudence, it should be considered whether the lawyer is bound to the client by a relationship of employment. Due to the fact that in everyday practice in-house counsel are 'not bound to the client by a relationship of employment', it is accepted that their communication with the business is also protected by legal professional privilege. However, in cases where 'exclusive employment' exists and in-house counsel in the exercise of their duties participate in administrative decisions or exercise administrative duties, their communication with the business is not covered by legal professional privilege, when their particular function does not constitute provision of legal services. Generally speaking, each case is being decided ad hoc and the practice tends to recognise privilege rather than to deny it.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The Code of Lawyers does not differentiate between Greek and EU nationals (who can practise law in Greece under permit of the local Bar association, PD 130/23.05.2000) as to the application of legal professional privilege. Third country nationals cannot qualify as lawyers in Greece with the exception of Greek expatriates following special permit by the Ministry of Justice and respective Bar Association. Given that standard EU jurisprudence shall be respected, communications, other than correspondence, between a Greek (or EU) in-house legal counsel and lawyers outside the EU (third countries) are not covered by legal professional privilege.

Legal professional privilege is a concept and an institution of public order, deriving and protected by the Constitution, and therefore, in principle, it is afforded special status (as all public order rules) and cannot be derogated from without specific legislation and it cannot be waived. Parties sometimes waive such protection by consent, but such waiver is not binding and enforceable.

Overall, legal professional privilege applies to every aspect of the legal profession, irrespective of proceedings and without differentiation between independent lawyers and in-house counsel, save for specific exceptions prescribed by law. However, in the context of competition law investigations by the Commission, it has become accepted that legal professional privilege does not apply to communication between in-house counsel and the business.

Recent cases and/or other legal developments

The Law 3213/2003, as amended, on the obligations of particular categories of persons to submit to the tax authorities statements of origin of their ownership of assets (the doctrine of '*pothen eshes*' – 'where from') provides for important exceptions to the protection of legal privilege (see above). By reference to the legislation on money laundering (the provisions of which are adopted), lawyers are obliged to inform the competent committees of any violation of the law on 'where from' and breach of such obligation constitutes a criminal

offence (imprisonment of up to two years). According to the preamble of L. 4065/2012, 'any professional privilege is inflected and no obligations of confidentiality apply as against any person obliged to submit a statement of 'where from'.

It should also be noted that the law provides that in case a lawyer has to testify against their client, permission of the relevant Bar Association is required. The relevant jurisprudence refers to matrimonial matters, wills and child support, rather than corporate matters, and the permission is usually denied.

Data privilege

Content to follow shortly.

Key contacts



Linos Choo

Partner

linos.choo@dlapiper.com

T: +44 20 7153 7909



Hong Kong

Last modified 01 July 2021

Concept of legal professional privilege

In Hong Kong, legal professional privilege is a substantive right available under statute (Basic Law) and common law. Hong Kong's legal system is based on English common law. The justification for legal professional privilege is the public policy interest in the need to facilitate the administration of justice by encouraging and enabling a client to consult their lawyer fully and frankly, and in complete confidence, safe in the knowledge that what they tell their lawyer will never be revealed to a third party without their consent.

Two main classes of documents and communications are protected on this ground, namely:

- those that are privileged, whether or not litigation was contemplated or pending (legal advice privilege); and
- those that are only privileged if litigation was contemplated or pending when they were made or came into existence (litigation privilege).

There is also common interest privilege. This privilege is in aid of anticipated litigation in which several persons have a common interest although all such persons have not been made parties to the action. They may share privileged information without waiving their right to assert lawyer-client privilege.

Common to these types of privileges is that these privileges cannot be claimed unless the relevant communication or document is confidential. Therefore, documents which are in the public domain are not privileged. Moreover, privilege is lost once the relevant communication ceases to be confidential. For example, if a client forwards an email from their lawyer to an accountant, the email loses confidentiality and will no longer be considered privileged.

In Hong Kong, the privileges exist in the context of civil litigation, criminal investigations and investigations by regulatory authorities.

The parties to a civil litigation or the subject of any criminal investigations or investigations by any regulatory authorities are entitled not to disclose any communications and documents which are covered by privilege (and such privilege has not been waived).

Privilege does not extend to cases where the document came into existence as a step in a criminal or illegal proceeding. However, to bring a case within this exception there must be a definite charge of fraud or illegality or a *prima facie* case must be made.

Scope of legal professional privilege

What is protected by legal advice privilege?

Letters and other communications passing between a party and their lawyer are privileged from production if they are, and sworn to be:

- confidential;
- written to or by the lawyer in their professional capacity; and
- for the purpose of getting legal advice or assistance for the client.

Legal advice privilege applies to communications between a lawyer and their client. It does not provide protection for communications

with an independent third party. However, legal advice privilege does extend to information that the lawyer receives in a professional capacity from a third party and which the lawyer conveys to their client.

In addition to confidentiality, a document or communication must also be made for the purpose of getting legal advice before legal advice privilege can apply.

The purpose of getting legal advice has been construed broadly. Where information is passed between a lawyer and their client as part of a process aimed at keeping both informed, so that advice may be sought and given, legal professional privilege will attach. Moreover, legal advice is not confined to telling the client the law; it may include advice about what should prudently and sensibly be done in the relevant legal context.

Where the client appoints employees to communicate with their lawyer, those employees are the client for the purpose of legal advice privilege. Information provided to the lawyer by any other employee of the client for the dominant purpose of obtaining legal advice will also attract legal advice privilege.

Where legal advice privilege applies to lawyer-client communications, internally circulated documents or parts of documents revealing such communications are also privileged.

What is protected by litigation privilege?

Litigation privilege is wider than legal advice privilege. It not only covers communications between a lawyer and their client, but also covers the communications between a lawyer and their non-professional agent, a lawyer and a third party or the client and their agent or third party, provided that:

- they came into existence after litigation is commenced or contemplated; and
- they are for the dominant purpose of giving or obtaining legal advice, obtaining or collecting evidence or obtaining information which may lead to the obtaining of such evidence.

These two requirements must be satisfied before litigation privilege can be applied.

Litigation refers to proceedings in court and tribunals, arbitration, disciplinary proceedings and any other adversarial proceedings. It must be “adversarial” as opposed to investigative or inquisitorial. Hence, where a proceeding is merely fact-gathering or where a tribunal is an administrative one, it is unlikely that litigation privilege can be claimed.

The application of the “dominant purpose” test can be problematic:

- If the relevant communication came into existence for more than one purpose, and
- In deciding at what stage it can fairly be said any such purpose is obtaining advice in anticipated litigation

In analysing the dominant purpose, it is important to turn to the facts of the particular case. Hong Kong courts have in the past examined “purpose” from an objective standpoint, examining all the relevant evidence, including reference to the intention of the actual author or creator of the relevant document (or the person under whose direction it was made) at the time when the document is brought into existence.

If a document or communication has not come into existence for the purposes of the litigation, but is already in existence before the litigation is contemplated or commenced, litigation privilege does not apply even if it was obtained by the client or their lawyer for the purposes of the litigation. Hence, a pre-existing document not entitled to legal advice privilege does not become privileged merely because it is handed to a lawyer for the purposes of litigation.

Are communications with in-house counsel protected by legal professional privilege?

Yes. The definition of “professional lawyer” for the purpose of legal advice and litigation privilege includes all members of the legal profession:

- solicitors;
- barristers;
- in-house lawyers; and
- foreign lawyers.

Communications between the in-house lawyer and the management and employees of the same company are therefore prima facie entitled to enjoy legal professional privilege and / or litigation privilege in a similar way to those of private lawyers.

Legal advice privilege however cannot be sufficiently established based on the mere fact that a party to a communication is a lawyer. The lawyer must be acting in a professional capacity as a lawyer. Therefore, if an in-house lawyer is consulted about anything other than the law, or where legal advice had been given on a social rather than professional basis, legal advice privilege will not be attached to such advice.

Moreover, an in-house lawyer should take particular caution if, apart from being a legal adviser, they hold other positions within the company (such as an executive or operational role). If the lawyer is consulted in their capacity as a business adviser about commercial issues, legal advice privilege will not apply.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Yes. Legal advice privilege exists between a foreign lawyer and their client to the same extent as the legal advice privilege exists between a Hong Kong lawyer and their client. The approach to determining the question of legal advice privilege is the same as adopted for communications with Hong Kong lawyers.

How is legal professional privilege waived?

Privilege is in all cases the privilege of the client and not of the lawyer, and it may only be waived expressly or impliedly by the client. Privilege is considered waived if the relevant document or communication is included in the depositions filed in the course of a court action or in the transcripts of other notes of court proceedings.

Hong Kong law also incorporates the concept of partial waiver of privilege. If a privileged document is disclosed for a limited purpose only (eg for investigation by a regulator such as the Securities and Futures Commission), it does not follow that privilege is waived generally. The privilege is waived for that particular purpose only.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Hong Kong. Currently, only the telecommunications sector is subject to merger control in Hong Kong. As of 14 December 2015, the applicable merger control rules are contained in Schedule 7 of the Competition Ordinance (Chapter 619, Laws of Hong Kong). There are no Hong Kong cases on merger control so far. Nevertheless, legal professional privilege has been recognised as a substantive right and cannot be disregarded within the context of merger control proceedings.

Recent cases and/or other legal developments

On 29 June 2015, the Hong Kong Court of Appeal in *Citic Pacific Limited v Secretary for Justice & Commissioner of Police* [2015] 4 HKLRD 20 (the “**Citic Decision**”), rejected the restrictive definition of “client” in the context of legal advice privilege taken by the English Court of Appeal in *Three Rivers District Council v Governor and Company of the Bank of England* (No. 5) [2003] QB 1556. In *Three Rivers* (No. 5), the English Court of Appeal ruled that the “client” means the person or persons authorized by a corporation to seek and obtain advice from its legal advisers and therefore confidential internal communications within a corporation created with a view to putting the information before the legal advisers do not attract legal advice privilege.

The Hong Kong Court of Appeal did not follow the decision of the English Court of Appeal in *Three Rivers* (No. 5) and decided that a more liberal approach should be adopted. In essence, the Hong Kong Court of Appeal ruled that the client is simply the corporation and its employees should be regarded as being authorised to act for it in the process of obtaining legal advice. Therefore, legal advice privilege should not only be limited to communications passing between the client and its legal advisers, but should also cover a wider range of communications, including documents generated during the information gathering process.

The Hong Kong Court of Appeal found that a narrow definition of “client” would basically frustrate the rationale behind legal professional privilege, which is to give effective and meaningful protection for confidentiality whilst clients obtain legal advice in any context. The Hong Kong Court of Appeal further held that the “dominant purpose” test is more appropriate in setting proper limits for legal advice privilege, is consistent with authorities and rationale of legal professional privilege, and should therefore be the test to be adopted in Hong Kong.

On 5 September 2018, the UK Court of Appeal in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006 made specific reference to the Citic Decision to note that *Three Rivers* (No 5) is an outdated decision that fails to reflect the nature of modern day multinational corporations.

Since the UK Court of Appeal decision in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*, there have been a number of new decisions related to legal professional privilege made by the UK courts e.g. in *Civil Aviation Authority v R Jet2.com Ltd* [2020], the UK Court of Appeal held that actions such as copying lawyers into an email chain is insufficient to claim legal professional privilege as parties need to expressly claim legal professional privilege for the relevant communications. Although these new cases are not strictly binding on Hong Kong courts, they are persuasive authorities which the Hong Kong courts will take into account if similar issues arise before the Hong Kong courts.

Data privilege

Content to follow shortly.

Key contacts



Satpal Gobindpuri

Partner

satpal.gobindpuri@dlapiper.com

T: +852 2103 0836



Leo Cheng

Partner

leo.cheng@dlapiper.com

T: +852 2103 0681



Hungary

Last modified 19 November 2021

Concept of legal professional privilege

Hungary has no separate and independent right of legal professional privilege. However, pursuant to the Act on Legal Practice, legal practitioners are obliged to keep the confidentiality of attorney-client privileged information. This confidentiality obligation extends to documents and other data carriers containing such attorney-client privileged information.

Save for certain exceptions, legal practitioners are not bound by any confidentiality obligations *vis-à-vis* their clients where privileged information has been obtained in the course of work carried out for the benefit of that client. If privileged information is received from another practising attorney in the context of a particular case, the legal practitioner may not disclose such information to their own client if the person disclosing the information has expressly prohibited such disclosure.

The legal practitioner's obligations of confidentiality are independent of the existence of a legal relationship, and survive any termination of the legal relationship or mandate.

Therefore, based on the above, no separate right exists that grants protection specifically to legal advice. It is, however, the necessary consequence of the obligation imposed on lawyers not to disclose information obtained due to their professional capacity.

Since confidentiality is a result of the secrecy obligation, its rights are connected to the lawyer and not to the legal advice. It is a right in *personam*. This practically means that only information communicated to and in possession of the lawyer is protected. Advice or information communicated by the lawyer to their client does not fall within the scope of protection (save for certain specific information, eg in the field of criminal, antitrust and competition law).

Legal professional privilege in the context of civil litigation

Legal practitioners must object to be heard as witnesses and / or may not disclose data related to attorney-client privileged information in any civil proceedings, except when they have been exempted from their confidentiality obligation by the person entitled to waive the obligation.

Legal professional privilege in the context of criminal investigations

Legal practitioners must object to be heard as witnesses and / or may not disclose data related to attorney-client privileged information in criminal proceedings, except when they have been exempted from their confidentiality obligation by the person entitled to waive the attorney-client confidentiality obligation. However, no waiver is possible in respect of attorney-client privileged information obtained by a lawyer acting as defence counsel. Nevertheless, legal practitioners may disclose attorney-client privileged information to the extent necessary to prove a crime committed against them by a person other than the client, or a crime committed against their client (with their client's consent).

Legal professional privilege in the context of investigations by the competition authority

An investigation by the Hungarian competition authority is subject to applicable national rules on legal professional privilege. Legal practitioners must object to be heard as witnesses and / or must not disclose data related to attorney-client privileged information in any

regulatory proceedings, except when they have been exempted from their confidentiality obligation by the person entitled to waive the obligation.

Where the investigation is carried out by the European Commission (including where the European Commission is assisted by a national competition authority of an EU Member State), communications relating to a procedure enforcing Articles 101-102 TFEU are granted protection. Also, communications predating the initiation of such procedure but which are related to its context are protected. Documents covered by EU legal professional privilege are both protected against seizure during a dawn raid conducted by the European Commission and exempted from disclosure in response to a request for information by the European Commission.

Scope of legal professional privilege

What is protected by legal professional privilege?

It can generally be stated that documents enjoy the protection regardless of the point in time at which they were created due to the nature of the secrecy obligation described above. Generally, there is no specific rule with regard to the type of documents or contents protected. Attorney-client privileged information may include any and all facts, information and data obtained by the legal practitioner during the course of carrying out their professional duties.

In competition law procedures, it is generally irrelevant when the document was created, provided it is labelled as privileged lawyer-client communication with the *caveat* that a court may rule otherwise if it can be established from the contents of the document in question that it was created for the purpose of abusing legal professional privilege.

Are communications with in-house counsels protected by legal professional privilege?

In-house counsel (including bar association legal counsel and legal clerks) may only benefit from the protections of legal professional privilege if they are practising law (eg endorsement or legal representation) under the Hungarian Act on Legal Practice. However, bar association legal counsel and legal clerks are not bound by any obligations of confidentiality towards their employer (or any persons specified by this employer or their client) in circumstances in which the privileged information was obtained during the course of their employment.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

REGARDING LAWYERS

European Community jurists who permanently practice law in the territory of Hungary have to, in the course of their activities, comply with the provisions of the Act on Legal Practice and the Hungarian Bar Association regulations.

The Act on Legal Practice also governs the activities of European Community jurists who provide temporary services with regard to legal representation. The activities of European Community jurists who provide temporary services in Hungary other than legal representation are governed by the laws of the EU Member State where the European Community jurist is registered. In case of such European Community jurists, the Act on Legal Practice and the regulations of the Hungarian Bar Association would be applicable notwithstanding the lack of a permanent practice in the territory of Hungary.

Foreign (non-EEA) qualified lawyers are only subject to the Hungarian Act on Legal Practice if they practice law (eg endorsement or legal representation) in Hungary and are registered as foreign legal counsel at the Hungarian Bar Association.

REGARDING IN-HOUSE COUNSEL

Legal professional privilege rules deriving from the Act on Legal Practice would apply to the activities of any non-national in-house counsel practising law (eg endorsement or legal representation) in Hungary as registered in-house counsel.

How is legal professional privilege waived?

Generally the client can grant an informed waiver of the professional secrecy obligation owed by lawyers. However, in criminal proceedings, even upon the informed consent of the client, the lawyer may not disclose confidential information they obtained in their capacity as a defence lawyer.

Other remarks

Legal trainees registered with the Hungarian Bar Association are covered in the same way as fully licensed lawyers are.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of Hungarian merger control. Hungarian case law on legal professional privilege relates to cartel proceedings and there is no Hungarian case law for merger cases so far. Nevertheless, legal professional privilege has an increased importance within the context of merger control proceedings, because the Hungarian Competition Authority has been empowered to conduct dawn raids also in merger control proceedings since 2018.

As far as we know there were only one inspection in the form of dawn raid conducted in merger control proceedings so far, however companies have to set up to protect their internal strategic documents if they contain legal professional privilege. Since the communications coming from attorneys and bar association legal counsels benefit from the protections of legal professional privilege, by incorporating within these communications information obtained by other professionals (such as economic advisors), is a possible way of extending the legal professional privilege to other professionals. It shall be ensured however, that no communications take place directly between the undertaking and the other professionals without adding an attorney or bar association legal counsels to the communication flow.

Recent cases and/or other legal developments

No details for this country.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

The attorney-client/legal professional privilege (LPP) exists in internal investigations in the same manner as in civil and criminal investigations, that is in relation to investigations by any authority (including but not limited to Competition Authority, Prosecution's Office). This LPP is based on the Sections 9-13 of Act LXXVIII of 2017 – on Legal Practice.

As a general rule, LPP in Hungary applies to qualified lawyers and junior lawyers, European Community jurists, foreign legal counsels, bar association registered in-house counsel, as well as those persons who assist these people in their work.

The Act on Legal Practice defines LPP as any and all facts, information and data about which the legal practitioner gains knowledge during the course of carrying out their professional duties.

(Section 9-13 of Act LXXVIII of 2017 – on Legal Practice)

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

No, legal privilege is not affected by any time periods. (Section 9 (4) of Act LXXVIII of 2017 – on Legal Practice)

c) Are communications to/by companies and in-house counsel protected by privilege?

Yes, communications with bar association registered in-house counsel are protected by LPP. (Section 4 of Act LXXVIII of 2017 – on Legal Practice)

d) Are there any specific requirements of a privileged incident response engagement letter?

No, there are there no specific requirements since LLP also applies to bar association registered in-house lawyers in Hungary. However, it

is advised to always clearly mark documents sent to clients and bar association registered in-house counsel from external law firms as legally privileged.

(Section 9 of Act LXXVIII of 2017 – on Legal Practice)

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, as the LPP extends to all types of documents, parts of document, emails and other data carriers containing such LPP information.

(Section 9 (2) of Act LXXVIII of 2017 – on Legal Practice)

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

As regards the legal status of the document, it does not matter whether it is located at the premises of the client or the lawyer. However, in case of an official investigation, different procedures may be applied based on where the document is located. For details, please see question 6. (Section 13 of Act LXXVIII of 2017 – on Legal Practice)

c) How are seized documents put into evidence in a criminal/civil procedure?

On the premises of the lawyer:

The lawyer may not disclose the documents and data containing privileged information, may not be obliged to testify and provide data concerning privileged information during the authority's revision, inspection, or onsite search.

On the premises of the client:

If the documents containing LPP are considered as “made for the purposes of defence” then those may not be examined, may not be seized and may not be copied by public authority bodies; their presentation, handing them over, giving access to them may be refused.

The law describes the term made for the purposes of defence as: documents or part of documents that were created for the sake or within the frameworks of exercising the client's right to defence in public authority proceedings, during the communication between the legal practitioner and their client or a record of what was said during such communication, and this character is evident from the document itself. Documents that are not in the possession of the client or the legal practitioner shall not be deemed as documents made for the purposes of defence, except when they prove that the document has been removed from their possession unlawfully or under a criminal procedure.

The authority is entitled to have access to the document – without infringement of the right to LPP, and to the extent absolutely necessary – to establish whether reference to classification as a document made for the purposes of defence is obviously groundless or not.

If the classification of the document is disputed between the client and the authority, during the inspection or onsite search the authority may take possession of the document concerned, providing the document is placed on a storage device that excludes access to the data and the possibility to make subsequent changes.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

The person concerned may waive their rights to LPP, except when the document is connected with the defence in a criminal case where such waiver cannot be made.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

In the case of data breach investigations, the authority must be given access to all documents of the data controller, and may request copies thereof, and is entitled to inspect all such documents – including those stored on electronic data medium – which are presumed to have any bearing on the case at hand, and may request copies of such documents. The data controller and the organisation or person

involved in the case at hand must comply with the authority's request within the time limit prescribed by the authority.

If the findings of such internal investigation falls under LPP, then giving access to the authority may be refused. In such cases it is highly recommended to engage external legal counsel for advice in advance.

(Section 51(1)-(2) of Act CXII of 2011 – on the Right of Informational Self-Determination and on Freedom of Information)

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

This will depend on the scope and nature of the information to be shared. Referring to question 3b, in such cases it is highly recommended to engage external legal counsel for advice in advance.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

We are not aware of such specific cases.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

We are not aware of such specific case law.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Yes, but only if it complies with Hungarian legal requirements.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

In Hungary there is no specific law on this.

Key contacts



Dr. András Posztl

Country Managing Partner
andras.posztl@dlapiper.com
T: +36 1 510 1100



Dávid Khegyi

Local Partner, Budapest
david.khegyi@dlapiper.com
T: +36 1 510 1100



Ireland

Last modified 28 September 2020

Concept of legal professional privilege

Legal professional privilege is a concept which protects certain documents from disclosure in the context of legal proceedings. Without the protection of privilege those documents may need to be disclosed to the other side in litigation or arbitration prior to trial or could be seized or inspected by investigators in most regulatory procedures and relied on as evidence at a trial.

There are two main types of legal professional privilege under Irish law:

- **Legal advice privilege** protects from disclosure confidential communications between a client and its lawyers where the purpose of the communication is giving, seeking or receiving legal advice. It does not extend to advisors who are not lawyers, such as tax advisers or accountants.
- **Litigation privilege** protects from disclosure confidential communications between a client and its lawyers, or either of them and a third party, where the sole or dominant purpose of the communication is to prepare for actual or reasonably apprehended litigation.

Other types of legal professional privilege which are occasionally asserted are joint privilege, common interest privilege and without prejudice privilege.

Legal professional privilege is a substantive legal right (not a procedural rule). It enables a person to refuse to disclose certain documents in a wide range of situations. No adverse inference can be drawn from a valid assertion of legal professional privilege.

Legal professional privilege only protects confidential documents. If documents which would otherwise be privileged contain information which is already in the public domain or which has been widely shared with third parties, legal professional privilege may be lost (subject to certain exceptions).

Legal professional privilege belongs to the client, not the lawyer, and does not depend upon the document being in the lawyer's custody. Privileged documents can be (and frequently are) held by the client.

Scope of legal professional privilege

What is protected by legal professional privilege?

Legal advice privilege

If no adversarial proceedings are in contemplation, legal professional privilege will only attach to documents which constitute confidential communications between a lawyer and their client made for the purpose of giving or obtaining legal advice and documents which evidence such communications, including material forming part of the continuum of those communications.

Communications

The term "communication" is broadly defined for the purpose of privilege and covers a range of information conveyed in a variety of forms. It extends not only to written communications but also to notes or memoranda recording oral conversations, documents generated by the lawyer in the course of formulating legal advice, records on IT systems and emails.

In order to attract legal advice privilege, a document must actually transfer information from the client to the lawyer or be intended for that purpose. A document which is not prepared for the purpose of being placed before a lawyer for the purpose of seeking legal advice or is not addressed and delivered to a lawyer specifically for advice may not constitute a communication. For example, a statement prepared by an employee at the request of a manager to record the employee's recollection of events is unlikely to benefit from legal advice privilege – even if the employee believes that the document will be passed to lawyers for advice – since it is not a communication with a lawyer. The onward transfer of that statement by a client to their lawyer for advice would, however, benefit from legal advice privilege. In contrast, documents prepared by the lawyer in the course of formulating legal advice which are not ultimately communicated to the client can attract privilege.

Lawyer

Includes all members of the legal profession: solicitors, in-house lawyers, barristers within Ireland and duly accredited foreign lawyers. Where appropriate input from a qualified solicitor, it can also extend to legal executives, paralegals and trainee solicitors.

A risk may arise in communications with in-house lawyers where the context of the communication relates to commercial rather than legal matters. Where that is the case, privilege will not apply. A further exception applies in relation to in-house lawyers, in that communications between them and their clients will not be protected by privilege in the context of European Commission competition investigations, on the basis that the in-house lawyers are not deemed to be sufficiently independent from their clients in those circumstances.

Client

The Irish courts have yet to consider in detail who the "client" is for the purposes of legal advice privilege. However, it was stated in a High Court decision^[1] that "*where the client is corporate, it appears necessary to consider whether the individual making the communication is a person engaged or employed to obtain or receive legal advice on behalf of the client.*" It would therefore be prudent for large corporate organisations to consider which employees constitute "the client" at the outset of a matter and as a matter progresses. It may also be advisable to specifically identify personnel for the purpose of representing the corporation in its capacity as "the client" and to ensure that relevant communications are only circulated to the designated personnel. It is important to ensure the privileged communications do not lose their privilege due to circulation to others within the organisation who may not be considered "the client" for the purpose of legal advice privilege.

Documents created for the purpose of obtaining legal advice

Legal professional privilege only attaches to communications that give or seek legal advice. This typically involves advice as to what should prudently and sensibly be done in a relevant legal context, and advice on the effectiveness or consequences of certain courses of action that a client has taken or is contemplating. It includes advice on how best to present facts in light of legal advice given. Privilege will not attach to advice which is purely commercial.

There is also a distinction to be made between legal advice and legal assistance. Generally, the Irish courts do not regard legal assistance as attracting privilege (unless covered by litigation privilege, addressed below).

Some documents may be part-privileged, that is they contain information which is covered by legal advice privilege and information which is not. In these circumstances the privileged information can be redacted from the documents which are disclosed.

Duration of legal advice privilege

The Irish courts have quoted with approval the phrase "once privileged, always privileged" with regard to legal advice privilege. As such, legal advice privilege is permanent in duration. It remains for the duration of the legal professional relationship and continues to operate even after the relationship has ceased.

Litigation privilege

Litigation privilege protects from disclosure confidential communications between a client and its lawyers, or either of them and a third party, where the sole or dominant purpose of the communication is to prepare for actual or reasonably apprehended litigation. Litigation privilege can also be asserted over documents in the context of regulatory or criminal investigations, or

in Tribunals of Inquiry. Unlike legal advice privilege, litigation privilege extends to communications between the client and third parties other than its legal advisors.

Confidential

Only confidential communications will be protected. No communication made by or to the opposing party can be considered confidential. Communications made with third parties for the sole or dominant purpose of litigation may not attract litigation privilege if such communications are not confidential in nature.

Dominant purpose

If litigation (or regulatory / criminal investigation or Tribunal of Inquiry) is reasonably apprehended, a 'dominant purpose' test will apply to protect as privileged all confidential documents prepared for the dominant purpose of giving or obtaining legal advice with regard to that litigation or aiding the conduct of that litigation. Where a particular communication was made solely for use in litigation, the privilege will undoubtedly apply. However, documents or communications are often made for a variety of purposes, only one of which may be to assist in the preparation of actual or reasonably apprehended litigation. Litigation privilege will only attach to such documents where the dominant purpose of the document was for use in litigation. Determining the purpose of a document can be problematic, particularly as the test is one of dominance and not exclusivity, and the Irish courts have taken a restrictive approach. However, the court will assess the purpose of a document on an objective basis.

Proximity of litigation

Litigation must be "reasonably apprehended" before a claim of litigation privilege can be sustained although solicitors do not have to be instructed in order to prove that litigation is reasonably apprehended. The test as to whether litigation is reasonably apprehended is an objective one.

Duration of litigation privilege

Unlike legal advice privilege, which is permanent in duration, litigation privilege does not extend beyond the relevant legal proceedings or closely related proceedings. The Irish courts have taken a number of factors into account when considering whether related proceedings are deemed sufficiently "closely related" to allow litigation privilege to endure. Therefore, parties to litigation cannot assume that a connection between sets of proceedings will be considered by a court sufficient to deem the proceedings "closely related" so as to preserve privilege.

Legal professional privilege in the context of criminal investigations

Legal advice privilege

Legal advice privilege applies in the context of criminal investigations, provided it is asserted over confidential communications between a client and its lawyers where the purpose of the communication is giving, seeking or receiving legal advice.

Litigation privilege

The Irish courts have ruled that documents which are created for the dominant purpose of engaging in a regulatory or criminal investigation can attract privilege. Therefore, a claim to privilege will be valid and the document can be withheld from inspection, provided the document meets the dominant purpose test. Litigation privilege also applies in the context of a Tribunal of Inquiry.

Are communications with in-house counsel protected by legal professional privilege?

Yes, except in the context of an antitrust and competition investigation by the European Commission. In the context of EC competition law, the European Court of Justice has held that a lawyer who is an employee of the client is not "an independent lawyer" for the purposes of legal professional privilege.

In addition, an in-house lawyer must take particular care to ensure that they distinguish clearly between advice which is legal and that which is commercial in nature. Privilege will only attach to confidential communications between the lawyer and individuals within the business when the lawyer is acting in their capacity as a legal advisor. The in-house lawyer must also take care when instructing external lawyers to clearly identify and effectively manage the relevant lawyer / client relationships.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Yes. Legal professional privilege applies to communications with lawyers admitted to practice in foreign jurisdictions

Where the question of disclosure is governed by European law (such as in the context of an antitrust and competition investigation within the Republic of Ireland by the European Commission), only the advice of an independent lawyer qualified within the EEA is protected by legal professional privilege.

How is legal professional privilege waived?

Waiver of privilege over a document can be express or implied.

Privilege over a document can be waived expressly if the client, or lawyer on behalf of the client, chooses to waive privilege and disclose the relevant material. If the privileged material has been disclosed through certain actions, conduct or communications, privilege will be deemed to have been impliedly waived.

Reference in court to the fact of a document, as opposed to the contents of the document, does not waive privilege over the relevant content. The Irish courts have held that witness statements do not lose privilege when served on the opposing party but do when they are adopted in court or otherwise put into a public arena. The Irish courts have also held that privilege will not automatically be deemed waived if the document has been disclosed by mistake or procured by fraud. Further, the Irish Supreme Court has held that documents disclosed to a regulator as part of an investigation on a confidential "non-waiver" basis with only limited carve outs will not lose privilege.

Legal professional privilege in the context of merger control.

It is usual for merging parties to engage in pre-notification discussions with the Competition and Consumer Protection Commission (**CCPC**) during which it is the CCPC's practice to send the parties detailed questions concerning the transaction. Further questions from the CCPC are likely after the formal Merger Notice has been submitted, for example, to respond to information concerning the transaction that the CCPC has received from third parties such as customers of the merging parties. Such requests for information supplement the information that the parties are required to submit under the terms of the Merger Notice. Once the filing is made, the CCPC has wide statutory powers to require the parties to produce information and documents for the purpose of the examining the notification (section 20 of the Competition Act 2002, as amended). However, the Competition and Consumer Protection Act 2014 provides that the parties shall not be compelled to disclose privileged legal materials. Despite this, in circumstances where a determination from the High Court as to whether information is privileged legal material is pending, disclosure of such information may be compelled, or information may be taken, provided it is done in such a way that the confidentiality of the information is maintained (against the person compelling disclosure or taking information)[2]

[1] *University College Cork v Electricity Supply Board* [2014] IEHC 135

[2] Section 33 CCPA 2014

Recent cases and/or other legal developments

Defender Ltd v HSBC [2018] IEHC 587, High Court, Twomey J, 15 October 2018

Whether privilege can be claimed over witness statements which have been delivered to the opposing party is a question that was considered by the Irish High Court in *Defender Ltd v HSBC*.

In summary, the position in Ireland is that a witness statement does not lose its status as a privileged document once it is served and that privilege is preserved until the witness statement is "*adopted by the witness or otherwise put into the public arena.*"

The plaintiff, Defender Limited (Defender), invested with Bernard L Madoff Investment Securities LLC (Madoff) and suffered losses when Madoff's investment business was exposed as having operated the world's largest Ponzi scheme. Defender then issued proceedings against HSBC in its capacity as Defender's custodian, claiming negligence and breach of contract.

During the course of the proceedings, Defender sought copies of witness statements that had been delivered by HSBC in two separate sets of proceedings which Defender was not involved in. Both sets of proceedings involved funds (Thema and Primeo respectively) that alleged negligence against HSBC following the exposure of Madoff's fraud. The Thema proceedings were heard by the Irish High Court.

The proceedings settled after 17 days and therefore not all of the witness statements sought were adopted in Court. The Primeo proceedings, however, were heard in full by the High Court of the Cayman Islands. HSBC claimed privilege in respect of the witness statements sought.

The High Court held that the witness statements delivered in the Primeo proceedings had lost their privilege during the course of the trial as they had been adopted in open court by the relevant witnesses. The High Court ordered that the Primeo witness statements be made available to Defender on discovery.

In relation to the Thema witness statements, a question arose as to whether privilege is lost when a witness statement is delivered to the opposing party but not adopted in open court. The High Court noted that there are policy reasons for preserving the privileged status of witness statements and emphasised in particular the importance of frank and honest witness statements to encourage settlement between the parties and the benefits of retaining privilege over witness statements until "*the last minute*". The High Court held that a witness statement does not lose its status as a privileged document once it is served and that privilege is preserved until the witness statement is "*adopted by the witness or otherwise put into the public arena*."

As the concept of "once privileged, always privileged" does not exist in respect of litigation privilege in Ireland, and the privilege ends when the proceedings end unless another set of proceedings is considered to be sufficiently closely related in order to allow the privilege to continue, the High Court also considered whether the Thema and Primeo proceedings were sufficiently closely related to the Defender proceedings. The High Court held that, while the overlap of parties involved in the various sets of proceedings was relevant, *more significantly, the subject matter of all three cases are closely connected, since they involve claims by three different funds against a HSBC company that, inter alia, the HSBC entity was negligent in relation to its alleged use of a Bernie Madoff company as a sub-custodian for the assets of the funds*.

The High Court therefore found that, to the extent that privilege exists in the witness statements, that privilege would "*prevent the discovery of those documents to Defender, because although the Thema and Primeo Cases have finished, they are closely connected with the Defender Case*."

Data privilege

Content to follow shortly.

Key contacts



Caoimhe Clarkin

Partner

caoimhe.clarkin@dlapiper.com

T: +353 1 436 5483



Marcus Walsh

Senior Associate

marcus.walsh@dlapiper.com

T: +353 1 487 6651



Clodagh Butler

Associate

clodagh.butler@dlapiper.com

T: +353 1436 5485



Israel

Last modified 18 September 2019

Concept of legal professional privilege

Israeli law is based upon a common law legal system, which has been influenced both by its major religious communities and by the diverse history of the country (which, prior to its independence in 1948, was under Ottoman and then British sovereignty). Whilst predominantly a common law system, Israel's legal system does comprise facets of civil law, largely drawn from the Ottoman regime, German civil law and religious laws (including the Jewish Halakha and Shari'a law).

Despite numerous references in the Israeli Declaration of Independence, the State of Israel does not have a written constitution. The Knesset has responsibility for enacting statutes in the State of Israel.

The Israeli Supreme Court (*Beit Mishpat Elyon*) is the final court of appeal in the State of Israel, reserved to hear appeals from the District Court (which deals with all civil and criminal matters not under the jurisdiction of a Magistrate Court). The Supreme Court also sits as the High Court of Justice in Israel, hearing administrative cases.

Unlike in many civil law jurisdictions in the region, the concept of legal professional privilege does exist in the State of Israel.

Scope of legal professional privilege

Legal professional privilege protects all communications between professional legal advisers and their clients from being disclosed without the permission of the client. The privilege is solely for the benefit of the client and not the lawyer. The objective of this legal principle is to protect one's access to the justice system by ensuring individuals can disclose all relevant information to their legal advisers without the fear that this disclosure may result in negative repercussions or prejudice them in the future.

A lawyer ceases to be bound by the requirements of legal professional privilege protection if they can demonstrate that documentation or information:

- Was in the public domain at the time it was disclosed to the lawyer;
- Entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer; or
- Was in the lawyer's possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by contemporaneous records.

A lawyer may disclose certain documents / information that would otherwise be protected by lawyer-client privilege to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the lawyer provides the client with reasonable prior written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents / information so disclosed be used only for the purposes required by law.

Under Israeli law (pursuant to both the *Bar Association Law 1961* and the *Evidence Ordinance [New Version] 1971*), all matters or documents exchanged between a client and their lawyer, pertaining to the professional service granted by the lawyer to their client, are privileged. Accordingly, communications between in-house legal counsel of a company and its officers, directors or employees, pertaining to legal services rendered by the in-house legal counsel to their client – the company – are privileged.

The fact that the in-house legal counsel is an employee of the company is irrelevant and does not influence the application of privilege.

However, the communication is privileged only if both the officers, directors or employees are acting on behalf of the company and the communication relates to matters falling within the professional lawyer-client relationship between the in-house legal counsel and the company. In instances where privilege applies, it is absolute, and can only be waived by the client.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Israel.

Recent cases and/or other legal developments

There do not appear to be any recent cases and other legal developments in Israel regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts



Jeremy Lustman

Partner

jeremy.lustman@dlapiper.com

T: +1 202 799 4214



Italy

Last modified 01 March 2022

Concept of legal professional privilege

Legal professional privilege in the context of civil litigation

In the context of civil litigation, a defendant may challenge a request of disclosure by the claimant on the ground that the documents requested are covered by legal professional privilege.

Legal professional privilege in the context of criminal investigations

All documents can generally be seized under Italian rules. The only exception to this general rule is provided by Article 103 of the Italian Procedural Criminal Code (IPCC). It relates to the defence lawyer formally appointed in criminal proceedings and provides that the public prosecutor cannot carry out inspections and / or searches at the defence lawyer's premises (unless the defence lawyer is indicted). Under this provision, the public prosecutor cannot seize any documents at the lawyer's premises which concern the defence strategy, the defence's investigations and any correspondence between them.

Legal professional privilege in the context of investigations by the competition authority

The Italian Competition Authority (ICA) has wide investigatory powers in competition law and consumer protection cases. According to the Italian Competition Act, the ICA is empowered to conduct inspections at the business premises of the investigated company, take copies of extracts from books / business records, ask for oral explanations on the spot and undertake other investigations with a view to obtaining information necessary to bring to light infringements. On this basis, all documents can potentially be discovered and copied by the ICA. Please consider that the ECN+ Directive has been recently implemented in Italy with the Italian Legislative Decree n. 185/2021, entered into force on 14 December 2021. Accordingly, the ICA has been awarded with new investigatory powers with reference to the investigations pertaining to the competition law cases. For what is more relevant, where certain conditions are met, investigations might be carried out at premises other than those of the company under investigation (including homes of directors, managers and other members of the staff of the company concerned).

However, the ICA's investigatory powers are subject to various limitations (for instance, the need to protect confidentiality). Legal professional privilege prevents the ICA from examining certain written communications between the company and its lawyers.

Under Italian case law (see, for example, Supreme Administrative Court, 24 June 2010, No. 4016), case law established by the European Union Court of Justice should also be applied to domestic Italian cases.

Scope of legal professional privilege

What is protected by legal professional privilege?

Confidentiality of written communications between lawyers and clients should be protected under two cumulative conditions:

- Information exchange with the lawyers must be connected to the right of defence of the client concerned
- Such information exchange must emanate from an independent lawyer who is not bound to the client by any employment relationship

Similar to the situation under EU law, the legal basis for legal professional privilege in Italy derives from the confidential character of the relations between a lawyer and their client. Legal professional privilege covers written communications exchanged after the launching of a competition investigation, although it extends to previous written communications which are linked to the subject matter of such procedures.

Legal professional privilege covers all written communications, including information stored electronically.

In principle, legal professional privilege does not cover documents which illustrate the external lawyer's opinion but which are not written by the external lawyer. However, internal notes which reproduce the text or the content of communications with independent and external lawyers relating to legal advice received may be covered by legal professional privilege (see Supreme Administrative Court, 24 June 2010, No. 4016).

Are communications with in-house counsel protected by legal professional privilege?

Legal professional privilege does not cover communications between a client and its in-house lawyer. Indeed, the employment relationship with the client could affect the lawyers' ability to exercise their professional independence by taking into account the commercial strategies of their employer. Italian administrative case law has confirmed that legal professional privilege is limited to the communications between the defendant and their external lawyers (TAR Latium, sec. I, 9 September 2012, No. 7467).

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Legal professional privilege in Italy applies without distinction to any lawyer that is entitled to practise law in one of the EU (and EEA) Member States.

How is legal professional privilege waived?

A party may choose to waive legal professional privilege in a document or part of a document which is helpful to their case.

Legal professional privilege in the context of merger control

Italian case law on legal professional privilege relates to infringement proceedings. To date there have not been any cases in the Italian courts relating to the question of privilege in merger control proceedings.

However, since Italian case law acknowledges the applicability of the principle of legal professional privilege to the ICA's investigative activity, it is arguable that the same principle also applies in the context of merger control proceedings.

Recent cases and/or other legal developments

The Supreme Administrative Court has held that legal professional privilege does not apply to internal notes of the company (see Supreme Administrative Court, 24 June 2010, No. 4016). In that regard, the ICA has held that it is not relevant that the external lawyer participated in a meeting during which a certain document was shown or discussed, since the mere fact that the contents of a certain document have been discussed with an external lawyer does not automatically make that document subject to legal professional privilege (see ICA, decision of 22 December 2020, case PS11517 – *MYWORLD-LYCONET-CASHBACK*).

With Legislative Decree No. 3 of 19 January 2017 Italy implemented EU Directive 2014/104/EU of 26 November 2014, according to which:

'Member States shall ensure that national courts give full effect to applicable legal professional privilege under the Union or national law when ordering the disclosure of evidence'.

As provided by Art. 3 of Legislative Decree No. 3 of 19 January 2017:

'In the actions for damages for infringements of the competition law provisions, upon receipt of a party's reasoned request,[...] the judge can order the parties or a third party to disclose relevant available evidence in accordance with the provisions of this Chapter. [...] This is without prejudice to the confidentiality of communications between lawyers in charge of a party's representation and the client itself'.

Law No. 31 of 12 April 2019, entered into force on 19 May 2021, reformed Italian rules on class actions, entrusting the judge with a similar power to order the disclosure of relevant evidence available to the defendant. Also in the context of class actions proceedings it is provided that 'This is without prejudice to the confidentiality of communications between lawyers in charge of a party's representation and the client itself' (see new Article 840-quinquies of the Italian Civil Procedure Code).

Data privilege

Content to follow shortly.

Key contacts



Alessandro Boso Caretta

Partner

alessandro.bosocaretta@dlapiper.com

T: +39 06 68 88 05 02



Domenico Gullo

Partner

domenico.gullo@dlapiper.com

T: +39 06 68 880 514



Japan

Last modified 19 November 2021

Concept of legal professional privilege

Legal advice and certain information and materials are protected through the following concepts:

Confidentiality (concept of legal professional privilege in Japan)

Confidentiality is a basic right and obligation of a lawyer. It is also necessary in order for the lawyer to satisfy their fiduciary obligations to their client.

It is stipulated in the Attorney Act (Law No. 205 of 1949, Article 23) that a lawyer or a former lawyer shall have the right and the obligation to maintain the confidentiality of any facts which they may have learned of in the course of performing their duties ('Confidentiality Obligation').

Under the Code of Attorney Ethics created by the Japan Federation of Bar Associations (JFBA), if a lawyer discloses client information to others or violates the lawyer's Confidentiality Obligation, the lawyer could be disciplined by the Bar Association.

Refusal rights

Refusal rights are the corollary to the Confidentiality Obligation. Lawyers are entitled to refuse court orders that would require the disclosure of client information or the attempt to seize documents or materials in the lawyer's possession that are confidential.

Even if the client or person who has the right to keep such information confidential discloses the confidential information to a third party, this may not necessarily be a waiver of confidentiality. The lawyer's refusal rights may remain in place if the client or person who has the right to keep such information confidential does not intend to permit the information to be publicised and the information is disclosed as confidential information and only to a limited number of people.

Unlawful disclosure of confidential information

Any lawyer or other professional who receives confidential information has an obligation not to disclose the confidential information which they have come to know in the course of their work. This obligation is imposed on them based on their status and the relationship of trust they form with their client. A violation of this obligation is a crime under Japan's Penal Code (Law No. 45 of 1907) and could result in imprisonment for up to 6 months or a fine up to JPY100,000 (Article 134).

Legal professional privilege in the context of civil litigation

Lawyers are entitled to refuse court orders that would require the disclosure of client information under the disclosure process in civil litigation pursuant to the Civil Procedure Act (Law No. 109 of 1996, Articles 197 and 220.4(iii)). However, if confidentiality is waived by the client or the person who has the right to keep such information confidential, the lawyer may no longer assert the right.

In addition, a lawyer, including a registered foreign qualified lawyer, may refuse to testify regarding matters covered by the lawyer's Confidentiality Obligation. These rights are guaranteed under the Civil Procedure Act (Article 197.1.2). It should be noted that although

these rights may be asserted by the lawyer, if confidentiality is waived by the client or the person who has the right to keep such information confidential, the lawyer may no longer assert these rights.

Legal professional privilege in the context of criminal investigations

Under the Criminal Procedure Act (Articles 105 and 222), lawyers, including registered foreign qualified lawyers, may refuse to provide documents or items that contain the confidential information of others which they have been entrusted with and retain or possess in the course of their duties, unless:

- The person in question has given consent for the disclosure, or
- The refusal is deemed to be an abuse of rights wholly for the interests of the accused (unless the information is about the accused)

A refusal to disclose the confidential information would be an abuse of rights, for example if the information no longer needs to be protected because it has been disclosed to other parties.

In addition, a lawyer, including a registered foreign qualified lawyer, may refuse to testify regarding matters covered by the lawyer's Confidentiality Obligation. These rights are guaranteed under the Criminal Procedure Act (Law No. 131 of 1948, Article 149). It should be noted that although these rights may be asserted by the lawyer, if confidentiality is waived by the client or the person who has the right to keep such information confidential, the lawyer may no longer assert these rights. Also, in criminal cases, the lawyer is not permitted to refuse to disclose confidential information if the refusal is deemed to be an abuse of rights wholly for the interests of the accused (unless the information is about the accused).

Legal professional privilege in the context of investigations by the antitrust / competition authority

In competition law investigations, lawyers and their clients are not protected by the Criminal Procedure Act and are not permitted to refuse to disclose documents or items containing confidential information. This is because, under Japanese law, competition law investigations are classified as an administrative / governmental procedure, not as a criminal investigation. Fewer protections are granted to lawyers in such investigations under the current legislation.

However, in line with the implementation of the new leniency program, a special legal professional privilege called "determination procedure" is also introduced under the amended Rules on Examination by the Fair Trade Commission (Fair Trade Commission Rule No. 5 of October 19, 2005), which came into effect on 25 December 2020. Under the procedure (Article 23-2 of the said Rules), even where the Japan Fair Trade Commission orders an enterprise to submit relevant materials in the anti-trust investigation, certain materials that record the contents of confidential communication between a business and its lawyer (*Bengoshi*) regarding a legal opinion on an alleged act that is subject to the leniency program, will be returned to the enterprise without the examiner having access to its contents if the requirements are satisfied.

Scope of legal professional privilege

What is protected by legal professional privilege?

The scope of the Confidentiality Obligation is not clearly delineated but it is limited to confidential information which the lawyer has come to know in the course of their work with clients. The obligation is not just limited to secret information which the client believes will not be disclosed but includes any information that a reasonable person would expect to be held in confidence. It should also be noted that the obligation continues after a case is completed or if a case is transferred to another lawyer, regardless of whether the client has paid the lawyer for the lawyer's work. In addition, the Confidentiality Obligation may extend beyond the client to cover information about third parties if that information is learned of during a lawyer's representation of a client.

There is no provision in Japanese law regarding the timing of the creation of protected documents as long as the documents contain the confidential information of other people which the lawyer has been entrusted with and of which they retain or possess in the course of their duties.

There is no limitation regarding the types of documents protected as long as the documents contain the confidential information of other people which the lawyer has been entrusted with and retains or possesses in the course of their duties.

Are communications with in-house counsel protected by legal professional privilege?

In-house counsel have similar rights and obligations with respect to confidential information that private lawyers have in Japan. In-house counsel are subject to the same obligations and have the same rights not to divulge confidential information regarding their employers (provided the in-house counsel is a licensed lawyer). Pursuant to the Code of Attorney's Ethics, in-house counsel are expected to perform their duties as freely and independently as possible within their enterprises or organisations (Article 50). If in-house counsel comes to know information regarding some unlawful conduct, they should take appropriate action within the enterprise or organisation, ie report the issue to their superior. However, the in-house counsel is not required to disclose confidential information outside their enterprise or organisation under the Code (Article 51).

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The Confidentiality Obligation applies to a foreign qualified lawyer registered as a Foreign Lawyer (*Gaikokuhou-Jimu-Bengoshi*) under the Foreign Lawyers Act (Law No. 66 of 1986, Article 50.1, which stipulates that the provisions in Articles 23 to 30 of the Attorney Act shall apply to a registered Foreign Lawyer). Similar to the treatment of Japanese lawyers, if a foreign qualified lawyer violates the Confidentiality Obligation, they could be disbarred by the JFBA (Articles 51 and 52) and this violation is subject to imprisonment of up to 6 months or a fine of up to JP ¥100,000 (Article 67).

How is legal professional privilege waived?

The Confidentiality Obligation may cease to exist in the following situations:

- When the client permits the lawyer to disclose the confidential information
- When the client clearly intends to commit a crime and the threat of the client carrying out this intent is high, or
- Where the lawyer faces accusations regarding the matter in which the information was learned of and disclosure is necessary to protect the lawyer from claims or damages

The Confidentiality Obligation in Japan applies to information in the lawyer's possession, not necessarily information created by the lawyer but no longer in the lawyer's possession. Therefore, if documents created by a lawyer are held by a third party, including the client, the documents will not be subject to the Confidentiality Obligation.

What are the differences between the scope of legal professional privilege in civil litigation, criminal investigations, and antitrust and competition law investigations?

While refusal rights are protected in civil litigation and criminal investigations, there is no special protection guaranteed in antitrust and competition law investigations. Also, in criminal cases, even where the confidentiality has not been waived by the person in question, if the refusal is deemed to be an abuse of rights wholly for the interests of the accused (unless the person is the accused), the lawyer may not exercise the refusal right (ie if there is no confidential information to be protected for the person in question and the only reason for the refusal is to decriminalise the accused, the lawyer cannot assert the refusal right).

Legal professional privilege in the context of merger control

Whether the protections afforded by Legal Professional Privilege apply in particular merger control proceedings depend on the type of action being brought. As noted above, if the action is based on a competition law investigation, fewer protections are granted and Legal Professional Privilege may not apply. However, Legal Professional Privilege may apply if criminal proceedings are brought pursuant to any investigation.

Recent cases and/or other legal developments

In Japan, there is a Legal Apprentice (*Shihou-Shuushuu-Sei*) programme which is a national legal training system for lawyers, judges and prosecutors who have passed the Bar exam. All legal apprentices study legal practice for one year under the supervision of experienced judges, prosecutors and lawyers. Under the rules regarding Legal Apprentices formulated by the Supreme Court (Article 3), legal apprentices are also obliged to hold in confidence information that they have come to know while acting as an apprentice.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

No. In general, there is no system of privilege or other system similar to discovery procedures. Therefore, in Japanese litigation, each party is able to select the evidence which will be submitted to the court (except in limited circumstances, parties will not be forced to disclose its documents. The exception is detailed in question 6 below). Accordingly, even though there is no privilege system, the risk that documents relating to legal advice are disclosed to the other party is quite low.

In addition, we are not aware of any specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters.

Please note that lawyers may refuse to give testimony in court about the issue related to their client.

Please also note that the privilege is also not introduced in the investigation by Japan Fair Trade Commission regarding violation of anti-trust law. There are currently, however, ongoing moves to introduce such a system.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

No. Please refer to our answer to question 1a above.

c) Are communications to/by companies and in-house counsel protected by privilege?

No. Please refer to our answer to question 1a above.

d) Are there any specific requirements of a privileged incident response engagement letter?

No. Please refer to our answer to question 1a above.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

No. As mentioned in the answer to question 1a above, there is no privilege system in Japan. As such, none of these documents are protected by privilege.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No.

c) How are seized documents put into evidence in a criminal/civil procedure?

Criminal Procedure

Prosecutors can submit the seized documents to court as evidence. There is no privilege system in criminal procedures so legal advice provided by an attorney to a client could be seized and be submitted to the court as evidence.

Civil Procedure

As mentioned in question 1 above, there is no system similar to discovery procedures. Therefore, in Japanese litigation, each party is able to select the evidence which will be submitted to court (except in limited circumstances, parties will not be forced to disclose their documents). In other words, each party must generally acquire evidence by itself.

The exception, however, is that a party can file a petition for submission of documents to court. The court may order the other party to

submit the documents if the petition has reasonable grounds. However, if the documents include information which any attorney knows in the course of its business and is subject to the confidentiality duty imposed to the attorney, the court shall not issue such order.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

No. Please refer to our answer to question 1a above.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

No.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

No.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

No.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

No.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

No.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

As no such system of privilege exists, there are no such regulations under Japanese law.

Key contacts

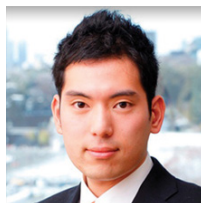


Lawrence Carter

Partner

lawrence.carter@dlapiper.com

T: +81 3 4550 2811

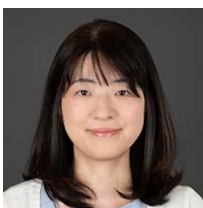


Keitaro Uzawa

Of Counsel

keitaro.uzawa@dlapiper.com

T: +81 3 4550 2833



Tomomi Fujikouge

Of Counsel

tomomi.fujikouge@dlapiper.com

T: +81 3 4550 2817



Kuwait

Last modified 01 September 2021

Concept of legal professional privilege

The second Article of the State of Kuwait's permanent Constitution of 1963 confirms that Kuwait's legal system is based upon Shari'a law (**"Islamic Religious Law"**). Legislation deriving from Shari'a is the main source of law in the state of Kuwait. The Amir has overarching responsibility for initiating, sanctioning and promulgating laws in the State of Kuwait.

However, in contrast to many other gulf states, such as the United Arab Emirates, the State of Kuwait's legal system is based upon a number of differing legal systems including French civil law, English common law, Islamic legal principles and Egyptian law.

In many civil law jurisdictions in the region, the concepts of legal professional privilege and "without prejudice" communications do not exist *per se*, and the parties have the right to use any document which may support their position in civil litigation. This is the position in the State of Kuwait, which does not have any express provision in respect of legal professional privilege. Instead, lawyer-client legal professional privilege is interpreted under Islamic Religious Law.

Indeed, lawyers in the State of Kuwait are bound by duties of confidentiality which, in many cases, incorporate concepts similar to legal professional privilege.

Scope of legal professional privilege

Legal professional privilege protects all communications between a professional legal adviser and their client from being disclosed without the permission of the client. The privilege is solely for the benefit of the client and not the lawyer. The objective of this legal principle is to protect one's access to the justice system by ensuring individuals can disclose all relevant information to their legal advisers without the fear that this disclosure may result in negative repercussions or prejudice them in the future.

A lawyer ceases to be bound by the requirements of legal professional privilege if the lawyer can demonstrate that documentation or information:

- Was in the public domain at the time it was disclosed to the lawyer;
- Entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer; or
- Was in the lawyer's possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by contemporaneous records.

Notwithstanding the lawyer-client privilege, a lawyer may disclose certain documents / information to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the lawyer provides the client with reasonable prior written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents / information so disclosed be used only for the purposes required by law.

The concept of legal professional privilege in the State of Kuwait is limited only to the professional relationship between a lawyer and their client, through the lawyer's obligation to keep confidential all information disclosed by their client (pursuant to *Kuwait Law No. 42/1964* organizing the legal profession). Accordingly, the relationship between a lawyer and their client benefits from a limited scope of privilege because the parties are independent entities and the lawyer, of course, owes a duty of confidentiality to the client.

It appears that the same privilege protections do not apply to in-house legal counsel advising officers, directors or employees of the company as they are not independent to the client. However, to protect information or communications passing between in-house counsel and the employer, it may be possible for a confidentiality agreement to be put in place.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Kuwait.

Recent cases and/or other legal developments

There do not appear to be any recent cases or other legal developments in the State of Kuwait regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts



Peter Anagnostou

Senior Legal Consultant

peter.anagnostou@dlapiper.com

T: +971 4 438 6392



Latvia

Last modified 23 May 2022

Concept of legal professional privilege

Under Latvian law, the concept of legal professional privilege is mirrored by the professional secrecy obligation, which is set out in Section 6(3) of the Advocacy Law of the Republic of Latvia (the Advocacy Law). It is also indirectly covered by international law such as Section 6 and Section 8 of the European Convention on Human Rights.

Pursuant to the Advocacy Law, it is prohibited to:

- Interfere in the professional activities of advocates, exert influence or put pressure upon them
- Request information and explanations from advocates, as well as interrogate them as witnesses in relation to facts which have become known to them in the process of providing legal assistance
- Control postal and telegraph correspondence and documents that advocates have received or prepared while providing legal assistance, to examine or confiscate them, as well as to carry out a search to find and confiscate such correspondence and documents
- Control the information systems and means of communication, including electronic means of communication, used by advocates for the purposes of providing legal assistance, to remove information from them and to interfere with their operation
- Request information from clients regarding the provision of legal assistance by advocates and the contents of any advice given
- Subject advocates to any sanctions or threats in relation to the provision of legal assistance to clients
- Hold advocates liable for written or oral announcements which they have made while performing their professional duties in good faith

Additionally, the advocates' professional Code of Conduct includes a duty to observe confidentiality regarding information provided by the client and any other information about the client obtained by the advocate in the course of their professional activities. This includes the content of legal assistance provided to the client, the terms of agreement between the advocate and the client, including the fee, as well as any other information related to the client's matters. The professional secrecy obligation also covers whether someone has sought legal assistance, as well as the client's identity.

The professional secrecy obligation is not limited in time. It applies from the first communication between the advocate and the client and continues to apply even after the client's case is closed. The professional secrecy obligation protects any information obtained by the lawyer in the context of providing legal assistance to the client.

The professional secrecy obligation only protects lawyers who hold the title of a "sworn advocate" or an "assistant of a sworn advocate" ("*zvrints advokts*" or "*zvrinta advokta palgs*" in Latvian) and are members of the Bar.

Scope of legal professional privilege

What is protected by legal professional privilege?

Litigation privilege

Civil proceedings in Latvia are based on the adversarial principle that each party must submit evidence in support of its claim or defence. There is no mandatory document disclosure. However, pursuant to sections 112(1) and 105(2) of the Civil Procedure Law of the Republic of Latvia, the party can request the production of a document that is relevant to the case or to call a witness to testify about the circumstances of the case. In exercising its discretion, the court must take into account the fact that it is not authorised to request relevant information about the case from the advocate, nor to obtain such information by controlling any of the advocate's correspondence with their client. The court is also not authorised to interrogate the advocate as a witness regarding the facts which have become known to them while providing legal assistance.

Legal advice privilege

The professional secrecy obligation covers not only litigation and all activities related to legal assistance before, during and after legal proceedings, but also to the legal advice provided to the client. It covers all oral and written communication between an advocate and a client, regardless of whether it is located with the advocate or with the client.

Legal professional privilege in the context of criminal investigations

The professional secrecy obligation applies not only to civil proceedings, but also to criminal investigations and any other investigations. Section 122(1) of Criminal Procedure Law of the Republic of Latvia (Criminal Procedure Law) grants immunity to an advocate in the context of criminal proceedings. Subsequently, an advocate cannot be interrogated as a witness regarding facts that have become known to them in providing legal assistance. Nor is it permitted to control, inspect, or remove documents that the advocate has created, or correspondence that they have received or sent while providing legal assistance. Furthermore, it is prohibited to control the information systems and means of communication to be used by an advocate for the provision of legal assistance, to retrieve information from such systems, and to interfere in their operation.

It should be noted that unlawful activity by an advocate performed in the interests of a client while providing legal assistance, as well as an activity for the promotion of an unlawful offence of a client, is not considered legal assistance and is therefore not covered by professional privilege.

Professional secrecy obligations cease to apply in the case of criminal proceedings against an advocate (i.e. if an advocate is suspected of committing a criminal offence or assisting in a criminal offence). Professional secrecy obligations are superseded by the right to remain silent (pursuant to Section 602(1) of Criminal Procedure Law).

Legal professional privilege in the context of investigations by the antitrust/competition authority

The rules set out above for criminal investigations also apply to investigations by the antitrust/competition authority. However, the protection of professional secrecy obligations is granted by Section 6(3) of the Advocacy Law, not by the Criminal Procedure Law.

Legal professional privilege in the context of merger control

The rules that apply to investigations by the antitrust/competition authority also apply to merger control investigations.

Are communications with in-house counsel protected by legal professional privilege?

Pursuant to Section 6(3) of the Advocacy Law, the professional secrecy obligation only applies to members of the Bar. It is not applicable to communications or to legal assistance in any form performed by a lawyer who is not a member of the Bar (e.g. in-house counsel).

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Pursuant to Section 6(3) of the Advocacy Law, the professional secrecy obligation applies only to members of the Bar. It should be noted that advocates from other jurisdictions within the European Union are considered equivalent to members of the Bar if they are registered in a special register of the Bar, pursuant to Section 121 of the Advocacy Law, or are certified as fit for permanent activity in Latvia, pursuant to Section 130 of the Advocacy Law. Latvian Advocacy Law (including the professional secrecy rules) generally does not apply to lawyers that are not authorised to practice as attorneys in Latvia. However, any legal professional privilege granted under EU law or international law also applies to correspondence to non-national attorneys.

How is legal professional privilege waived?

Pursuant to Section 6(4) of the Advocacy Law, an unlawful action of an advocate in the interests of a client, or an action for the promotion of an unlawful offence of a client, is not recognised as a provision of legal advice. It is therefore not protected by professional privilege. In the case of criminal proceedings against an advocate, the professional secrecy obligation is superseded by the right to remain silent under Section 602(1) of the Criminal Procedure Law.

Recent cases and/or other legal developments

Decision of the Department of Criminal Cases of the Senate of the Republic of Latvia of 29 September 2020 in case no. SKK-97/2020

An advocate who provided legal assistance to the victim testified in criminal proceedings about the unlawful activities of the accused. The accused argued that the testimony could not be used as evidence because it is prohibited to interrogate an advocate as a witness regarding facts that have become known to them while providing legal assistance. However, the Supreme Court did not agree with this because the purpose of the professional secrecy obligation is to protect the client's information which has become known during the provision of legal assistance. In this case, the advocate was authorised to file an application to the police on behalf of their client regarding the accused's unlawful activities. Thus, the advocate, when giving testimony in criminal proceedings, acted with the consent and in the interests of the victim. Therefore, such testimony must be recognised as admissible and usable evidence.

Decision of December 17, 2020, of the European Court of Human Rights (ECHR) in the case *Mouskis v. Latvia* (Application no. 71064/12)

The applicant complained that, during a search of his residence, police officers had seized his computer, which contained information about his clients, to whom he had provided legal assistance as an advocate.

The ECHR noted that in other countries, independent observers are required to be present who can, independently of the investigators, identify material covered by the advocate's professional secrecy. Latvian law contains no such requirement. It is possible that in the specific criminal proceedings the investigator could invite a representative of the Latvian Council of Sworn Advocates as an "independent observer."

The ECHR found a violation of Article 8 of the European Convention on Human Rights. It concluded that the applicant did not have the opportunity to ensure the protection of advocate-client correspondence and other privileged information, and that the applicant had been denied access to all private information on his computer for an indefinite period.

Data privilege

Content to follow shortly.

Key contacts

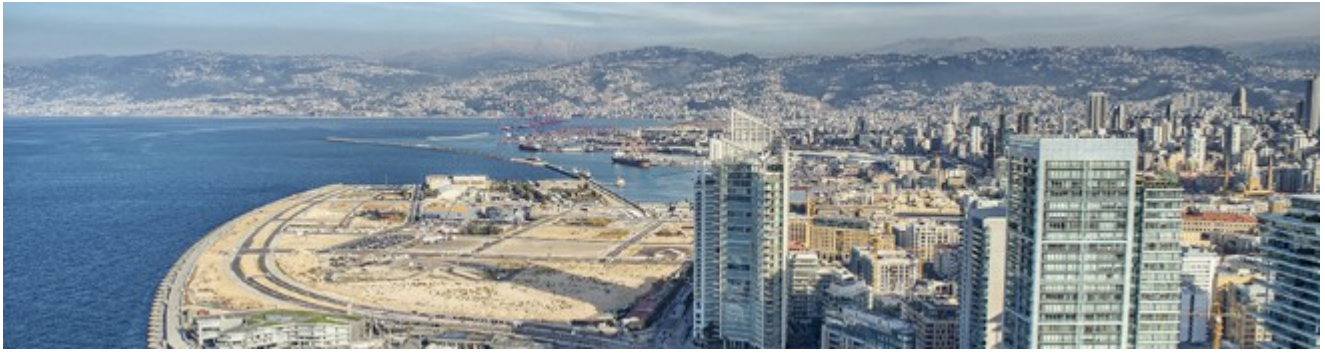


Ieva Andersone

Partner

ieva.andersone@sorainen.com

T: +371 67 365 000



Lebanon

Last modified 18 September 2019

Concept of legal professional privilege

While the key tenets of the legal system of Lebanon are based upon both the Shari'a law ("**Islamic Religious Law**") and the French civil law system, much of Lebanon's legislation also derives from legal principles inherent within the Ottoman Empire.

By way of its constitution, which was amended on 21 September 1990, Lebanon constitutes a parliamentary democracy. The President is the head of the State of Lebanon and is charged with responsibility for promulgating the laws adopted by the Lebanese Parliament. In contrast, the Lebanese Prime Minister oversees the Executive Branch and presides over the Cabinet of ministers, which is responsible for implementing the executive functions of Lebanon.

Lebanon has a tripartite judicial system, namely: civil courts, commercial courts and criminal courts. The Court of Cassation of Lebanon is the final court of appeal, reserved to hear cases of high value or particular significance.

In many civil law jurisdictions in the region, the concepts of legal professional privilege and "without prejudice" communications do not exist *per se*, and the parties have the right to use any document which may support their position in civil litigation. This is the position in Lebanon, whose constitution does not contain any express provision in respect of legal professional privilege.

Scope of legal professional privilege

Legal professional privilege protects all communications between professional legal advisers and their clients from being disclosed without the permission of the client. The privilege is solely for the benefit of the client, and not the lawyer. The objective of this legal principle is to protect one's access to the justice system by ensuring individuals can disclose all relevant information to their legal advisers without the risk that this disclosure may result in negative repercussions or prejudice them in the future.

A lawyer ceases to be bound by the requirements of legal professional privilege protection if they can demonstrate that documentation or information:

- Was in the public domain at the time it was disclosed to the lawyer;
- Entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer; or
- Was in the lawyer's possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by contemporaneous records.

A lawyer may disclose certain documents / information that would otherwise be protected by lawyer-client privilege to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the lawyer provides the client with reasonable prior written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents / information so disclosed be used only for the purposes required by law.

As is the position with most civil law jurisdictions in the Middle East, there are no express privilege rules in Lebanon and parties are able to, in theory, adduce in evidence any document which may support their position. Instead, the concept of legal professional privilege in Lebanon is limited only to the professional relationship between a lawyer and their client, through the lawyer's obligation to keep confidential all communications passing between the lawyer and their client.

It appears that the same privilege protections do not apply to in-house legal counsel advising officers, directors or employees of the company as they are not independent to the client. However, to protect this information, it is possible to enter into a confidentiality agreement between the employer and the employed in-house legal counsel.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Lebanon.

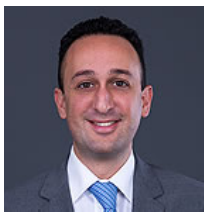
Recent cases and/or other legal developments

There do not appear to be any recent cases or other legal developments in Lebanon regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts



Peter Anagnostou

Senior Legal Consultant

peter.anagnostou@dlapiper.com

T: +971 4 438 6392



Lithuania

Last modified 23 May 2022

Concept of legal professional privilege

Non-disclosure of client secrecy (confidentiality) is one of the principles governing the activities of advocates stated in the Law of the Republic of Lithuania on the Bar. The main principles are laid down in the Code of Ethics of the Bar of the Republic of Lithuania:

- Confidentiality is a fundamental and overriding right and duty of a lawyer that is not subject to limitation
- Information received by the lawyer has to be kept confidential by the lawyer
- Without the client's consent, the information constituting a lawyer's professional secrecy cannot be used against the client or disclosed in any way (except when required by law or for the proper execution of a client order)
- A lawyer is prohibited from using information that constitutes a lawyer's professional secrecy in their own or another person's interests in an illegal manner
- An advocate has the right to disclose information that constitutes professional secrecy without the consent of the client, where this is strictly necessary:
 - To save human life
 - To protect the rights and legitimate interests of the client, their successor or assignee
 - To protect the lawyer's rights in a dispute with a client, but only to the extent necessary for the fair settlement of the dispute.

For legal services provided by lawyers who are not advocates, the general confidentiality duties apply to the relationship between the client and the general legal practitioners. If a lawyer is employed by the client, the confidentiality duties in the context of employment relationship would apply under employment law.

Scope of legal professional privilege

What is protected by legal professional privilege?

Litigation privilege

Law on the Bar provides that an advocate may not be summoned as a witness or be made to give explanations as to the circumstances which came to the advocate's knowledge in the course of their professional duties. According to the Code of Civil Procedure of the Republic of Lithuania, representatives in civil proceedings may not be questioned about matters which they have learned about in their capacity as a representative or defence counsel. It is also prohibited to use information which constitutes a lawyer's professional secrecy as evidence when information is gathered by public or secret access, as well as data from a meeting or communication between a lawyer and their client.

Legal advice privilege

The professional secrecy of an advocate consists of the fact of referral to the advocate, the terms and conditions of the contract with the client, the information and data provided by the client, the nature of the consultation and the data collected by the advocate on the

client's behalf, as well as the content of any other communication between the advocate and their client (whether in the form of a meeting, correspondence, a telephone conversation or any other form of communication). It is the lawyer's duty and the client's right that such information remains confidential.

Legal professional privilege in the context of criminal investigations

It is prohibited to examine, inspect, or seize an advocate's documents or files containing data related to the advocate's professional activities, examine postal dispatches, wiretap and control any other information transmitted over telecommunications networks and other communications or actions, with the exception of cases where the advocate is suspected or accused of a criminal offence. The prohibition is also not applied to documents that are related to the allegations or charges made against the advocate.

A search or seizure at the office, residential premises, or a motor vehicle of an advocate entered on the list of practicing advocates of Lithuania, personal search, examination, inspection or seizure of documents and postal dispatches may be conducted only in the presence of a member of the Council of the Lithuanian Bar or an authorised advocate. The reason for this is that an authorised person must ensure that documents unrelated to the allegations or charges made against the advocate are left intact. It is mandatory for the officials to inform the Lithuanian Bar Association when a lawyer becomes a suspect or an accused person or when procedural steps are taken against them.

Moreover, according to the Criminal Procedure Code of the Republic of Lithuania, the defence counsel of a suspect, accused, acquitted or convicted person, or the representatives of a victim, a civil claimant or a civil defendant, may not be questioned as a witness in relation to circumstances which have come to their knowledge in the course of their duties as a defence counsel or a representative.

Legal professional privilege in the context of investigations by the antitrust/competition authority

In the case of an investigation by the antitrust/competition authority, the official may seize some of the documents from the undertaking. To ensure legal professional privilege, the undertaking (manager, employee or other representatives of the undertaking) may claim that the documents (correspondence) sought to be seized in the course of the inspection constitute legal professional privilege. The rule is that they must substantiate any assertions. If the officials authorised to carry out the inspection are satisfied that the documents are covered by professional secrecy, they cannot copy or seize such documents. If an undertaking subsequently informs the authority that documents constituting a lawyer's professional secrets were seized during the inspection, and the authorised officials are convinced, they may return them to the undertaking or delete or otherwise destroy them.

In cases when a dispute arises over the recognition of documents as a lawyer's professional secrecy, copies of the disputed documents are placed in a box, envelope or other closed container, which is sealed and taken to the premises of the authority. Later, in the premises of such authority, the box, envelope or other closed container is opened by removing the seal and a decision is made as to whether the documents constitute a lawyer's professional secrets.

Legal professional privilege in merger control procedure

As stated, all the general rules apply. Moreover, although undertakings or controlling persons participating in the concentration have the right to inspect the material of the Notification File, documents for restricted official use and information constituting commercial and professional (including legal privilege) secrets of other undertakings cannot be inspected.

Are communications with in-house counsel protected by legal professional privilege?

Legal professional privilege is mainly regulated by the Law on the Bar and the Code of Ethics. There are no particular laws protecting the professional secrecy of in-house counsel. In-house lawyers are bound by confidentiality obligations as employees, however, they do not enjoy privilege in litigation, advice protection or privilege from criminal investigations.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Legal professional privilege applies to lawyers from the Member States of the European Union and EEA who hold a professional title of lawyer granted by the competent authority of their country, as specified in the list approved by the Government of the Republic of Lithuania and have the right to provide services temporarily in the Republic of Lithuania.

How is legal professional privilege waived?

Under the Code of Ethics, an advocate has the right to disclose information that constitutes professional secrecy without the consent of

the client, where this is strictly necessary:

- To save human life
- To protect the rights and legitimate interests of the client, their successor or assignee; or
- To protect the lawyer's rights in a dispute with a client, but only to the extent necessary for the fair settlement of the dispute.

It is also possible that a client may agree to waive legal professional privilege and release a lawyer from keeping it.

Legal professional privilege in the context of merger control

According to the Law on Competition of the Republic of Lithuania, the Competition Council is not entitled to have access to information subject to legal professional privilege. The information which is subject to legal professional privilege may not be requested even when the claimant or the defendant is unable to obtain information related to the case themselves and asks the court to obtain it (at the time when litigation is in progress).

Recent cases and/or other legal developments

In the most recent case, the Supreme Administrative Court of Lithuania rejected the appeal of a company and left unchanged the ruling of the court of the first instance declaring that the Lithuanian competition authority was right in not applying the protection of legal professional privilege to correspondence between two companies and their lawyer and not removing this information from the case material of an investigation. It was stated that the lawyer holds a significant number of shares of the companies, participates in their activities by voting at the shareholders' meetings, and therefore may affect important decisions on the economic commercial activity of the companies and form its strategy. The relationship between the company and the lawyer could not be considered unconditionally independent. Accordingly, it was ruled that the competition authority acted lawfully when it did not apply the legal guarantee laid down in the Law on the Bar to correspondence, and such measure is reasonable, essential and necessary in a democratic society and proportionate to the attainment of the objective pursued. *Administrative case No. eA-3015-629/2021*.

In the same process, it was ruled that the legal guarantee laid down in the Law on the Bar Association is not absolute and may be limited where it is legitimate and strictly necessary in a democratic society. The Court stated that it should always be assessed whether there was a sufficiently justified and proportionate and legitimate aim in restricting the guarantee. *Administrative case No. eA-2145-556/2020*.

The Supreme Administrative Court of Lithuania also provided clarification on the information constituting a lawyer's professional secrecy. The Inspectorate requested information on whether the complainant, I. B., had contacted the office regarding the investigation of its activities in obtaining and processing her data; if such information had been provided, indication of when, how and what information was provided; and if it was not provided, why not. It requested certified copies of the documents confirming the facts of the complainant's application and any reply. Paragraph 5 of Article 46 of the Law on Advocacy stipulates that a lawyer's professional secret consists of the fact of contacting a lawyer, the terms of the contract with the client, the information and data provided by the client, the nature of the consultation and the data collected by the lawyer. Such information that the managing partner of the law firm could provide to the Inspectorate would be, for example, a copy of the agreement with the State Enterprise Centre of Registers. Thus, the managing partner of the law firm was able to answer some of the Inspectorate's requests (regarding that part of the information that did not constitute a lawyer's secret) without commenting on the activities of another lawyer. *Administrative case No. A-47-822/2018*.

Data privilege

Content to follow shortly.

Key contacts



Stasys Drazdauskas

Counsel

stasys.drazdauskas@sorainen.com

T: +370 52 685 040



Luxembourg

Last modified 01 August 2021

Concept of legal professional privilege

Communications between lawyers and clients are in principle protected by professional secrecy. Article 35 of the law of 10 August 2011 on the legal profession (*loi sur la profession d'avocat*) (the **2011 Law**) sets out the rules on professional secrecy.

The obligation of professional secrecy is also contained in the following: (i) the internal regulation of 9 January 2013 of the Luxembourg Bar (*Règlement intérieur de l'Ordre des Avocats du Barreau de Luxembourg*) (the **2013 Regulation**) and (ii) the internal regulation of 22 April 2005 of the *Diekirch Bar* (the **2005 Regulation**).

The professional secrecy of the lawyer is a matter of public order. It is general, absolute and unlimited in time, except as provided otherwise by law.

Article 458 of the Criminal Code (*Code pénal*) provides that violation of professional secrecy may be subject to a jail sentence of eight days to six months and a fine of €500 to €5,000. The same provision provides for two exceptions to the obligation of professional secrecy:

- when one is called to testify in court; and
- when one is required by law to disclose certain information.

Also, under the law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended, the disclosure in good faith of any relevant information to the Luxembourg competent authorities does not constitute a breach of the duty to maintain professional secrecy and does not result in liability of any kind for the lawyer making the disclosure.

In addition to criminal sanctions, the lawyer may face (i) disciplinary sanctions, from the bar, ranging from a warning to a ban on practising the profession (ii) as well as being held contractually liable by the injured client.

Legal professional privilege in the context of civil litigation

The judge is authorized to order the production of documents in both civil and commercial litigation (article 280 of the *Nouveau code de procédure civile*).

However, a judge may not order any lawyers participating in proceedings to produce documents, as this would be contrary to the right of defence and the right to a fair trial. In the absence of any specific or implied exception, the issue arises as to whether a judge could order a lawyer who had been instructed previously by a client but who was not currently retained by that client, to produce certain documents (such orders have been made in respect of banking institutions who were holding client documents).

A lawyer may be called as a witness by the court (as permitted by the Criminal Code), in which case they will have to determine whether the facts on which they are questioned are protected by professional secrecy and if so, should only disclose to the court the circumstances in which the information came to their knowledge, so as to allow the court to determine whether professional secrecy applies.

Legal professional privilege in the context of criminal investigations

Legal professional privilege also applies in the context of criminal proceedings (see [Scope of legal professional privilege](#)).

A lawyer who is subject to criminal proceedings, may disclose information covered by professional secrecy only to the extent strictly necessary for her/his defence.

Searches of law firms may only be carried out in the presence of the Head of the Bar or their representative, or if they have been duly called to attend.

The Head of the Bar or their representative may make observations regarding the preservation of professional secrecy to the investigative authorities and, in order not to be invalidated, all acts of seizure must record the presence of the Head of the Bar or their representative, or their having been called to attend.

Legal professional privilege in the context of investigations by the antitrust/competition authority

The above-mentioned principles also apply in the context of investigations by the antitrust / competition authority.

Scope of legal professional privilege

What is protected by legal professional privilege?

Professional secrecy applies to all information pertaining to the client and their affairs brought to the attention of the lawyer by their client, or of which the lawyer has gained knowledge through the exercise of their profession, whatever the source of the information. It applies also to all documents and information emanating from the lawyer advising, representing in court or assisting their client.

It covers all legal advice given to or intended for a client, all correspondence between the lawyer and their client as well as with other lawyers, notes of meetings and generally all information received by the lawyer in the exercise of their profession, the name of the client of the lawyer, the diary of the lawyer and the financial arrangements between the lawyer and their client.

Correspondence and discussions between lawyers are protected by professional secrecy, unless the correspondence:

- is marked as "official" and does not contain any information confidential by nature;
- comprises a formal and unconditional agreement between parties; or
- is not confidential by nature (letter sending a brief or asking for a document or a procedural act).

Are communications with in-house counsel protected by legal professional privilege?

In the absence of any specific legislation recognizing legal professional privilege for in-house counsel and in view of the fact that the latter are bound by an employment contract with their employers, it may be expected that the advisory activity of in-house counsel is not protected by professional secrecy.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Lawyers should exercise caution when communicating with lawyers who are not subject to the rules of the Luxembourg Bar, as the rules governing legal professional privilege may vary from one country to another. At European level, the recommendations in article 5.3 of the CCBE Code of Conduct for European Lawyers should preferably be followed.

How is legal privilege waived?

Although the law requires a lawyer to keep confidential all matters entrusted to them by their client, the reverse is not necessarily true as nothing prevents the client from disclosing to third parties what they have disclosed to their lawyer (in other words, the client does not owe any obligations of confidentiality).

In some cases, the court has:

- set aside the minutes of an investigation initiated by an individual who was handing over correspondence between their lawyer and another lawyer; and
- denied the application of a lawyer to file a complaint against another lawyer on the basis of an alleged criminal offense committed

by the latter which threatened their client.

Pursuant to the 2013 Regulation, a lawyer may disclose confidential information if:

- she/he determines that this disclosure is in the best interests of the client; and
- her/his client has authorized them to do so after having been duly informed of the nature of the information to be disclosed and the proposed recipients of the information.

There may also be situations where a 'state of necessity' or other principles take precedence over professional secrecy thereby releasing a lawyer from their obligations of legal professional privilege. An explicit reference to the 'state of necessity' was mentioned in a previous version of the 2013 Regulation (and may still be found in the 2005 Regulation) but it is generally considered that this principle remains applicable despite its omission from the 2013 Regulation.

Recent cases and/or other legal developments

No details for this country.

Data privilege

Content to follow shortly.

Key contacts

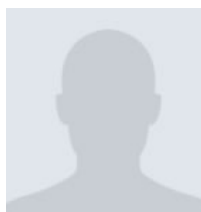


Olivier Reisch

Partner

olivier.reisch@dlapiper.com

T: +352 26 29 04 2017



Amin Bouazza

Associate

amin.bouazza@dlapiper.com

T: +352 26 29 04 2615



Malaysia

Last modified 14 June 2022

Concept of legal professional privilege

In Malaysia, there are generally two subsets of legal professional privilege. The first is legal advice privilege, which is enshrined in statute, specifically Section 126 of the Evidence Act 1950 (Evidence Act). The second subset is litigation privilege, which exists under common law.

Scope of legal professional privilege

What is protected by legal professional privilege?

Legal advice privilege

Legal advice privilege under Section 126 of the Evidence Act has a wider scope of application than the usual common law litigation privilege. Primarily, legal advice privilege covers all legal advice given by an advocate and solicitor (as described below) to their client. Legal advice privilege also covers *any* documents which have been provided to the advocate and solicitor, brought to the attention of the advocate and solicitor, or which the advocate and solicitor had become familiar with in the course of their professional employment.

Litigation privilege

Litigation privilege under common law covers all documents that were created at a time when litigation was either pending or in contemplation. To determine if litigation privilege applies, the Malaysian courts will apply a two-stage test: (i) to determine whether litigation was pending or apprehended when the document or information was obtained, and (ii) to determine whether litigation was the dominant purpose for the preparation of the document in question.

Legal professional privilege in the context of criminal investigations

Legal professional privilege applies equally in the context of criminal investigations in Malaysia. See for example the Malaysian Anti-Corruption Commission Act 2009 (Anti-Corruption Commission Act 2009) which provides, under Section 46(2), that no order of the court may compel an advocate and solicitor to disclose any privileged information or communication in respect of any property which is liable to seizure, for the purpose of any pending proceedings.

Legal professional privilege in the context of investigations by the antitrust/competition authority

Section 22 of the Competition Act 2010 (the Competition Act) expressly provides that no person is required to produce or disclose any communication with a legal advisor which would be protected under Section 126 of the Evidence Act, unless privilege is waived by the privilege holder.

Legal professional privilege in merger control procedure

As of the date of writing, there are no merger control provisions applicable under the Competition Act. However, even if the Competition

Act is amended to include merger control provisions, Section 22 of the Competition Act would likely extend to apply to legal professional privilege in a merger control situation, unless the amended provisions state otherwise.

Currently in Malaysia, there is a sector-specific merger control regime for aviation services under the Malaysian Aviation Commission Act 2015 (the Aviation Commission Act). While there are merger control provisions under the Aviation Commission Act, there are no specific provisions on legal professional privilege. This would mean that the usual laws of privilege under the Evidence Act and common law (as outlined above) apply.

Are communications with in-house counsel protected by legal professional privilege?

No. This position is untested in the Malaysian courts, and it remains to be seen whether the courts in Malaysia will specifically recognise communications with in-house counsel as being protected by legal professional privilege. Malaysia has no equivalent provision to Singapore, which has enacted Singapore's Evidence Act (Cap. 97) section 128A to extend privilege to communications with in-house legal counsel.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

This position is untested in the Malaysian courts. However, legal professional privilege is unlikely to apply to the correspondence of non-national qualified lawyers, pending further developments under Malaysian law.

This is because, under the Evidence Act, legal advice privilege extends to an "advocate". Under the Interpretation Act 1948 and 1967, an "advocate" is defined to mean a person entitled to practice in Malaysia. As non-national qualified lawyers are not entitled to practice in Malaysia under the Legal Profession Act 1976, legal advice privilege would not extend to non-national qualified lawyers.

How is legal professional privilege waived?

Generally, legal professional privilege is absolute and may only be waived by the privilege holder, save for situations where protection is eroded by legislation. For example, under Section 46 of the Anti-Corruption Commission Act 2009 and Section 47 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFA), an application may be made to a Judge of the High Court to order disclosure by an advocate and a solicitor in relation to an investigation to offences under the acts.

However, such disclosure is strictly related to information available in respect of any transaction or dealing relating to property liable to seizure. There are further provisions under both sections that limit the extent of disclosure to exclude any privileged information or communication which came to the knowledge of the advocate and solicitor for the purpose of the proceedings pending before the court.

Legal professional privilege in the context of merger control

There are currently no merger control provisions under the Competition Act 2010. However, in the event merger control provisions are introduced, and when there is no express exclusion of privilege under said merger control provisions, legal professional privilege would apply.

Recent cases and/or other legal developments

In October 2021, the Malaysian Court of Appeal affirmed the High Court's decision in an action brought by the Malaysian Bar Council against the Inland Revenue Board of Malaysia (IRB). The Malaysian Bar Council sought certain declarations to prevent the IRB from conducting raids on law firms in order to audit client accounts and access accounting books and records pertaining to client accounts.

The Court of Appeal held that the client accounts, and information related to the client accounts, are protected under Section 126 of the Evidence Act i.e. subject to legal professional privilege. The Court of Appeal further held that privilege is absolute and may only be waived by the privilege holder. The Malaysian Court of Appeal's decision is currently the subject of an appeal to Malaysia's Federal Court.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

There is no specific legal privilege applicable within the context of internal investigations, save for legal advice privilege under Section 126 of the Evidence Act and litigation privilege under common law.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

No. Privilege is absolute unless waived.

c) Are communications to / by companies and in-house counsel protected by privilege?

No. As described above, Malaysian law has yet to specifically recognise that communications to/by companies and in-house counsel are protected by privilege.

d) Are there any specific requirements of a privileged incident response engagement letter?

No.

b) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, if these notes, transcripts, or expert reports were considered as part of the provision of legal advice, or if the documents were prepared with litigation in mind. In order to preserve privilege over such work product, there should be explicit directions from the advocate and solicitor to the third parties before the third parties commence work.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No.

c) How are seized documents put into evidence in a criminal / civil procedure?

If privileged documents are seized, subject to an objection being taken, those documents must be sealed and brought before the court to determine if those documents are protected by privilege.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Legal privilege can be waived in Malaysia if the right to privilege is not asserted or enforced. To prevent this from occurring, the privilege holder ought to make an objection and make the relevant applications to the courts in order to protect the document. In addition, it is important to clearly label and mark the relevant documents as “legally privileged” to avoid any ambiguity.

b) In data breach litigation, does a company ever need to rely on the findings of internal investigations, and if so, does that mean privilege has been waived?

Yes. If the company relies on the findings of an internal investigation in court proceedings, then privilege in respect of the findings is waived.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last 5 years? If so, please provide details.

No.

b) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Generally, no. However, if the data meets the standards for legal privilege under Malaysian law, then it may be treated as privileged regardless of the approach taken outside the jurisdiction.

c) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

If an investigation is commenced outside Malaysia, and if the relevant authorities from that jurisdiction attempt to seize the privileged data, the laws of the jurisdiction in question are likely to apply as to whether the data is considered privileged or otherwise.

However, where there is ambiguity about whether the data would be considered privileged under Malaysian law, the privilege holder may consider making an application to the Malaysian court to make the relevant determination on this, including to obtain any relevant injunctions to prevent disclosure, as required.

Key contacts



Maurice Burke

Head of Investigations, Asia
maurice.burke@dlapiper.com
T: +65 6512 9560



Rishikeesh Wijaya

Associate
rishikeesh.wijaya@dlapiper.com
T: +65 6512 9515



Morocco

Last modified 07 April 2020

Concept of legal professional privilege

The Moroccan regulatory framework does not recognize the concept of legal professional privilege, such as this concept may exist in common law jurisdictions.

This said, Moroccan law establishes the principle of the protection of the confidentiality of information through the principle of professional secrecy.

The legal protection of the confidentiality of information is ensured from a professional perspective, not with regards to the content of the information itself. Consequently, the protection of a document by legal professional privilege is not determined by its content but by the quality and the role of its author and/or its recipient.

The principle of professional secrecy is set forth in article 446 of the Moroccan criminal code which provides that: *'All persons who are entrusted with secrets by virtue of their status or profession or function are prohibited from disclosing them'*. Failure to comply with this provisions rule is punishable by imprisonment from one to six months and a fine between MAD 1,200 to 20,000 (approximately € 120 to 2,000).

Furthermore, the legal professional privilege is protected by the article 36 of the Dahir 1.08.101 dated on 20 October 2008 enacting the law 28-08 organising the profession of lawyer, which forbids lawyers from disclosing any information in breach of legal professional privilege.

Legal professional privilege in the context of civil litigation

In the context of civil litigations, article 5 of Moroccan Civil Procedure Code states that the litigating parties must show good faith during the litigation process. In practice, this principle does not mean that the parties have disclosure obligations as this may be the case in some common law civil procedure.

In the context of commercial litigations, a judge may ask a party to reveal an evidence even if this evidence is against its interests. This said, the requested party may oppose the professional secrecy and refuse to divulge the evidence, if the document is covered by the professional secrecy i.e. if it is, for example, a communication with its attorney.

Legal professional privilege in the context of criminal investigations

In accordance with the above mentioned article 36 of the Dahir 1.08.101, lawyers must respect the confidentiality of criminal investigation and refrain from disclosing any information taken from files or any items, documents or letters relating to an on-going investigation (ie emails, correspondence, notes, advice, and preparatory documents). In this context, lawyers are protected by this provision against any request coming from judicial or administrative authorities with regards to information protected by the legal professional privilege.

As an additional protection, the inspection or seizure of a lawyer's office by the judicial police officers cannot happen without the presence of a judge or a public prosecutor. Also, the president of the bar association namely the *Bâtonnier* shall be notified and be present (Article 59 of the Moroccan Penal Procedure Code), all for the sake of protecting the confidentiality of the documents subject to the legal professional privilege which are in their office.

An important exception to the principles of legal professional privilege is provided for in the law n° 43.05 against money laundering as amended and completed. According to this law, legal professionals cannot refuse to divulge confidential information if such information is requested by the authorities in charge of investigating against money laundering. Moreover, this law imposes a disclosure obligation on legal professionals when they suspect money laundering activities while acting on behalf of their clients.

Legal professional privilege in the context of investigations by the competition authority

In the context of investigations by the Moroccan competition authority, the above mentioned principles and rules are applicable.

Scope of legal professional privilege

What is protected by legal professional privilege?

The protection of a document by legal professional privilege is neither determined by the date of its creation, nor its type nor its content but by the quality and the role of its author and / or its recipient. Thus, legal professional privilege applies to communications between a lawyer and client regardless of the timing of creation and the format of the communication.

Furthermore, legal professional privilege also applies to communications between two lawyers for the matters of their respective clients except if the lawyers expressly state in their communications that they are 'not confidential'.

Are communications with in-house counsel protected by legal professional privilege?

Moroccan law does not attribute to in-house counsel a special legal status and consequently this function does not benefit from the privileges granted to the lawyers.

In-house counsel are bound by the provisions of the above mentioned article 446 of the Moroccan criminal code but, unlike the lawyers, the in-house counsel cannot invoke this article to refuse disclosing information in their possession if duly requested to do so by a judicial or an administrative authority.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

From the perspective of the foreign-qualified lawyer, if a communication with their client benefits from legal professional privilege in accordance with their national legislation, they will be entitled to refuse disclosure of such information to Moroccan authorities.

From the perspective of the client, we are of the opinion that they will not be able to benefit from the legal professional privilege as if the lawyer was Moroccan because the Moroccan authorities would state that the Dahir 1.08.101 dated on 20 October 2008 enacting the law 28-08 organizing the profession of lawyer and the legal professional privilege therein applies only to Moroccan lawyers.

How is legal professional privilege waived?

The legal privilege protection has been put in place to protect the interests of the client. Thus, the client may waive it. There is no particular format for that, provided that the waiver is explicit and made by the client having the full knowledge of the consequences of such waiver. It is the duty of the lawyer to inform the client about the consequences of such waiver.

Legal professional privilege in the context of merger control

In the context of merger control, the above mentioned principles and rules also apply.

Recent cases and/or other legal developments

Commentary on the law n°43-05

The anti-money laundering law n°43-05 brought important exceptions to the legal professional privilege as it imposes a declaration of suspicion to lawyers when they receive from their clients information which may lead them to think that their client may be found guilty of

anti-money laundering.

Furthermore, the lawyers cannot invoke the legal professional privilege to refuse to communicate information to the administrative or judicial authorities investigating about cases of anti-money laundering.

Data privilege

Content to follow shortly.

Key contacts



Mehdi Kettani

Partner

mehdi.kettani@dlapiper.com

T: +212 520 427 830



Netherlands

Last modified 18 November 2021

Concept of legal professional privilege

The Dutch concept of legal professional privilege is a general principle of law based on confidentiality and the right of non-disclosure. Legal professional privilege applies irrespective of the field of law, as legal professional privilege is linked to the quality of the lawyer admitted to the Dutch Bar (*advocaat*). Legal professional privilege or the professional duty to protect client confidences and secrets is laid down in Articles 10a and 11a of the Legal Counsel Act (*Advocatenwet*).

The duty to protect client confidentiality is not absolute. For example, under the law implementing the EU Anti-Money Laundering Directive (*Wet ter voorkoming van witwassen en financieren van terrorisme*), (legal) professionals providing specific services such as advising on the creation of legal entities, share purchases, management of money, money instruments and other valuables, creating fiscal structures, etc., are obliged to report unusual transactions. To this extent, the professional may need to set aside the duty to protect the confidentiality of their client's information. The duty to report is subject to narrowly defined exceptions.

Legal professional privilege in the context of civil litigation

In the context of civil litigation, lawyers admitted to the Dutch Bar (*advocaten*) are not allowed to disclose information that is subject to legal professional privilege. When requested to testify as a witness or to produce documents, lawyers need to satisfy themselves that disclosure of the information is allowed. Lawyers cannot be compelled to answer questions or disclose information protected by legal professional privilege according to Article 165(2) Code of Civil Procedure (*Wetboek van burgerlijke rechtsvordering*). The scope of legal professional privilege covers all communications between lawyer and client in relation to a legal issue, including all information provided to the lawyer for the purpose of obtaining assistance in relation to a legal issue.

Legal professional privilege in the context of criminal investigations

If a lawyer is called as a witness in a criminal investigation, the lawyer can invoke their right of non-disclosure during the entire procedure (Article 218 of the Code of Criminal Procedure (*Wetboek van strafvordering*)). However, the lawyer cannot refuse to appear. Pursuant to Articles 96a and 98 Code of Criminal Procedure, information (such as documents and data) that are protected by legal professional privilege cannot be seized without the lawyer's prior approval. Documents which are not protected by legal professional privilege can be seized.

Any search and seizure at a lawyer's premises needs to be pre-authorised by an examining judge and must be executed in the least burdensome manner. In practice, the dean of the relevant district's Bar association will attend a search for seizure at a lawyer's premises to confirm this.

In 2015 the Court of Appeal of The Hague (*ECLI:NL:GHDHA:2015:2881*) ruled that in principle, a lawyer's phone may not be tapped. Official reports based on privileged phone calls need to be destroyed and cannot be used in a criminal case (Article 126aa(2) of the Code of Criminal Procedure). An exception applies if a lawyer personally is considered a suspect of a crime.

Under very exceptional circumstances, legal professional privilege can be set aside, for instance in cases of suspicion of an organised criminal group consisting of the lawyer and their clients. In practice, setting aside legal professional privilege is very rare.

Lawyers are exempted from the duty to report certain crimes. It is generally assumed that lawyers may not report a committed crime they become aware of in their capacity as a lawyer.

Legal professional privilege in the context of administrative law

Apart from its position as a general principle of law, administrative legal professional privilege regarding regulatory powers is guaranteed by Article 5:20 of the Dutch Administrative Code (*Algemene wet bestuursrecht*). Based on this article, certain professionals (lawyers, doctors, notaries and clergymen) are not obliged to cooperate with investigations of the administrative authorities charged with law enforcement, such as the Dutch Competition Authority (ACM), the Dutch Authority Financial Markets Authority (AFM), the Tax Investigation (FIOD) or the Dutch Central Bank (DNB), if by doing so they would breach their duty of confidentiality. These professionals can, and normally will, refuse cooperation and will not disclose any information, data or documents.

Legal professional privilege in the context of investigations by the Dutch competition authority

Article 12g of the Act Establishing the Dutch Authority for Consumers and Markets (*Instellingswet ACM*), states that all materials (mostly documents and data carriers) at the premises of an undertaking, which would fall under legal privilege if they were held by the lawyer, fall under the scope of non-disclosure and cannot be seized, copied or used by the ACM. For lawyers, the legal professional privilege is based on Article 5:20 of the Dutch Administrative Code.

If during an inspection a dispute arises between an undertaking (or its lawyer) and the ACM on the question whether or not a document is covered by legal professional privilege, the ACM will act in accordance with its Legal Privilege Policy (*ACM Werkwijze geheimhoudingsprivilege advocaat 2014*). In summary, this policy provides that the ACM inspectors charged with the investigation may take contested documents, without reviewing them, in a sealed envelope to the ACM office, where a specifically appointed ACM official who is not involved in the investigation decides on the confidentiality claim. The undertaking (and lawyer) in question are invited to make their views known to the privilege official.

Legal professional privilege in the context of merger control

The scope of legal professional privilege in the context of merger control remains undetermined in the Netherlands. This may partly be due to the fact that unlike investigations into cartels or abuse of dominance, merger control in itself is not aimed at detecting violations of the law. The regular review by the ACM of a notified merger normally does not give rise to the ACM making use of its investigative powers under the Dutch Administrative Code, according to which a refusal to cooperate would constitute a violation in its own right. In these circumstances, in relation to the regular review of a notified merger, the need to invoke legal professional privilege as an exception to the duty to cooperate tends not to arise.

If the ACM were to conduct a formal investigation into a violation of the merger control provisions, for example into a failure to notify a merger, or a failure to observe the standstill obligation in relation to a notified merger, the ACM would make use of its investigative powers under the Dutch Administrative Code and in that case the same rules on legal privilege as discussed above would come into play.

Scope of legal professional privilege

What is protected by legal professional privilege?

In practice, legal professional privilege applies to almost all lawyer/client correspondence. This correspondence includes:

- Documents prepared by the client for the sole purpose of seeking legal advice from a lawyer;
- Any advice given by the lawyer; and
- The client's internal reports and summaries of the lawyer's advice.

No specific requirements exist regarding the moment of creation of documents in order to fall under the scope of legal professional privilege. In particular, documents specifically prepared for the purpose of seeking legal advice or to be used in the context of providing legal advice fall under the scope of legal professional privilege.

In principle, any type of information is covered by legal professional privilege, including letters, emails, phone calls and digital data. Documents or objects that form an integral part of an offence or that were used to commit the offence, and objects that are not in the possession of the lawyer in their professional capacity, fall outside the scope of legal professional privilege.

Legal privilege also extends to correspondence between a lawyer and advisers who are not lawyers and who are requested by the lawyer to provide information or non-legal advice in relation to the matter on which the lawyer provides legal advice. For example, if a lawyer engages an economist to advise in relation to a matter and bases the legal advice on the economist's advice, the economist's advice is also covered by legal professional privilege. However, following a judgement of the Midden-Nederland District Court (*ECLI:NL:RBMNE:2017:4281*), reports produced by third parties at a lawyer's request for a purpose other than providing legal advice in relation to the subject-matter of those reports, are not covered by legal professional privilege. Also, documents that were not created for the purpose of seeking legal advice are not covered by legal professional privilege solely on the basis that a copy of those documents was sent to a lawyer in relation to a request for legal advice.

The lawyer will primarily assess whether information falls under the scope of legal professional privilege. This assessment needs to be respected unless the claim for legal professional privilege cannot be reasonably correct.

Are in-house counsel protected by legal professional privilege?

Under Dutch law, in-house counsel who are admitted to the Dutch Bar (so-called '*Cohen advocaten*') may invoke legal professional privilege, provided that it is clear from the documents that the in-house counsel acted in their capacity as advocaat. However, in-house counsel admitted to the Dutch Bar or to the Bar of another country can only claim legal privilege in the Netherlands if a written staff regulation ('*Professioneel Statuut*') signed by the in-house counsel and their employer guarantees a sufficient level of independence. Communications with and advice from an in-house counsel who is not admitted to the Bar, always fall outside the scope of legal professional privilege.

With regard to EU competition law investigations led by the European Commission, however, the rules of EU legal professional privilege apply, pursuant to which in-house lawyers cannot invoke legal professional privilege whether or not they are admitted to the Bar.

Are other (non-lawyer) advisers protected by legal professional privilege?

No. Even though in some cases, as mentioned above, documents produced by non-lawyer advisers (such as economists) may be protected by legal professional privilege, in these cases privilege is derived from that of the lawyer. In relation to such documents, non-lawyers cannot assert legal privilege as a justification for a refusal to cooperate with an investigation. Only the lawyer from whom the legal privilege is derived is able to claim legal privilege. Non-lawyers cannot, therefore, refuse to provide documents but if they indicate that a document is covered by legal privilege the authority must ask the lawyer's opinion before reviewing the document in question. If the lawyer confirms that it is covered by legal privilege, the situation will be treated similarly as if the document had been directly requested from the lawyer.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Privileged information in the possession of lawyers who are admitted to the Bar of another country, whether inside or outside the EU, is protected under legal professional privilege to the extent that such lawyers are bound to confidentiality by their home legal system (see in the context of a criminal investigation the judgements of the Oost Brabant District Court of 26 March 2014 (*ECLI:NL:RBOBR:2014:3420*) and of the Rotterdam District Court of 7 October 2019 (*ECLI:NL:RBROT:2019:7856*)). In-house lawyers who are admitted to the Bar of another country and who work outside of the Netherlands, can invoke legal privilege to the same extent as provided for by their home legal system. In-house lawyers who are admitted to the Bar of another country but who work in the Netherlands can invoke legal privilege under Dutch law, subject to them satisfying the same conditions as apply to Dutch in-house counsel, in particular the requirement of a written staff regulation signed by both the lawyer and their employer is in place (see the judgement of the Rotterdam District Court of 28 January 2021 (*ECLI:NL:RBROT:2021:527*)).

How is legal professional privilege waived?

Legal professional privilege can be waived by the client or by the lawyer (albeit, in principle, only with their client's consent). For instance, the lawyer can:

- Give permission for seizure of documents, or
- Set aside legal professional privilege by testifying in a court voluntarily.

Recent cases and/or other legal developments

By judgement of 15 March 2013 (*ECLI:NL:HR:2013:BY6101*), the Dutch Supreme Court (*Hoge Raad*) confirmed the legal professional privilege for in-house lawyers who are admitted to the Bar and comply with requirements guaranteeing their independence. This principle therefore applies in the Netherlands with regard to all fields of law, except in the event of an investigation in the Netherlands by the European Commission.

By judgements of 26 January 2016 (*ECLI:NL:HR:2016:110*) and 6 June 2017 (*ECLI:NL:HR:2017:1018*), the Dutch Supreme Court confirmed that when a lawyer is copied in on an email or is requested to be present at a meeting with the apparent sole purpose of bringing the contents of that email or meeting within the scope of legal privilege, the lawyer is not acting “in his capacity as a lawyer” and cannot invoke the protections of legal professional privilege.

By judgement of 7 October 2019 (*ECLI:NL:RBROT:2019:7856*) the Rotterdam District Court clarified the position of external lawyers and in-house counsel admitted to a foreign Bar. The Rotterdam District Court further clarified the position of foreign in-house counsel admitted to a foreign Bar by judgement of 28 January 2021 (*ECLI:NL:RBROT:2021:527*).

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

In the Netherlands, there is no specific legal privilege applicable in the context of internal investigations, criminal investigations and/or data protection matters.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

There are no specific time periods applying to legal privilege.

c) Are communications to/by companies and in-house counsel protected by privilege?

In-house counsels who are admitted to the Dutch bar (*Cohen advocaten* or *advocaten-in-dienstbetrekking*) also fall within the scope of legal professional privilege when they act in the capacity of an attorney (*advocaat*), provided that they comply with all the requirements set out by the Dutch bar and that their independent position vis-à-vis their employer is confirmed by a signed professional statute. This was confirmed by a judgement of the Dutch Supreme Court on March 15, 2013 (*ECLI:NL:HR:2013:BY6101*). The requirement of having a professional statute in place that guarantees the in-house lawyer's independence was reiterated in the judgement of the Rotterdam District Court of 7. October 2019 (*ECLI:NL:RBROT:2019:7856*). There can also be other reasons for an in-house lawyer to be considered insufficiently independent, for example if the head of the company's legal department is on the executive board and therefore responsible for the management of the company, presenting a potential conflict of interest.

In-house lawyers based outside the Netherlands can also rely on professional legal privilege if it is afforded to them by national law of their home jurisdiction. However, if the in-house lawyers are too embedded in the company, independence may not be properly safeguarded and professional legal privilege may not apply.

d) Are there any specific requirements of a privileged incident response engagement letter?

No, the general rules apply: documents specifically prepared for the purpose of seeking legal advice or to be used in the context of providing legal advice fall under the scope of legal professional privilege.

2) Documents and reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, the general rules apply: documents specifically prepared for the purpose of seeking legal advice or to be used in the context of providing legal advice fall under the scope of legal professional privilege. In principle, any type of information is covered by legal professional privilege, including letters, emails, phone calls and digital data. Third parties that are assigned by an attorney to provide

(expert) advice on the legal issue for which the client has approached the attorney can claim (derived) privilege.

In 2015, the District Court of The Hague (ECLI:NL:RBDHA:2015:248) ruled that a report about a housing corporation drafted by a law firm following an internal investigation, which only contained factual findings and no legal findings, qualifications or conclusions did not fall within the scope of legal privilege. The Court decided that the defendants in the civil law procedure needed to be provided with a copy of the report. A relevant consideration of the Court was that the report had been given to the defendants in draft form in an earlier stage.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

In principle, all communications between a lawyer (admitted to the Dutch bar) and their clients are protected by legal privilege, if the lawyer acts in their professional capacity. It does not matter where the communications are stored.

c) How are seized documents put into evidence in a criminal/civil procedure?

Legal professional privilege applies to a search for seizure.

Any search and/or seizure at a lawyer's premises needs to be pre-authorised by an examining judge and must be executed in the least burdensome manner.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Legal professional privilege can be waived by the client or by the lawyer. As lawyers have an obligation to maintain confidentiality, they should not waive legal privilege without their client's consent. Lawyers may be subject to disciplinary action of the bar, or even be held criminally liable if they do not fulfil this obligation.

A practical step to ensure that privilege is not lost: always indicate clearly that the correspondence between a lawyer and their client is confidential (for instance mark the document with "legal professional privilege" or "client-attorney privilege").

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

It may be necessary in litigation to produce a privileged document as evidence. If so, Dutch law makes it possible to share this information only with the court (subject to the court's and the counterparty's approval). If the counterparty does not approve, however, the court may not involve the document in its deliberations. As an alternative, it may be agreed to share a document only between lawyers or only within a 'confidentiality ring'.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

Yes, however see the answer above at question 3 b) for alternatives.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

No.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

Yes, see answer to question 1 c) above.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Yes, if the conditions for privilege are satisfied, the physical location of the data is not determinative.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege

is maintained?

There are no specific rules on this. Whether local privilege is respected depends on the privilege regulations of the country where the investigation takes place.

Key contacts



Léon Korsten

Partner, Global Co-Chair of Antitrust & Competition Group

leon.korsten@dlapiper.com

T: +31 205 41 9873



Martijn van Wanroij

Legal Director

martijn.vanwanroij@dlapiper.com

T: +31 20 5 41 9 643



New Zealand

Last modified 19 November 2021

Concept of legal professional privilege

New Zealand law recognises two main kinds of legal professional privilege:

- **Lawyer/client privilege**, which applies to communications between a lawyer and her/his client for the purposes of seeking, obtaining or providing legal advice; and
- **Litigation privilege**, which applies to documents or communications created for the purpose of preparing for an anticipated court proceeding.

Both kinds of privilege are recognised in both civil and criminal proceedings.

Other types of privilege are also recognised. Perhaps most importantly, a party to a dispute or a mediator of a dispute has a privilege in respect of any communications or documents that were intended to be confidential and made in connection with an attempt to settle or mediate the dispute. This is commonly referred to as '**without prejudice privilege**'. This legal privilege does not extend to the terms of a settlement once it is actually reached. Also, the privilege does not prevent a party disclosing a settlement offer that it made on a 'without prejudice save as to costs' basis if the party to whom the offer was made rejected the offer but subsequently seeks a court order for legal costs in its favour.

There is also privilege in relation to certain special types of confidential communication, including communications with ministers of religion and, in criminal proceedings, with medical practitioners and clinical psychologists. However, there is no longer in New Zealand any privilege for communications between husbands and wives, civil union partners or *de facto* partners.

Legal professional privilege in the context of civil litigation

Documents that are subject to privilege are not required to be disclosed in court proceedings.

Any person who has privilege in information or in a communication has the right to refuse to disclose that information or communication or any opinion formed on the basis of it in any proceeding. The person who holds the privilege can also prevent any other person who also has the information or communication from disclosing it (provided that person did not receive the information or communication in a way that amounted to waiver of the privilege). In addition, a judge can order that evidence of a communication, information, opinion or document in which a person has privilege must not be given in a proceeding. The person who has the privilege, or any other interested party, can seek such an order from a judge.

A party's discovery obligations in civil matters include identifying those documents in which privilege is claimed.

However, those documents do not have to be produced for inspection by other parties. The High Court Rules provide a regime for challenging a claim of privilege.

Legal professional privilege in the context of criminal investigations

In criminal matters, both the prosecuting party and the defendant are required to disclose certain information, but not that which is privileged. However, under the Criminal Disclosure Act 2008, a judge may disallow a claim of legal professional privilege by the

prosecuting party if it is necessary for the defendant to present an effective defence.

As with civil proceedings (see below), in criminal proceedings a judge can order that evidence of a communication, information, opinion or document in which a person has a privilege must not be given in a proceeding. The person who has the privilege, or any other interested party, can seek such an order from a judge.

Legal professional privilege in the context of investigations by the antitrust / competition authority

The rules which apply in civil matters apply to antitrust and competition law cases. In addition, both lawyer / client privilege and litigation privilege are also recognised by the common law in areas that are not 'proceedings'. This includes investigations by, for example, the New Zealand Commerce Commission or other government regulations. Where the Commerce Commission compels production of documents, those documents that are protected by lawyer / client privilege (and litigation privilege, if any) do not have to be provided.

Scope of legal professional privilege

What is protected by legal professional privilege?

All types of privilege protect a wide variety of interaction, including oral communications and documents (except privilege in relation to lawyers' trust accounts, which applies only in relation to documents). However, privilege does not extend to communications made or received for a dishonest purpose or to assist a person to commit an offence.

Lawyer / client privilege protects communications between a client and their legal adviser where the communication is intended to be confidential and is made for the purposes of requesting or obtaining legal advice. This includes documents prepared with a view to being used as a communication for the purpose of obtaining legal advice, although not in fact so used, or as an *aide-memoire* for more effective communication. An amendment to the Evidence Act in 2016 clarified that this privilege applies to a person who requests legal services whether or not the person actually receives such services. The privilege also attaches to documents such as drafts and working papers, and has been found to attach to fee notes issued by legal advisers. Where such a communication is made or received by the agent of either party, it will also be protected by this privilege. Lawyer / client privilege is owned by the client.

Litigation privilege is wider than lawyer / client privilege. It protects information and communications made, received, compiled or prepared for the dominant purpose of preparing for court proceedings during the time that those proceedings are either afoot or reasonably apprehended (the 'mere possibility' of litigation being insufficient to attract the legal professional privilege). Litigation privilege protects communications made between the party and any other person, and the party's legal adviser and any other person. It also protects information compiled or prepared by the party or the party's legal adviser or by any other person, at the party's request or the legal adviser's request, for the dominant purpose of preparing for the court proceedings. For example, communications between a party's lawyer and the party's expert for the dominant purpose of preparing for a proceeding are privileged, as is information compiled and prepared by the expert at the request of the party or its lawyer for the proceeding. As with lawyer / client privilege, litigation privilege is owned by the client.

Are communications with in-house counsel protected by legal professional privilege?

Both lawyer / client privilege and litigation privilege will apply in respect of communications with and / or information made, received, compiled or prepared by in-house counsel, provided they hold a current practising certificate and are acting in their capacity as legal adviser (as opposed to simply an executive of the company). Litigation privilege may also apply in respect of correspondence with or information prepared or compiled by the in-house counsel for the dominant purpose of preparing for a proceeding, even where the in-house counsel is not acting in their capacity as legal adviser (provided that the communication is between, or the information is prepared at the request of, the party and the party's legal adviser).

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Lawyer / client privilege and litigation privilege both extend to overseas practitioners if they are either a person who is a barrister or lawyer in Australia or a person who is entitled under the laws of another country, to undertake work that in New Zealand is normally undertaken by a lawyer or patent attorney. This will include somebody with a current practising certificate, or equivalent, in an overseas country.

How is legal professional privilege waived?

Privilege is relatively easily lost by express or implied waiver. Privilege can be waived by producing or disclosing any significant part of the privileged material in circumstances that are inconsistent with a claim of confidentiality. Privilege may therefore be waived in respect of material which is disclosed without an express requirement that it remain confidential.

Privilege can also be waived by putting the privileged material 'in issue' in a proceeding. This generally occurs where a party seeks to rely upon privileged material in a proceeding (eg as justification for an action taken by that party), or where a witness gives evidence which introduces the privileged material into the proceeding. Waiver in this context would require greater disclosure than the bare fact that the person acted 'on legal advice'.

Legal professional privilege in the context of merger control

The Commerce Commission, the regulator in New Zealand responsible for merger control, has powers to compel the provision of information to it. However, where the Commerce Commission compels the production of documents, those documents that are protected by lawyer / client privilege (and litigation privilege, if any) do not have to be provided.

It is important to review documents being provided to the Commerce Commission, or any other regulator, to ensure that privileged material is withheld, and not inadvertently provided to the Commission. If privileged material is provided to the Commission, it may be argued that any privilege in the document has therefore been waived.

Recent cases and/or other legal developments

Law Commission review and recommendations

There have been no recent changes to the Evidence Act 2006 and the Law Commission's most recent report on the Evidence Act (from March 2019) concluded that no amendments to the sections relating to privilege were necessary.

Recent case law of interest

NZ Iron Sands v Toward Industries Limited [2019] NZAR 1199

The High Court considered a challenge to a privilege/confidentiality claim under rule 8.15/8.25 of the High Court Rules.

The Court held that:

- Where in-house counsel have multiple duties, whether or not privilege attaches to any particular document depends on the nature of the relationship, the subject matter of the advice and the circumstances in which the advice was rendered.
- Privilege does not attach to a document sent to the legal advisers if that document was not prepared for the purpose of seeking advice or preparing for the litigation.
- A document containing both privileged and non-privileged material should be disclosed with the privileged material redacted. If redaction is not possible, the whole document may be treated as privileged.
- Where a claim of privilege is challenged, another judicial officer not connected with the case should inspect the documents.

Minister of Education v Carter Holt Harvey Ltd [2020] NZHC 1539

The High Court considered in detail claims about mis-classification of privileged documents and held that there would need to be cogent evidence of a system error in the party's approach to privilege to justify an independent review of every document over which privilege has been claimed.

Primero Maritime Ltd v Southern Spars Ltd [2019]

The Court held that:

- The provisions of the Evidence Act replicate the common law test for litigation privilege.
- Questions of whether litigation was reasonably apprehended at the time the statements were prepared and as to whether they were prepared for the dominant purpose of such litigation have to be determined on the basis of evidence, with both limbs of the

test having to be satisfied before litigation privilege attaches.

- Whether or not litigation was reasonably apprehended is a question of fact, importing an objective element; the question is whether a reasonable person in the position of the party in question, and possessed of the same information at that time, would have regarded the future commencement of litigation as probable.
- Where the party claiming litigation privilege is a corporate entity, if an individual with influence in that party's decision to litigate has formed a view as to the likelihood of litigation, that will be a critical fact from which an objective observer would almost certainly infer that litigation was probable.

Miah v AMP Life Ltd [2018] NZHC 1964

The Court refused to uphold a claim for privilege in relation to documents relating to work carried out by in-house lawyers, because the party had not produced evidence that the in-house lawyers in question held current practicing certificates.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

No, there is no specific privilege for investigations, but the usual privilege rules will apply.

In New Zealand, privilege applies to:

- communications with legal advisors for the purpose of requesting or obtaining legal services and providing such services;
- communications made or prepared for the dominant purpose of preparing for a proceeding or apprehended proceeding;
- communications made in connection with an attempt to settle or mediate a dispute.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

No.

c) Are communications to/by companies and in-house counsel protected by privilege?

Yes, communications with in-house counsel are protected by privilege if the communication is for the purpose of requesting, obtaining or providing legal services.

d) Are there any specific requirements of a privileged incident response engagement letter?

No.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, if prepared for the purpose of obtaining legal advice or for the purpose of preparing for a proceeding.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No.

c) How are seized documents put into evidence in a criminal/civil procedure?

There are different procedural rules for criminal and civil proceedings. Usually they will be entered into evidence by being introduced by a witness, or by agreement.

When documents are seized it is usual for a process to be put in place to isolate privileged documents and exclude these from review.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Yes. A party who holds the privilege can waive that privilege. Privilege can also be waived inadvertently by reference to privileged communications in other documents.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

If a company wishes to rely on privileged documents in litigation, it would be required to waive privilege. Your lawyer can advise on whether you should waive privilege and the implications of the waiver.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

Sharing privileged documents with third parties may amount to a waiver of privilege and careful thought should be given before sharing privileged documents.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

No.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

No.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Yes, if it is within one of the categories above.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

Privileged information does not have to be provided in court or disclosed to any party.

Key contacts



Iain Thain

Partner

iain.thain@dlapiper.com



Alicia Murray

Partner

alicia.murray@dlapiper.com



Emma Moran

Partner

emma.moran@dlapiper.com



Norway

Last modified 19 November 2021

Concept of legal professional privilege

Legal professional privilege exists in all civil litigation and criminal investigations and in relation to investigations by the Norwegian Competition Authority and the EFTA Surveillance Authority (ESA).

Legal professional privilege applies to qualified lawyers and junior lawyers, as well as those persons who assist the lawyer in their work. Legal professional privilege does not apply to legal documents that are in the hands of a third party.

Legal professional privilege supersedes the lawyer's duty of disclosure, including their duty to testify, unless otherwise prescribed by a statutory provision. Furthermore, documents protected by lawyer / client legal privilege cannot be confiscated by the Norwegian authorities.

Scope of legal professional privilege

What is protected by legal professional privilege?

In order to be considered privileged, the information must be communicated to the lawyer in their capacity as a lawyer, ie in connection with obtaining legal advice. Legal professional privilege may also apply to information obtained indirectly, as well as the lawyer's assessments and advice given to the client. The lawyer / client legal professional privilege does not apply to information a lawyer receives when acting in another capacity, for instance as a member of a company's Board of Directors.

As such, legal professional privilege applies for all types and contents of documents, provided they satisfy the above criteria. However, in criminal investigations, legal professional privilege cannot be invoked if it leads to an innocent person being convicted or a serious crime being executed.

Are communications with in-house counsel protected by legal professional privilege?

Under Norwegian national law, communications with in-house counsel are protected by legal professional privilege as described above. Under EEA/EU law, however, information given to in-house counsel is not protected by legal professional privilege. The result of this is, for instance, that if a dawn raid is undertaken by the ESA (which falls within the scope of EEA/EU law), any in-house counsel at the company in question cannot invoke legal professional privilege. However, whilst in-house counsel may not be able to claim that their communications are protected by legal professional privilege in the context of investigations by the ESA, they may seek to do so in the context of an investigation by the Norwegian Competition Authority.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Legal professional privilege applies regardless of the lawyer's nationality. In a case where an in-house counsel of a US-corporation had prepared certain strategy documents in connection with a dispute, it was held that sections containing legal considerations and assessments of litigation risk were to be considered as privileged information, cf. decision by the Appeals Selection Committee of the

Supreme Court, 22 December 2000 (see **footnote 1**).

How is legal professional privilege waived?

Legal professional privilege may be waived by the party receiving the advice and / or having submitted the privileged information. Such waiver should be made in writing.

If a lawyer is sued by a client for alleged malpractice, the lawyer is free to disclose privileged information to the extent that this disclosure is necessary for their defence. However, information received under a specific confidentiality agreement cannot be divulged even in such cases.

Legal professional privilege in the context of merger control

There is currently no specific case law concerning the application of legal professional privilege in the context of merger control in Norway, but the general principle of legal privilege as explained above would nevertheless be relevant.

Footnote 1: Rt-2000-2167

Recent cases and/or other legal developments

Historically, there is a debate between the National Authority for Investigation and Prosecution of Economic and Environmental Crime ('*Økokrim*') and the Norwegian Bar Association on the privilege of lawyer / client information. *Økokrim* has been arguing that legal professional privilege is an obstacle to its work against white collar crime, and has been asking for new regulations to limit legal professional privilege. The Norwegian Bar Association has, on its part, been clear about the importance of trust and confidentiality in the lawyer / client relationship and that lawyer / client legal privilege is a fundamental part of this.

This debate culminated in the mandating of a task force to propose legislative changes in relation to legal professional privilege in general. The proposal for the new legislation was published by the Norwegian Government on 11 June 2021 (see **footnote 1**). In general, the proposal only contains minor changes compared to the current applicable law. For instance, it is proposed that information received by a lawyer whilst acting in another capacity should be covered by the legal professional privilege.

In December 2010, the Supreme Court concluded that information regarding money transfers as part of the lawyer's legal practice, as well as the client's identity in a specific instruction for legal advice, was privileged information (see **footnote 2**). This view was further sustained by a High Court ruling in 2011. In 2012, the Supreme Court stated that even when a lawyer is subject to bankruptcy proceedings, information on names of clients and on money transfers between lawyer and client will be subject to legal professional privilege, and supersede any duty of disclosure unless otherwise provided by a clear statutory provision (see **footnote 3**). The Supreme Court has assumed that the lawyer can, without prejudice to the duty of confidentiality, recover outstanding fees, even if such action results in the client relationship being disclosed (see **footnote 4**).

In 2013, the Supreme Court concluded that evidence in the form of email correspondence will be considered privileged information if it is sent as a copy to the lawyer, regardless of whether the lawyer has had access to its content (see **footnote 5**). However, taxation and VAT legislation was retrospectively amended so that a lawyer is required, regardless of legal professional privilege, to give transaction data, and balance and debt information (including in relation to the parties to the transaction), to the government. The Supreme Court has also found that email correspondence between a tax payer and their lawyer is exempt from review by the Tax Authorities without further examination (see **footnote 6**). In 2018, the Supreme Court also rejected *Økokrim*'s request for access to a lawyer's time sheets (see **footnote 7**). In addition, the Supreme Court clarified the duty to produce legally privileged material (in this case a lawyer's annual accounts) in a redacted version as evidence in a law suit (see **footnote 8**). In 2019, the Supreme Court concluded that written testimonies drawn up by a lawyer is covered by the legal professional privilege (see **footnote 10**).

Footnote 1: Prop. 214 L (2020–2021)

Footnote 2: Rt-2010-1638

Footnote 3: HR-2012-00788-A

Footnote 4: Rt-2012-608

Footnote 5: Rt-2013-1336**Footnote 6:** HR-2017-467-A**Footnote 7:** Rt-2018-109**Footnote 8:** HR-2018-2403-A**Footnote 9:** HR-2019-2168-U

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

The legal basis for the attorney-client/legal professional privilege (LLP) exist in internal investigations in the same manner as in civil and criminal investigation, that is in relation to investigations by the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim) or the Competition Authority and other authorities with similar investigation powers. This LLP is based on a mix of case law and the Sections 119, 204, and 205 of the Criminal Procedural Code and Section 22-5 of the Civil Procedural Act.

As a main rule, LLP in Norway applies to qualified lawyers and junior lawyers, as well as those persons who assist the lawyer in their work.

There are some exceptions/caveats to the LLP, such as in criminal investigations where it leads to an innocent person being convicted or a serious crime being committed, where waivers can be made.

In addition, the LLP does not apply to information a lawyer receives when acting in another capacity, for instance as a member of a company's Board of Directors.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

There are, to our knowledge, no time period limits or differences as such between litigation and legal advice with respect to the LLP.

c) Are communications to/by companies and in-house counsel protected by privilege?

Under Norwegian national law, communications with in-house counsel are protected by LLP.

Under EEA/EU law, however, information given to in-house counsel is not protected by LLP. The result of this is, for instance, that if a dawn raid is undertaken by the EFTA Surveillance Authority (ESA), which falls within the scope of EEA/EU law, any in-house counsel at the company in question cannot invoke LLP. However, while in-house counsel may not be able to claim that their communications are protected by LLP in the context of investigations by the ESA, they may seek to do so in the context of an investigation by the Norwegian Competition Authority.

d) Are there any specific requirements of a privileged incident response engagement letter?

No, there are no specific legal requirements, since LLP also applies to in-house lawyers in Norway. However, it is advised to always clearly mark documents sent to clients and in-house counsel from external law firms with "legally privileged".

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

The LLP in Norway applies to all types of documents, including parts of documents and emails where the lawyer is copied in, provided that they satisfy the criteria mention in question 1 above.

LLP also applies regardless of the lawyer's nationality. In a case where an in-house counsel of a US corporation had prepared certain

strategy documents in connection with a dispute, it was held that sections containing legal considerations and assessments of litigation risk were to be considered as privileged information, cf. decision by the Appeals Selection Committee of the Supreme Court, 22 December 2000. The Supreme Court clarified the duty to produce legally privileged material (in this case a lawyer's annual accounts) in a redacted version as evidence in a law suit. In other words, parts of a document may be legally privilege and other parts not.

In December 2010, the Supreme Court concluded that information regarding money transfers as part of the lawyer's legal practice, as well as the client's identity in a specific instruction for legal advice, was privileged information.

In 2012, the Supreme Court stated that even when a lawyer is subject to bankruptcy proceedings, information on names of clients and on money transfers between lawyer and client will be subject to LLP, and supersede any duty of disclosure unless otherwise provided by a clear statutory provision. In 2013, the Supreme Court concluded that evidence in the form of email correspondence will be considered privileged information if it is sent as a copy to the lawyer, regardless of whether the lawyer has had access to its content. However, taxation and VAT legislation was for posterity amended so that a lawyer is under obligation, regardless of LLP, to give transaction data, and balance and debt information, inclusive of parties to the transaction, to the government. The Supreme Court has also found concerning the Tax Authorities' right of access to email correspondence between a taxpayer and his lawyer to be exempt from the review without further examination. In 2018 the Supreme Court also rejected Økokrim's request to get access to a lawyer's time sheets. The Supreme Court in addition clarified the duty to produce legal privilege material (in this case a lawyer's annual accounts) in a redacted version as evidence in a law suit.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No.

c) How are seized documents put into evidence in a criminal/civil procedure?

Seized documents are first "cleared of LLP" before they become part on an ongoing investigation and are used as evidence. Clearance is done with forensic tools which filters out any legal privilege document by a search of lawyers' email addresses and other search terms such as "legally privileged". When the relevant data material is collected and mirror-copied for an investigation, the entity should ensure that the IT or technical personnel together with the lawyer reviews all the material that is identified as privileged, and such documents are excluded from the material.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

LLP may be waived by the party receiving the advice and/or having submitted the privileged information. Such waiver should be made in writing.

If a lawyer is sued by a client for alleged malpractice, the lawyer is free to disclose privileged information to the extent that this disclosure is necessary for their defence. However, information received under a specific confidentiality agreement cannot be divulged even in such cases.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

Documents protected by the LLP cannot be seized by either external or internal investigators, unless the company representative with the necessary authority release the document from the privilege.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

With reference to the question above, there is no reliance on internal investigation with respect to LLP.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

There are several examples of fines for "general data breach" in Norway; however, we are not aware of any data breach privilege cases.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

LLP applies regardless of the lawyer's nationality. In a case where an in-house counsel of a US corporation had prepared certain strategy documents in connection with a dispute, it was held that sections containing legal considerations and assessments of litigation risk were to be considered as privileged information, cf. decision by the Appeals Selection Committee of the Supreme Court, 22 December 2000.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Yes, but only if it complies with Norwegian legal requirements, as it does not matter if the advice is provided by a lawyer/in-house counsel of a different jurisdiction.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

We do not have specific case law on this apart from the fact that an in-house lawyer would have to provide LLP documentation to ESA even if under Norwegian law it is covered by the LLP exemption.

Key contacts



Petter Bjerke

Partner, Location Head IPT
petter.bjerke@dlapiper.com
T: +47 24 13 15 00



Kjetil Johansen

Partner
kjetil.johansen@dlapiper.com
T: +47 24 13 16 11



Oman

Last modified 01 September 2021

Concept of legal professional privilege

The primary sources of law in the Sultanate of Oman are the Anglo-Saxon common law and Shari'a law ("**Islamic Religious Law**"). Islam is the basis of legislation in the Sultanate of Oman (pursuant to Article 2 of the Constitution of the Sultanate of Oman dated 6 November 1996 ("**Constitution**"). While the Constitution affirms the independence of the judiciary in Oman, in practice Omani courts are subordinate to the Sultan and are subject to his influence. He acts as a court of final appeal and intercedes in special cases, such as those concerning national security.

The Constitution provides for two types of legislation in the Sultanate of Oman. Firstly, primary legislation is promulgated by the Sultan, which is known as a Royal Decree. In addition, secondary legislation is issued pursuant to Ministerial decisions using powers granted by a Royal Decree.

In many civil law jurisdictions in the MENA region, the concepts of legal professional privilege and "without prejudice" communications do not exist *per se*, and the parties have the right to use any document which may support their position in civil litigation. This is the position in the Sultanate of Oman, which does not have any express provision in respect of legal professional privilege. Instead, lawyer-client legal professional privilege is interpreted under Islamic Religious Law.

Indeed, lawyers in the Sultanate of Oman are bound by duties of confidentiality which, in many cases, incorporate concepts similar to legal professional privilege.

Scope of legal professional privilege

Legal professional privilege protects all communications between a professional legal adviser and their client from being disclosed without the permission of the client. The privilege is solely for the benefit of the client and not the lawyer. The objective of this legal principle is to protect an individual's access to the justice system by ensuring they can disclose all relevant information to their legal adviser without the fear that this disclosure may result in negative repercussions or prejudice them in the future.

A lawyer ceases to be bound by the requirements of legal professional privilege protection if the lawyer can demonstrate that documentation or information:

- Was in the public domain at the time it was disclosed to the lawyer;
- Entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer; or
- Was in the lawyer's possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by records at the time of disclosure.

Notwithstanding the lawyer-client privilege, a lawyer may disclose certain documents / information to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the lawyer provides the client with reasonable prior written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents / information so disclosed be used only for the purposes for which the law or regulation required.

The concept of legal professional privilege in the Sultanate of Oman is limited only to the professional relationship between a lawyer and their client, through the lawyer's obligation to keep confidential all information disclosed by their client (pursuant to *Article 44 of the Omani Advocacy Law*). Accordingly, the relationship between a lawyer and their client benefits from a limited form of privilege because the parties are independent entities and the lawyer, of course, owes a duty of confidentiality to the client.

It is advisable that if parties are attempting to settle their dispute in Oman, they should qualify any form of communications with statements to the effect that any offer or communication does not constitute an admission of liability. Parties should also seek an undertaking that any information contained within such communications will not be used as evidence in any subsequent proceedings.

It appears that the same privilege protections do not apply to in-house legal counsel advising officers, directors or employees of the company as they are not independent to the client. However, to protect this information, it is possible to enter into a confidentiality agreement between the employer and the employed in-house legal counsel.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Oman.

Recent cases and/or other legal developments

There do not appear to be any recent cases or other legal developments in the Sultanate of Oman regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts



Peter Anagnostou

Senior Legal Consultant

peter.anagnostou@dlapiper.com

T: +971 4 438 6392



Poland

Last modified 19 November 2021

Concept of legal professional privilege

The concept of legal professional privilege does not exist under Polish law. However, lawyers are obliged by a duty to keep confidential all information which they became aware of in the course of providing legal services. In accordance with Polish law, lawyers are bound by the professional secrecy of lawyers, which means that they must keep all information concerning their provision of legal services confidential. Generally, the professional secrecy exists in all kinds of proceedings, including civil, criminal and competition law. However, under some circumstances, strictly provided by law, the secrecy obligation may be waived in criminal and competition proceedings.

Scope of legal professional privilege

What is protected by legal professional privilege?

The scope of the legal professional privilege protection of the client is narrower under Polish criminal law than the concept under EU law. The professional secrecy of lawyers concerns knowledge and documentation in the possession of the lawyer only. As a result, documents relevant to a case are protected only when they are kept by a lawyer, not by clients. Therefore, it does not protect from disclosure of documents in the client's possession, even if they contain relevant information related to providing legal services in relation to criminal investigation.

With regard to competition proceedings, Polish competition law refers to the concept of legal professional privilege in case of dawn raids. The protection also applies to the documents that are in the possession of the client.

Are communications with in-house counsel protected by legal professional privilege?

There is no separate law concerning the secrecy of in-house lawyers. Therefore, the above-mentioned comments apply to in-house lawyers, provided that in-house lawyers are qualified lawyers (if the in-house lawyer is not a qualified lawyer, ie they are not admitted to the Bar, the professional secrecy rule does not apply to them).

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Generally, the above-mentioned rules will apply to non-national qualified lawyers (who obtained a professional title in a Member State of the EU or third country and are admitted to the Bar) in the event that they provide services in the territory of Poland. Polish law specifies the scope and limitation of legal services provided by foreign qualified lawyers in the territory of Poland. However, general rules applicable to lawyers will be applicable to foreign qualified lawyers, including the professional secrecy rule.

How is legal professional privilege waived?

The most important exception to professional secrecy is covered by the Polish Code of Criminal Procedure. Under its regulation, a judge, after a prosecutor's motion, can lift the confidentiality obligation and allow a lawyer to be examined as a witness. It could happen for the purpose of justice and in the absence of any other proper evidence. This regulation is highly criticised in Polish legal society and it is used

in very limited cases. Furthermore, a lawyer is obliged to disclose information which refers to money laundering or terrorist activities regulated under a separate statute.

Legal professional privilege in the context of merger control

Legal professional privilege is not been clearly defined within the context of merger control and there is a lack of related jurisprudence concerning merger proceedings. Nevertheless, it is recognized as a fundamental right on the basis of Article 6 of the European Human Rights Convention.

However, it may be worth referring to cases of dawn raid. In a recent judgement concerning the confiscation of binary copies of entire hard drives, the Polish Competition Court ruled that this itself would not be unlawful, but the subsequent reviewing of electronic data without the presence of undertaking's representatives might be regarded as an infringement. The appropriate protection of legal professional privilege requires, selecting the relevant evidence that could potentially contain such information.

Recent cases and/or other legal developments

On the basis of the latest amendment to the Polish Criminal Procedure, evidence that is obtained illegally by authorities can be used in criminal cases. It is likely that this change may have a negative impact on legal professional privilege protection.

As of 1 Jan 2019, the very recent amendment of Polish tax law pertaining Mandatory Disclosure Rules entered into force. The Act transposes the Council of the European Union (EU) Directive 2018/822 of 25 May 2018 and makes the so-called promoters (ie tax advisors, advocates and attorneys-at-law) subject to the obligation to submit to the Head of National Revenue Administration information about tax schemes. The obligation to disclose arrangements applies not only to cross-border arrangements, but also to some domestic arrangements in Poland. In specific situations, it may be the case that advocate or attorney-at-law will be the party notifying about the tax scheme to the authorities (after the consultation with the client). As a result, the professional privilege in such cases is waived.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

Lawyers are obliged by a duty to keep confidential all information which they became aware of in the course of providing legal services. In accordance with Polish law, lawyers are bound by the professional secrecy of lawyers, which means that they must keep all information concerning their provision of legal services confidential.

Generally, professional secrecy exists in all kinds of proceedings, including civil, criminal and competition law. However, under some circumstances, strictly provided by law, the secrecy obligation may be waived in criminal and competition proceedings.

There are no specific rules on secrecy regarding data protection matters, ie the general obligation of professional secrecy applies.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

No.

c) Are communications to/by companies and in-house counsel protected by privilege?

There is no separate law concerning the secrecy of in-house lawyers. Therefore, the abovementioned comments apply to in-house lawyers, provided that in-house lawyers are qualified lawyers (if the in-house lawyer is not a qualified lawyer, ie they are not admitted to the Bar, the professional secrecy rule does not apply to them).

Generally, the abovementioned rules will apply to non-national qualified lawyers (who obtained a professional title in a Member State of the EU or third country and are admitted to the Bar) in the event that they provide services in the territory of Poland. Polish law specifies the scope and limitation of legal services provided by foreign qualified lawyers in the territory of Poland. However, general rules applicable

to lawyers will be applicable to foreign qualified lawyers, including the professional secrecy rule.

d) Are there any specific requirements of a privileged incident response engagement letter?

No.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, if they are prepared or obtained for the purpose of giving legal advice.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

Yes, generally we recommend to store all such documents at the premises of external lawyers.

c) How are seized documents put into evidence in a criminal/civil procedure?

Documents are seized, analysed by prosecution agency and put in the case files if they are relevant for the proceedings. In civil cases there are no discovery rules.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Professional privilege is an obligation of lawyers towards clients. If a client wants to use document that is privileged, they can do so. Clients may also waive the privilege for the lawyer. It needs to be done expressly.

The most important exception to professional secrecy is covered by the Polish Code of Criminal Procedure. Under its regulation, a judge, after a prosecutor's motion, can lift the confidentiality obligation and allow a lawyer to be examined as a witness. It could happen for the purpose of justice and in the absence of any other proper evidence. This regulation is highly criticised in Polish legal society and it is used in very limited cases. Furthermore, a lawyer is obliged to disclose information which refers to money laundering or terrorist activities regulated under a separate statute.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

There are no specific rules on this matter related to data protection regulations, general rules apply.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

N/A

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

As mentioned in the answer to question 1, there is no legal privilege under Polish and professional secrecy rules apply instead, therefore there is no relevant case law on data breach privilege to reference.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

The professional secrecy rules are regulated in local law and applicable to lawyers acting in Poland. There are no specific rules or case law we can identify which pertains to cross-border scenario.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

As mentioned above, there is no legal privilege under Polish and professional secrecy rules apply instead. Therefore, there are no clear rules on cross-border applicability of legal privilege and it is unclear whether foreign data would be treated as privileged in Poland.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

As mentioned above, in the case of proceedings on the territory of Poland, lawyers are bound by the professional secrecy of lawyers, which means they must keep all information concerning their provision of legal services confidential. For exceptions applicable to criminal proceedings, please refer to question 3a.

Key contacts

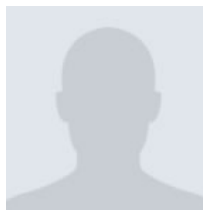


Krzysztof Kycia

Co-Managing Partner

krzysztof.kycia@dlapiper.com

T: +48 22 540 74 09



Magdalena Dec

Senior Associate

magdalena.dec@dlapiper.com

T: +48225407429



Piotr Czulak

Senior Associate

piotr.czulak@dlapiper.com

T: +48 22 540 74 42



Portugal

Last modified 19 November 2021

Concept of legal professional privilege

In Portugal, a key requirement for the free exercise of the legal profession consists in the possibility for a client to disclose information to the lawyer related with the mandate given to the latter and also for the lawyer to receive said information on a basis of confidence. Legal professional privilege is, therefore, recognised as a fundamental right and duty of the lawyer, safeguarded both in the constitution of the Portuguese Republic and in secondary legislation (civil and penal legal frameworks).

The concept of legal professional privilege and its particularities are specifically provided in the statutes of the Portuguese Bar Association (see **footnote 1** ("**EOA**"). According to the EOA, lawyers may not disclose any information, data or relevant facts obtained due to their professional status and the legal professional privilege extends to any document or data directly or indirectly related to the facts revealed in confidence to the lawyer. The obligation to maintain professional privilege is not limited in time and exists regardless of whether the act required from the lawyer involves judicial or extra-judicial representation, is paid or gratuitous, and even if the lawyer has not accepted the service.

This obligation is applicable to every lawyer that has had, directly or indirectly, any intervention in the matter. In the case of a law firm, this duty is extended to every lawyer and support staff of the firm and in practice, anyone who assists the lawyer can be obliged to maintain the same professional privilege. Any acts practiced by a lawyer in breach of legal professional privilege cannot be used as evidence in court. Moreover, breach of legal professional privilege rules can give rise to a disciplinary procedure, as well as civil and / or criminal liability.

Footnote 1: The EOA regulates the rights, conduct and code of ethics of Portuguese lawyers and was last approved by Law nr. 23/2020, of 6 July.

Legal professional privilege in the context of civil litigation

Legal professional privilege is fully applicable in civil litigation. This means that a lawyer cannot disclose, as a witness, any facts which they may have had knowledge of through the course of their professional activity, under the Civil Procedure Code.

See below special situations for waiving legal professional privilege.

Legal professional privilege in the context of criminal investigations

As mentioned above, a lawyer may refuse to testify about facts covered by legal professional privilege under the Criminal Procedure Code. Any act practiced in breach of professional privilege cannot be used as evidence in court, under the Criminal Procedure Code and the EOA.

In what concerns raids, searches and seizures, those carried out in a law firm, or any other archive location, as well as the interception and recording of conversations or communications (phone or e-mail registered in the Bar Association) from a lawyer in the exercise of the legal profession, can only be ordered and presided by a judge according to the EOA. The concerned lawyer, the president of the Regional

Council, the president of the delegation or a delegate from the Bar Association, as applicable, should be present during the diligence.

In the course of a raid, a lawyer can make a complaint for breach of legal professional privilege, in which case the judge must interrupt the investigation of the documents, seal them and wait for the president of the court of appeals to decide whether said documents can be accessed, according to the EOA. Despite the above, no correspondence concerning the exercise of the legal profession can be seized, except if such correspondence is related to a criminal fact in relation to which the lawyer has been formally accused, pursuant to the Code of Criminal Procedure and the EOA.

Legal professional privilege in the context of investigations by the antitrust / competition authority

The considerations concerning criminal investigations as set out above are fully applicable also in this type of investigation which concerns a misdemeanor (see **footnote 2**). The fact that Competition Act provides for specific rules regarding the Competition Authority's powers of investigation and seizures is without prejudice to the application of the principles of law and legal provisions concerning criminal investigations. In practice, this articulation of legal provisions is not always clear cut and in practice, especially as concerns surprise inspections and seizures, there are several topics where the Competition Authority's actions are criticized by undertakings as not complying with the rights of defense and constitutional limits.

In 2012 the Competition Authority issued guidelines for investigations and the same expressly recognize 'lawyers' legal privilege rules':

- As applicable to all communications;
- That seizures and other raid actions taken in lawyers' offices shall always be presided by a judge, a lawyer and a representative from the Portuguese Bar Association; and
- That in case of doubt on whether a given document shall be subject to legal privilege, the Competition Authority shall seize it, catalogue it and place it in a sealed envelope for further evaluation by the competent court.

Footnote 2: In Portugal the misdemeanor regime is a special sanctions regime, applicable to antitrust infringements via the Competition Act which is special law.

Scope of legal professional privilege

What is protected by legal professional privilege?

Legal professional privilege covers a broad spectrum of information and documents. Every fact and / or supporting document (in any format) disclosed to a lawyer by a client, its associated parties, co-defendants, counterparties and others are of a confidential nature, unless their disclosure is expressly authorised (as further explained below).

Please note that legal professional privilege does not cover facts

- Known to the public
- Previously proven in court
- Deemed a crime in which the lawyer is a suspect of having played an active role
- Described in public documents / deeds, and
- Disclosed in the client's benefit with the authorisation of the Bar Association

Are communications with in-house counsel protected by legal professional privilege?

Both on the basis of the EOA's provisions and the approach adopted by the General Council of the Bar Association, inhouse counsels have the same rights and are bound by the same duties as independent lawyers, notably as regards legal professional privilege.

Attention should also be drawn to Opinion No. E-07/07 of the same body of the Bar Association, where it was concluded that the search and seizure by the Competition Authority, of documents in the office and computer of an in-house lawyer is to be considered not only void

but could also constitute a criminal act. In this context, jurisprudence from 2008 should also be mentioned as regards the protection given to in-house lawyers in terms of legal privilege vis à vis the Competition Authority and the specificities concerning the physical places where in-house lawyers have their offices and the special duty on safeguarding documents.

In summary, Portuguese rules provide a more vigorous protection to in-house lawyers in competition cases than at the EU level and due regard should be had to the applicable law in each situation.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The Bar Association allows certain foreign accredited lawyers to register and practise in Portugal, whether on a permanent or occasional basis.

Besides the applicable EU legal framework, the Code of Conduct for lawyers in the European Union sets forth that while acting in other countries, a lawyer shall be 'bound to comply with the rules of the Bar or Law Society of the Host Member State', which means that non-national lawyers acting in Portugal shall comply with the statutes of the Portuguese Bar Association and, in general, with Portuguese Law. Hence, in these circumstances they are subject to the same guidelines and code of conduct as Portuguese lawyers, notably the rules of legal professional privilege.

In 2008, the Commercial Court of Lisbon has decided that non-national lawyers may only benefit from the rules regarding professional privilege if they are registered with the Portuguese Bar Association. Notwithstanding, the Portuguese Competition Authority adopts a broader approach in its 2012 Guidelines for Investigation, as it seems to interpret that non-national lawyers may benefit if registered with the Portuguese Bar or any other similar entities in other EU countries.

How is legal professional privilege waived?

A lawyer can only be authorised to reveal facts covered by professional privilege if that is absolutely necessary for the defence of the dignity, rights and legitimate interests of the lawyer or their clients or representatives. This waiver of legal professional privilege depends of previous authorisations from the Bar Association and even having obtained it, the lawyer may nonetheless choose to maintain secrecy.

Professional legal privilege can also be waived by order of the court under the Criminal Procedure Code. Albeit the Bar is heard previously to the court's waiver decision regarding professional privilege, it is highly discussed whether its opinion is, or not, binding to the court. Consequently, it is also controverted whether the lawyer that refuses an order of the court to waive professional privilege incurs in a crime of disobedience under the Criminal Code.

A different situation is that where the lawyer has the duty to waive professional privilege. Directive on Money Laundering was recently transposed by Law 83/2017, of 18 August, which provides for certain duties on lawyers when accepting new clients ('Know Your Client' policies), including requesting full details of the client's identity, ultimate ownership in case of legal persons and origins of values / moneys.

Whenever a lawyer has strong suspicions concerning the origin or legitimacy of their client and values / moneys involved, the lawyer has a duty to report it to the Bar Association which, in turn, and if the issue is deemed potentially unlawful, has the duty to report it to the Public Prosecutor. Despite the above, Portuguese lawyers have been limiting this reporting duty to confidential information not pertaining directly to their clients but to third parties involved, and the general understanding and interpretation of Article 92 of the statutes has prevailed.

In addition to the above and as complementary information, it should be noted that lawyers can be prosecuted if they assist their clients in perpetrating any unlawful actions.

Irrespective of the above, it should be noted that professional privilege cannot be waived regarding correspondence between lawyers, as it is considered that this is absolutely confidential, as long as it is identified as such.

Legal professional privilege in the context of merger control

Mergers are notified either in accordance with the regular or the simplified notification form. The regular form sets forth that the Notifying Party shall submit to the Competition Authority notably 'a copy of the final or most recent versions of all the documents directly related to the carrying out of the concentration' and 'analysis, reports, studies and other similar documents submitted to or prepared by the governing or management bodies of the Notifying Party / Parties for the preparation and evaluation of the concentration notified'.

Moreover, during the merger proceedings the Competition Authority may request any information (or documentation) which considers

necessary. Especially as concerns potentially complex merger cases, it is important for undertakings to prepare themselves so as to be able to respond swiftly to any requests by the Competition Authority as concerns disclosure of info and documentation while avoiding any breach of legal professional privilege. More in general, it is useful for undertakings to obtain guidance as to the optimization of the concept of legal professional privilege for communications with other professionals.

Recent cases and/or other legal developments

There is ongoing litigation regarding this subject matter in criminal and civil litigation, as well as in litigation concerning investigations of alleged competition infringements (which are misdemeanours). As concerns the latter and on the basis of public info, court actions concern primarily Competition Authority's actions in the context of surprise inspections ('dawn raids'). For instance, as regards the seizure and reading of e-mail communications sent or received by lawyers by the Competition Authority's officials, undertakings are currently arguing their illegality.

As for recent legal developments the focus is on the transposition of EU Directives.

The Private Damages Directive has been transposed by Law nr. 23/2018, of 5 June. If, on the one hand, the Directive provides that consistency is particularly necessary in what regards the arrangements for access to documents held by national competition authorities, on the other hand it provides for a restriction on disclosure of evidence covered by legal professional privilege. This is also provided in Law nr. 23/2018.

The process of transposing the ECN+ Directive into the Portuguese legal system is still continuing, even though the deadline for transposition has already passed. The original bill, drafted by the Competition Authority, envisaged certain limitations on legal privilege for in-house counsel, aimed at bringing the Portuguese regime closer to the EU regime. However, these provisions have been excluded from the modified bill that is currently under discussion in the Portuguese Parliament. It is expected that the law transposing the ECN+ Directive will be adopted before the end of 2021.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

No, legal privilege legal framework applies regardless of the type of investigation.

In Portugal, legal professional privilege is recognized as a fundamental right and duty of the lawyer, safeguarded both in the constitution of the Portuguese Republic and in secondary legislation (civil and penal legal frameworks).

Under the Statute of the Portuguese Bar Association (EOA), the broad definition of legal professional privilege covers a broad spectrum of information and documentation, applying to general legal advice, representation in litigation proceedings and covering all facts that a lawyer becomes aware during or as a result of their professional activity. Every fact and/or document (in any format) related to professional matters disclosed to a lawyer by a client, its associated parties, co-defendants, counterparties, and other, is covered.

Legal professional privilege is binding regardless of whether the lawyer is remunerated or has agreed to carry out the representation or service.

This obligation is applicable to every lawyer that has had, directly or indirectly, any intervention in the matter. In the case of a law firm, this duty is extended to every lawyer and support staff of the firm and in practice, anyone who assists the lawyer is obliged to maintain the same professional privilege, compliance with which should be ensured by a written statement drawn up to that effect before the beginning of the collaboration, and any violation of that duty is a disciplinary infraction.

A lawyer may refuse to testify about facts covered by legal professional privilege. Any acts practiced by a lawyer in breach of legal professional privilege cannot be used as evidence in court. Moreover, breach of legal professional privilege rules can give rise to a disciplinary procedure, as well as civil and/or criminal liability.

Nonetheless, legal professional privilege does not cover facts:

- known to the public;
- previously proven in court;
- deemed a crime in which the lawyer is a suspect of having played an active role;
- described in public documents/deeds; and
- absolutely necessary to defend the dignity, rights and legitimate interests of the lawyer or of the client, the authorization of the Bar Association (exceptional cases).

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

No. There are no specific types or categories of legal professional privilege, thus it does not vary depending on whether the privilege relates to legal advice or litigation. The obligation to maintain professional secrecy is not limited in time and exists regardless of whether the act required from the lawyer involves judicial or extra-judicial representation, is paid or free, and even if the lawyer has not accepted the service.

c) Are communications to / by companies and in-house counsel protected by privilege?

Yes, to the extent in-house counsels are members of the Portuguese Bar Association. In-house counsels have the same rights and are bound by the same duties as independent lawyers, notably as regards legal professional privilege. In fact, under Opinion No. E-07/07 of the General Council of the Bar Association, the search and seizure by the Competition Authority of documents in the office and computer of an in-house lawyer should be considered not only void but may also constitute a criminal act.

d) Are there any specific requirements of a privileged incident response engagement letter?

Under Portuguese law, there are no specific requirements for privileged incident response engagement letters. However, the engagement letter should be concluded in writing, directly between the lawyer and the third party prior to starting the cooperation and should include language making clear that the purpose is to assist the lawyer in the scope of its professional activity and the obligation of the third party to comply with secrecy obligation.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, legal professional privilege extends to any document or data directly or indirectly related to the facts revealed to the lawyer in the course of their professional activity.

If a client suspects a data breach and contacts a lawyer to assist them in clarifying the situation, and consequently the lawyer requests a third-party forensic expert to investigate and prepare a report, we understand that this report will be covered by legal professional privilege.

The engagement letter shall be concluded, in writing, directly between the lawyer and the third party prior to starting the cooperation and should include language making clear that the purpose is to assist the lawyer in the scope of its professional activity and the obligation of the third party to comply with secrecy obligation.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No, it doesn't matter where the documents are located. Regarding raids, searches and seizures carried out in a law firm (or in any other archive location), please see the answer to Question 2c.

c) How are seized documents put into evidence in a criminal/civil procedure?

Regarding raids, searches, and seizures, those carried out in a law firm, or any other archive location, as well as the interception and recording of conversations or communications (telephone or email registered in the Bar Association) of a lawyer in the exercise of the legal profession, may only be ordered and presided over by a judge in accordance with the EOA. The concerned lawyer, the president of the Regional Council, the president of the delegation or a delegate of the Bar Association, as applicable, should be present.

In the course of a raid, a lawyer may file a complaint for breach of legal professional privilege, in which case the judge must interrupt the

investigation of the documents, seal them and wait for the president of the court of appeals to decide whether the documents can be accessed, according to the EOA.

Notwithstanding the above, no correspondence concerning the exercise of the legal profession can be seized, except where such correspondence is related to a criminal fact in relation to which the lawyer has been formally charged, pursuant to the Code of Criminal Procedure and the EOA.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

A lawyer can be authorized by the Portuguese Bar Association to disclose facts covered by professional privilege if it is absolutely necessary for the defense of the dignity, rights and legitimate interests of the lawyer or their clients or representatives. However, even after authorization, lawyers may choose to maintain secrecy.

The waiver must be made by means of a request, signed by the lawyer, and addressed to the President of the District Council to whose geographic area the lawyer's professional domicile belongs. The request should identify, in an objective, concrete and exact manner, the fact or facts in relation to which the waiver is sought, contain the complete identification of the requesting lawyer, be accompanied by the documents necessary for examination of the request and, where the request concerns a proceeding in progress, be accompanied by the relevant procedural documents.

Professional legal privilege can be lifted by order of the court under the Criminal Procedure Code. Although the Bar Association is heard before the court's decision to waive professional privilege, it is highly discussed whether its opinion is binding or not. Consequently, it is also disputed whether a lawyer that refuses a court order to waive professional privilege incurs a crime of disobedience under the Criminal Code.

It should be noted that professional privilege cannot be waived regarding correspondence between lawyers, as it is considered that this is absolutely confidential as long as it is identified as such.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

Legal professional privilege is fully applicable to litigation. This means a lawyer can refuse to disclose facts that are subject to legal privilege. However, a lawyer can be authorized by the Portuguese Bar Association to disclose facts covered by professional privilege if that is absolutely necessary for the defense of the dignity, rights and legitimate interests of the lawyer or their clients or representatives.

In the context of the Data Protection Law (ensuring the implementation of the General Data Protection Regulation in Portugal) anyone who is subject to legal privilege, without cause and the respective consent, reveals or discloses personal data is punished with imprisonment up to one year or a fine up to 120 days. The fine is increased in double in its limits in case of:

- a worker in public office or equivalent, under the terms of the criminal law;
- a Data Protection Officer;
- intention to obtain any patrimonial advantage or other illegitimate benefit;
- endangering the reputation, honor, or privacy of third parties.

The legal duty of cooperation of public and private entities with the local Data Protection Authority cannot affect the legal privilege duty imposed to the Controller.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

Please refer to our answer b) above.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

In 2018, the IT systems of some Portuguese law firms were hacked. The documents and information disclosed were almost all subject to

legal professional privilege and included clients' personal data, from their addresses, citizen card numbers, mobile phone number and social security and taxpayer numbers. This case is still on trial.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

Yes, the Code of Conduct for European Lawyers contains provisions regulating the legal privilege in the scope of cross-border/multi-state activities, notably, establishing that a lawyer of a Member State may be obliged to respect the professional rules of other Member States' Bar Associations.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

In the EU, the Code of Conduct for European Lawyers sets forth that it is subject to legal privilege the information that a Lawyer gains knowledge in the scope of their professional activity.

Thus, in general terms, the legal professional privilege extends to lawyers who are admitted to a Bar Association in an EU Member States. The Code of Conduct for European Lawyers sets forth that while acting in other Member States, a lawyer may be bound to comply with the professional rules of the Bar or Law Society of the host Member State, which means that non-national lawyers acting in Portugal must comply with the Portuguese Lawyers' Bar Statutes and, in general, with Portuguese Law. Hence, in these circumstances they are subject to the same guidelines and code of conduct as Portuguese lawyers, notably the rules of legal professional privilege.

In the case of communications, a lawyer of a Member State who sends a communication to a lawyer in other Member State must indicate that the communication is "confidential."

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

Please refer to our answer above in relation to investigations outside Portugal in an EU Member State.

Key contacts



João Costa Quinta

Partner

joao.quinta@pt.dlapiper.com

T: +351 21 358 36 20



Margarida Leitão Nogueira

Senior Associate

margarida.nogueira@pt.dlapiper.com

T: +351 21 358 36 20



Miguel Mendes Pereira

Partner

miguel.pereira@pt.dlapiper.com

T: +351 213 583 620



Qatar

Last modified 01 September 2021

Concept of legal professional privilege

The primary source of law in Qatar is Shari'a law ("**Islamic Religious Law**"). This is confirmed in the first Article of the Permanent Constitution of the State of Qatar ("**Constitution**") which prescribes that *"Qatar is an independent sovereign Arab State and the people of Qatar are a part of the Arab nation. Its religion is Islam and Shari'a law (Islamic Religious Law) is the main source of its legislations. Its political system is democratic."*

The Government of the State of Qatar, from time to time, issue rules and regulations with the objective of supplementing Islamic Religious Law when the need arises. Articles 105 and 106 of the Constitution provide every Member of the Council of the State of Qatar with the power to propose bills. Once a draft bill has been reviewed and approved by the Council, and subsequently the Government, the draft law is referred to the Amir (Head of State) for ratification and promulgation. The power of law starts after publication in the official Gazette of the State of Qatar.

In many civil law jurisdictions in the MENA region, the concepts of legal professional privilege and "without prejudice" communications do not exist *per se*, and the parties have the right to use any document which may support their position in civil litigation. This is the position in the State of Qatar which does not have any express provision in respect of legal professional privilege. Instead, lawyer-client legal professional privilege is interpreted under Islamic Religious Law.

Indeed, lawyers in the State of Qatar are bound by duties of confidentiality which, in many cases, incorporate concepts similar to legal professional privilege.

Scope of legal professional privilege

Legal professional privilege protects all communications between a professional legal adviser and their client from being disclosed without the permission of the client. The privilege is solely for the benefit of the client and not the lawyer. The objective of this legal principle is to protect an individual's access to the justice system by ensuring they can disclose all relevant information to their legal advisers without the fear that this disclosure may result in negative repercussions or prejudice them in the future.

A lawyer ceases to be bound by the requirements of legal professional privilege if the lawyer can demonstrate that documentation or information:

- Was in the public domain at the time it was disclosed to the lawyer;
- Entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer; or
- Was in the lawyer's possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by records at the time of disclosure.

Notwithstanding the lawyer-client privilege, a lawyer may disclose certain documents / information to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the lawyer provides the client with

reasonable prior written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents / information so disclosed be used only for the purposes for which the law or regulation was required.

Pursuant to *Article 51 of the Qatar Code of Law Practice*, the concept of legal professional privilege in the State of Qatar is limited to the professional relationship between a lawyer and their client, through the lawyer's obligation to keep confidential all information disclosed by their client.

Further, *Article 265 of the Qatar Code of Civil and Commercial Procedure*, prohibits a lawyer or an agent from disclosing information that they obtain in connection with their professional retainer. Fundamentally, the obligation of confidentiality remains in place even after the professional has ended their retainer with the client.

It appears that the same privilege protections do not apply to in-house legal counsel advising officers, directors or employees of the company as they are not independent of the client. A key point to note is that neither the *Code of Law Practice* nor the *Code of Civil and Commercial Procedure* apply to in-house legal counsel who provide their services on an employment basis. In-house lawyers are instead governed by the *Qatar Labour Law*. However, to protect information or communications passing between in-house counsel and the employer, it may be possible for a confidentiality agreement to be put in place.

While it may be expected that the concept of legal professional privilege would be more widely applicable within the Qatar Financial Centre ("**QFC**") (due to the common law basis of its jurisdiction), there are currently no references to the concept in the QFC legal corpus. Accordingly, the above position is also likely to stand in the QFC.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in Qatar.

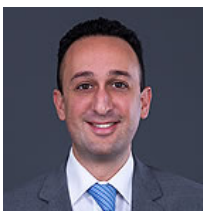
Recent cases and/or other legal developments

There do not appear to be any recent cases or other legal developments in the State of Qatar regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts

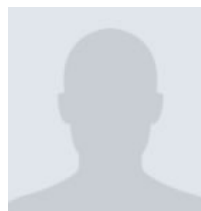


Peter Anagnostou

Senior Legal Consultant

peter.anagnostou@dlapiper.com

T: +971 4 438 6392



George Vlavianos

Partner

george.vlavianos@dlapiper.com

T: +974 4420 6129



Romania

Last modified 01 August 2021

Concept of legal professional privilege

Romanian legislation establishes the principle of protection of the confidentiality of information exchanged between the lawyer and its client through the concept of professional secrecy. The professional secrecy concerns knowledge and documentation in the possession of the lawyer only. As a result, documents relevant to a case are protected only when they are kept by a lawyer, not by the clients. Documents in the client's possession are not generally protected, with the exception of the investigations of the Competition Council, in which case protection is recognized for the communications between the investigated undertaking and its lawyer, exchanged for the exclusive purpose of exercising the undertaking's right of defence under the conditions in the Competition Law.

The concepts of legal professional privilege and professional secrecy in Romania are regulated by:

- Law no. 51/1995 regarding the organisation and exercise of the lawyer's profession ('Lawyer's Law') and the Statute of the Profession of Lawyer ('Lawyer's Statute')
- Romanian Civil Procedure Code
- Romanian Criminal Code and Romanian Criminal Procedure Code, and
- Romanian Competition Law no. 21/1996 ('Competition Law')

Legal professional privilege under the lawyers' legislation

The Lawyer's Law provides for the lawyer's obligation of professional secrecy with regard to any aspect of a matter which was confided to them, unless otherwise provided by the legislation (Article 11 of the Lawyer's Law).

The concept of professional secrecy is broadly defined by the Lawyer's Statute as covering any type of information, in any form and on any medium, provided by the client to the lawyer with the aim of receiving legal assistance and with respect to which the client has requested the preservation of confidentiality, as well as any documents drafted by the lawyer containing or based on information provided by the client for the same purpose and which the client has requested be kept confidential (Article 228(1) and (2) of the Lawyer's Statute).

Pursuant to article 10(1) and (4) of the Lawyer's Statute, the correspondence and information exchanged between the lawyer and the client, regardless of the support, cannot, under any circumstance, be brought as evidence in legal proceedings and cannot be depleted of the confidential character. Thus, the Lawyer's Statute does not allow for any intrusions of the State authorities in relation to the correspondence exchanged between the lawyer and their client. However, it is to be noted that the Lawyer's Statute has a legal force inferior to that of a law and its provisions are thus not enforceable in those cases where laws of a superior force, such as the Competition Law or the Criminal Code, provide for specific cases when the State authorities are not bound by legal professional privilege or by professional secrecy.

Lawyers cannot be called to testify and cannot provide information to any authority or person with regard to the matters entrusted upon them, except for when they have the prior, express and written approval of all clients having an interest in that respective matter (Article 45(3) of the Lawyer's Law).

Legal professional privilege in the context of civil litigation

Under the Civil Procedure Code, the lawyer may not be called to testify about facts learnt in the course of performing their professional tasks. However, the client can allow the lawyer to testify as a witness before the court and provide information which would have been otherwise confidential and covered by professional secrecy (Article 317 of the Civil Procedure Code).

In addition, the court must reject a claim for filing a document in the case file where the disclosure of the document would infringe a legal obligation of preserving the secret (Article 294(1) par. 2 of the Civil Procedure Code).

Legal professional privilege in the context of criminal investigations

Written documents held by the lawyer or in the lawyer's office may only be taken by a prosecuting officer on the basis of a warrant issued according to the law (Article 34(1) of the Lawyer's Law).

Based on a recent amendment to the Lawyer's Law, written documents containing lawyer-client communications or written documents containing notes made by the lawyer regarding client defence related matters, cannot be taken or confiscated (Article 34 (2) of the Lawyer's Law).

The conversations and correspondence of the lawyer having a professional character may be intercepted or recorded only under the specific conditions and procedure provided by law (article 34(3) of the Lawyer's Law).

The relation between the lawyer and their client may not be subject to technical supervision, (see **footnote 1**) except for where there are indications that the lawyer is committing or preparing to commit certain specific crimes such as money laundering, tax evasion, corruption, terrorism, crimes against the financial interests of the European Union or in the case of other crimes for which the law provides the sanction of imprisonment for five years or more.

The Criminal Procedure Code expressly provides that legal professional secrecy can be opposed to the prosecutor during criminal proceedings (art. 306(6) of the Criminal Procedure Code).

Article 147(2) of the Criminal Procedure Code prohibits the retention or review of correspondence sent or received between the lawyer and the suspect, the person indicted or any other person defended by the lawyer, except for the case when the lawyer is committing or preparing to commit certain specific crimes such as money laundering, tax evasion or corruption.

Pursuant to art. 116(3) and (4) of the Criminal Procedure Code, a witness cannot be called to testify in relation to those facts or circumstances having a secret or confidential character, that may be opposed by law to judicial bodies, unless a waiver is obtained from the beneficiary or if there is a legal provision to the contrary.

Footnote 1: Pursuant to Article 138 of the Romanian Criminal Procedure Code, technical supervisions measures may consist in (1) interception of communications or of any other long distance communication means; (2) access to IT systems; (3) audio or video surveillance or photography; (4) location or observance by technical means.

Legal professional privilege in the context of investigations by the antitrust / competition authority

Legal professional privilege in the context of investigations by the competition authority (ie the Romanian Competition Council) was expressly regulated for the first time following the amendment of the Competition Law through Government Emergency Ordinance 75/2010 which entered into force on 5 August 2010. The legal framework is represented by Article 38 paragraphs (8) through (11) of the Competition Law and Article 24 of the Romanian Competition Council Procedural Regulation.

In case of competition law investigations, to the extent the undertaking does not prove the privileged nature of the communication, the competition inspectors will seal and lift two copies of the document in question, together with the rest of the documents gathered during the dawn raid.

The President of the Romanian Competition Council will then urgently decide, on the basis of the evidence and arguments put forth by the investigated undertaking, whether the document will be deemed privileged or not. Should the President of the Romanian Competition Council decide to reject the privileged nature of the communication, the undertaking can challenge this decision before the Bucharest Court of Appeal within 15 days of the decision being communicated to the undertaking. The decision of the Bucharest Court of Appeal can be further challenged before the High Court of Cassation and Justice, within five days as of communication. De-sealing can only take place

after the expiry of the time period in which the decision of the president of the Romanian Competition Council can be challenged, or, if challenged, after the court decision becomes final.

Legal professional privilege is also recognized in case of forensic inspections taking place at the headquarters of the Romanian Competition Council. A specific procedure in this respect is included in Article 26 of the Romanian Competition Council Procedural Regulation (including a maximum 10 working days term for the undertaking to indicate, in a reasoned way, the information that may be subject to the legal professional privilege). Same procedure above applies in case of dispute.

Scope of legal professional privilege

What is protected by legal professional privilege?

As mentioned above, the concept of professional secrecy has a very broad definition under the legislation regulating the legal profession, covering any correspondence and information transmitted between the lawyer and the client, but only to the extent that such are in the lawyer's possession.

Legal professional privilege in the context of investigations of the Romanian Competition Council is strictly defined, and it covers communications between the investigated undertaking or association of undertakings and its lawyer exchanged for the exclusive purpose of exercising the undertaking's right of defence, respectively before or after the opening of the administrative procedure based on the Competition Law subject to such communication being related to the subject matter of the procedure. Preparatory documents are no longer covered by legal privilege and can be seized and used as evidence (please see below for more information regarding the recent legal developments in this area).

Are communications with in-house counsel protected by legal professional privilege?

As opposed to lawyers, in-house counsels are not considered to be practising a liberal profession. The aforementioned legal provisions appear not to cover the situation of in-house counsel – similar to the current approach of the European Commission and EU Court of Justice. Nevertheless, in-house counsels are also obliged to abide by professional secrecy, under the specific legislation regulating the in-house counsel profession (Law no. 514/2003).

How is legal professional privilege waived?

Article 46 of the Lawyer's Law provides that lawyers cannot be called to testify and cannot provide information to any authority or person with regard to the matters entrusted upon them, except for when they have the prior, express and written approval of all clients having an interest in that respective matter.

Recent cases and/or other legal developments

Recent legal developments

The scope of the documents covered by legal privilege has been narrowed down following recent amendments to the Competition Law, entered into force on 1 January 2016. As a consequence, the RCC inspectors will be able to seize and use as evidence preparatory documents.

Case Law

To our knowledge, there are only few court decisions regarding the privileged nature of documents seized by the Romanian Competition Council during a dawn raid.

In these cases (Bucharest Court of Appeal, Alpiq Romindustries SRL and Energy Holding SRL v. The Romanian Competition Council, Decision no. 5938 from 22 October 2010 and Decision no. 7074 from 11 December 2012, decisions maintained by the High Court of Cassation and Justice through its Decisions no. 5881 from 20 June 2013 and no. 7707 from 11 December 2013, and High Court of

Cassation and Justice decision no. 7707/2013), the documents for which the application of legal professional privilege was invoked were legal opinions of the external lawyers issued prior to the beginning of the investigation in respect of the relationships between the undertakings involved in the case.

The Bucharest Court of Appeal rejected the claims on the ground that the legal advice referred to purely commercial considerations and was not related to the right of defence of the undertakings investigated in relation to the enforcement of the competition rules. The High Court of Cassation and Justice irrevocably rejected the appeals made. The High Court of Cassation and Justice also defined the right of defence (for the purpose of legal professional privilege application) as including all the rights and procedures a person may employ for the purpose of defending its fundamental rights and liberties, in the cases where the breach of certain legal provisions may entail the application of an administrative or criminal fine, as the case may be. The document in question related only to the parties contractual relationship and did not have a connection with the potential anticompetitive nature of such relationship.

Legal professional privilege in the context of merger control

To our knowledge, legal professional privilege has not been invoked in practice in connection to merger control procedures.

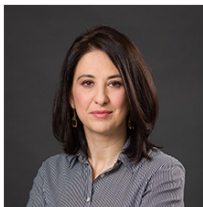
However, as legal professional privilege covers communication exchanged between an investigated undertaking and the external lawyer, it may be inferred that correspondence exchanged with a lawyer is only protected in the context of an investigation and not in the context of other type of procedures in front of the Competition Council, such as merger control procedures.

Furthermore, the High Court of Cassation and Justice has adopted a narrow definition of the right of defence concept (for the purpose of legal professional privilege application) in the above mentioned decisions. As such, the right of defence refers to all the rights and procedures a person may employ for the purpose of defending its fundamental rights and liberties, in the cases where the breach of certain legal provisions may entail the application of an administrative or criminal fine.

Data privilege

Content to follow shortly.

Key contacts



Livia Zamfiropol

Partner

livia.zamfiropol@dlapiper.com

T: +40372155809

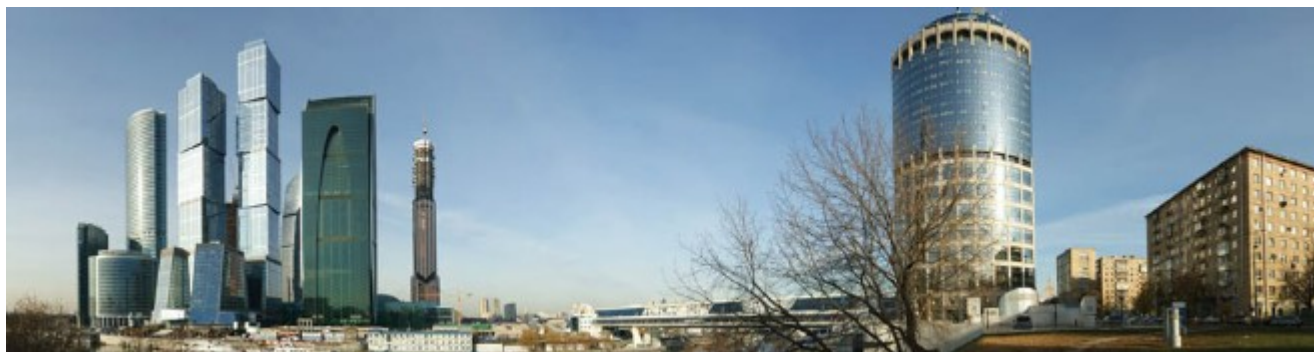


Alina Lacatus

Partner

alina.lacatus@dlapiper.com

T: +40372155837



Russia

Last modified 01 August 2021

Concept of legal professional privilege

Russian law does not in general recognise the concept of legal professional privilege as it operates in jurisdictions such as England or the US. However, the concept of legal professional privilege is still expressed in certain ways. The most similar concept is advocate secrecy (in Russian: "адвокатская тайна"). An advocate secret is any information connected with an advocate providing legal services to their client. Such information may include:

- fact of an advocate being contacted by a client;
- information obtained by an advocate from their client;
- evidence and documents collected by an advocate while preparing for a case; and
- the content of legal advice provided to the client, etc

An advocate secret is protected by law and there is no need to enter into a special agreement (ie a confidentiality agreement).

The disclosure of information considered to be an advocate secret cannot be requested by state bodies (either in the context of civil or criminal litigation or upon the request of the antimonopoly authority). Advocates cannot be questioned as a witness regarding circumstances that became known to them while providing legal services to their clients.

Under Russian law, not every lawyer is considered to be an advocate. To gain the status of an advocate, a candidate must meet the special requirements set out in the law and pass a special exam.

If a lawyer does not have the status of an advocate, information they receive from their clients can be protected by a regime of commercial secrecy (in Russian: "коммерческая тайна", also commonly referred to as "trade secrets"). This regime is different from the concept of legal professional privilege.

Commercial secrecy is a specific regime for protecting confidential information. Commercial secrecy covers information of any character (production, technical, economic, organisational, etc including the results of intellectual activity in the scientific and technical area, as well as information on the methods for performing a professional activity) which has an actual or a potential commercial value because it is unknown to third parties. A regime of commercial secrecy is established if the holder of commercially secret information has adopted the set of measures listed in federal law to protect the confidentiality of the information.

A commercial secret cannot be disclosed unless it is officially requested by a competent state authority (including investigative and pre-trial inquests agencies, courts and antimonopoly authorities). A commercial secrecy regime cannot be applied to certain types of data specifically excluded by law (for example, constituent documents, documents confirming entries in the relevant state registers, etc). This means that the commercial secrecy regime does not provide absolute immunity against document requests or seizure during inspections conducted, for example, by a competition authority (including dawn raids).

Russian competition law specifies that commercial secrecy cannot be established in relation to information provided by a party to a competition investigation on its own initiative to the regulatory authority. This means that commercial secrecy can only be applied to information that has been provided in response to a request from the competition authority, or obtained by the competition authority during an inspection.

The competition authority should not disclose any commercial secret obtained in the course of the exercise of its powers, except in specific circumstances permitted by law (eg upon the request of a court, investigation agency, etc). Therefore the commercial secrecy regime does not necessarily protect information or documents from disclosure to the competition authority, but it should protect it from further disclosure by the competition authority to third parties (including other parties to the antimonopoly case). If a commercial secret is wrongfully disclosed, the employees of the competition authority may be subjected to civil, administrative and / or criminal liability.

Scope of legal professional privilege

What is protected by legal professional privilege?

In addition to the above, special rulings are required to investigate the activities of advocates. Information, documents or goods obtained during the investigative activities can be used as evidence by the prosecuting authority to the extent they are not covered by advocate secrecy. However, this protection does not apply to proceeds of crime, the handling of which is prohibited in Russia.

Advocate secrecy does not apply to lawyer-to-lawyer communications (to the extent the lawyers are not advocates). Correspondence between legal advisors can be protected by means of a confidentiality agreement as a commercial secret. However, this information should be disclosed upon the request of a competent state authority. A commercial secret can be protected in two ways:

- Information received from a client can be protected from being disclosed to third parties by a confidentiality agreement between the client and the lawyer, and
- If a lawyer is an employee (including employees in law firms) they have to maintain the confidentiality of the commercially secret information which they obtained during the performance of their employment (including information received from clients)

Are communications with inhouse counsel protected by legal professional privilege?

In-house counsel cannot disclose to third parties (except competent state authorities) commercial secrets which they have obtained during the course of their employment. State authorities may seize documents or question an inhouse counsel as part of a special inspection of the company or criminal prosecution of the head of the company or other employees, as well as in other special cases.

There is a general constitutional right protecting the confidentiality of correspondence, telephone calls, etc (Article 23 of the Russian Constitution). This right can be limited if the information is officially requested by authorised state bodies. However, this applies only to private correspondence and not to official / business correspondence.

Additionally, foreign laws can provide protection for communications with Russian in-house lawyers (see **footnote 1**).

Footnote 1: For example, in *PJSC Tatneft v Bogolyubov and others* [2020] EWHC 2437 (Comm), Moulder J noted the following: "legal advice privilege extends to communications with foreign lawyers whether or not they are "in-house" and thus employees of a particular company or organisation and the court will not enquire into how or why the foreign lawyer is regulated or what standards apply to the foreign lawyer under the local law. The only requirement in order for legal advice privilege to attach is that they should be acting in the capacity or function of a lawyer... There is no additional requirement in my view that foreign lawyers should be "appropriately qualified" or recognised or regulated as "professional lawyers".

Does legal professional privilege apply to the correspondence of nonnational qualified lawyers?

Only advocates admitted in Russia are protected by advocate secrecy.

Foreign qualified advocates can advise in Russia on issues of foreign law. However, they cannot act in Russia on issues relating to state secrets of the Russian Federation.

If a foreign qualified lawyer is an employee under an employment agreement governed by the Russian Labour Code, they have to comply with the relevant rules on commercial secrecy.

How is legal professional privilege waived?

Advocate secrecy is unlimited in time and can only be waived by the client. There are certain exceptions to this rule stated in the law.

Legal professional privilege in the context of merger control

The principles of legal professional privilege set out above are equally applicable in the context of merger control procedures. The competition authority cannot require disclosure of information which is considered to be an advocate secret. If any information to be submitted to the competition authority constitutes a commercial secret, such information should be marked as such, and in this case the competition authority must ensure that it is treated confidentially, kept in a separate file and not disclosed to third parties.

Recent cases and/or other legal developments

No details for this country.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

Russian law does not in general recognise the concept of legal professional privilege. However, the concept of legal professional privilege is still expressed in certain ways. The most similar concept is advocate secrecy. An advocate secret is any information connected with an advocate providing legal services to their client. Such information may include:

- the fact of an advocate being contacted by a client;
- the information obtained by an advocate from their client;
- the evidence and documents collected by an advocate while preparing for a case; and
- the content of legal advice provided to the client.

An advocate secret is protected by law and there is no need to enter into a special agreement (ie a confidential agreement).

Information considered an advocate secret cannot be requested to be provided to any state bodies (either in the context of civil or criminal litigation or upon the request of the antimonopoly authority). Advocates cannot be questioned as a witness regarding circumstances that became known to them while rendering legal services to their clients.

Under Russian law, not every lawyer is considered an advocate. To gain the status of an advocate, a candidate must meet the special requirements set out in the federal law and pass a special exam.

If a lawyer does not have the status of an advocate, the information they receive from their clients can be protected by a regime of commercial secrecy. This regime differs from the concept of legal professional privilege.

Commercial secrecy is a specific regime for protecting confidential information. Commercial secrecy covers information of any character (production, technical, economic, organisational, etc, including the results of intellectual activity in the scientific and technical area, as well as information on the methods for performing a professional activity) which has an actual or a potential commercial value because it is unknown to third parties. A regime of commercial secrecy is deemed to have been established if the holder of commercially secret information has adopted the set of measures listed in federal law to protect the confidentiality of the information.

A commercial secret cannot be disclosed to third parties unless it is officially requested by an authorised state body (investigating agencies, agencies in charge of a pre-trial inquests, judicial authorities and antimonopoly bodies). A commercial secrecy regime cannot be applied to certain types of data specifically excluded by law (for example, constituent documents, documents confirming entries in the relevant state registers, etc). This means that the commercial secrecy regime does not provide immunity against document requests or seizure during inspections conducted by any competition authority (including dawn raids).

Russian competition law specifies that commercial secrecy cannot be established in relation to information provided by a party to a competition investigation on its own initiative to the regulatory authority. This means that commercial secrecy can only be applied to information that has been provided in response to a request from the competition authority, or obtained by the competition authority

during an inspection.

The competition authority should not disclose any commercial secret obtained in the course of the exercise of its powers, except in specific circumstances permitted by law (eg upon the request of a court, investigation agency, etc). Therefore, the commercial secrecy regime does not necessarily protect information or documents from disclosure to the competition authority, but it does serve to protect it from further disclosure by the competition authority to third parties (including other parties to the antimonopoly case).

If a commercial secret is wrongfully disclosed, the relevant employees of the competition authority may be subjected to civil, administrative and/or criminal liability. Damage caused by the disclosure of a commercial secret may be compensated by the state.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

N/A

c) Are communications to/by companies and in-house counsel protected by privilege?

In-house counsel cannot disclose to third parties (except authorised state bodies) commercial secrets which they obtained during the performance of their employment. Authorised state bodies have a right to seize documents or question an in-house counsel as part of a special inspection of the company or criminal prosecution of the head of the company or other employees, as well as in other special cases.

There is a general human and constitutional right for the secrecy of correspondence, telephone calls, etc (Article 23 of the Russian Constitution). This right can be limited if the information is officially requested by authorised state bodies. However, this applies only to private correspondence and not to official/business correspondence.

d) Are there any specific requirements of a privileged incident response engagement letter?

N/A

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Those documents can be protected if they fall under an advocate secret or commercial secret, as described above.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No, the key consideration is whether this falls under an advocate secret or commercial secret, as described above.

c) How are seized documents put into evidence in a criminal/civil procedure?

No specific rules apply in this regard.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Advocate secrecy is unlimited in time and can only be waived by the client. There are certain exceptions to this rule stated in the law.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

N/A

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

N/A

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

N/A

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

N/A

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

N/A

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

N/A



Saudi Arabia

Last modified 07 April 2020

Concept of legal professional privilege

In the Kingdom of Saudi Arabia (KSA), the primary source of law is “Shari’a”, Islamic law. There are also laws and regulations in Saudi Arabia which are issued by either regulatory or government entities, derived from Shari’a, to regulate most areas of daily life. With regard to legal professional privilege, the Legal Profession Law and Professional Code of Conduct for Lawyers in Saudi Arabia include provisions concerned with legal professional privilege to protect all communications between lawyers and their clients.

The constitution of KSA is Shari’a, as set out in the Basic Law of Governance. The Shari’a in this respect does not refer to lawyers but refers to someone who has been given power of attorney ('Wakalah / Power of Attorney'). Power of attorney (“POA”) is a special enabling document granted to a Saudi Arabian person or entity for use in Saudi Arabia that must be made before the authorised notary public or other authorised official in order to be effective. POA can create rights and obligations in various aspects, including civilian, criminal and competition enforcement. During the POA, the lawyer must take into account any instructions from the grantor of the power stipulated in the POA. The lawyer has an absolute duty to act in the best interest of the grantor at all times. A lawyer who acts improperly can be held personally and criminally liable for losses. The lawyer must keep and preserve accurate records and accounts for all dealings and transactions when exercising his powers. Failure to do so is an offence.

In many civil law jurisdictions in the region, the concepts of legal professional privilege and 'Without Prejudice' communications do not exist per se, as lawyers are bound by duties of confidentiality. For example, under the Saudi Legal Profession Law, a lawyer may not disclose a secret with which they have been entrusted, or of which they have become aware in the course of practicing their profession, unless such non-disclosure constitutes a violation of a Shari’a requirement or if there is an official order by an official entity or to prevent a crime. The essential material information obtained by a lawyer by virtue of their profession is considered "conditional", and not for public disclosure. Such an attorney is obliged not to divulge the confidential information received from clients, except to the extent that they are required to disclose specific information in order to defend their clients before Saudi courts.

Scope of legal professional privilege

What is protected by legal professional privilege?

Lawyer-client privilege protects all communications between a lawyer and their clients from being disclosed without the permission of the client. The privilege is that of the client and not that of the lawyer. The Legal Profession Law and the Professional Code of Conduct for Lawyers provide that a lawyer shall refrain from disclosing/publishing any confidential documents, information and judgments either to the public (such as newspapers), unauthorised individuals, or whomever is likely to publish them. The purpose behind this legal principle is to protect an individual's ability to access the justice system by encouraging complete disclosure to lawyers without fear that any disclosure of those communications may prejudice the client in the future. When a lawyer is not acting primarily as a lawyer but, for instance, as a business adviser, member of the board of directors or in another non-legal role, then legal privilege generally does not apply. The privilege protects the confidential communication, and not the underlying information. For instance, if a client has previously disclosed confidential information to a third party who is not a lawyer, and then gives the same information to a lawyer, the privilege will still protect the communication with the lawyer, but will not protect the communication with the third party.

A lawyer will not have any obligations under the legal professional privilege protection with respect to documentation or information which the lawyer can demonstrate:

- it was in the public domain at the time it was disclosed to the lawyer; or
- it entered the public domain subsequent to the time it was disclosed to the lawyer, through no fault of the lawyer.

Are communications with in-house counsel protected by legal professional privilege?

The Legal Profession Law applies to all individuals who practice law, including in-house counsel, and they are treated in the same way as lawyers working in law firms. Therefore, all communications with in-house counsel are protected by legal professional privilege. However, it is important to note that Legal Profession Law only applies to Saudi nationals. If in-house lawyers are non-nationals, they would be subject to the professional obligations of their home countries.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Non-Saudi national qualified lawyers are not allowed to practice law in Saudi Arabia unless hired by a certified Saudi law firm and approved by the Ministry of Justice. As legal professional privilege is obligated on Saudi law firms, so it will be obligated on non-national qualified lawyers. In the case of a breach of legal professional privilege by a non-national qualified lawyer, the Saudi law firm would be held liable before the Ministry of Justice and then the firm could take appropriate legal action against their non-national lawyer as per the employment contract and the Labour Law. Additionally, foreign qualified lawyers can be entitled to practice law in accordance with the terms of agreements concluded between Saudi Arabia and other countries

How is legal professional privilege waived?

Legal professional privilege may be waived if the confidential communications are disclosed to third parties. Other limits to legal professional privilege may apply depending on the situation being adjudicated. The Legal Profession Law states that a lawyer shall practice the profession in accordance with the *Shari'a* laws in force. A lawyer shall refrain from any act that compromises the dignity of the profession and shall comply with the relevant rules and instructions. A lawyer shall not refer to personal matters concerning a client's adversary or representative, and shall refrain from any offensive language or accusation in connection with the content of their written or oral argument. A lawyer shall not disclose any confidential information which has been communicated to them or of which they have become aware in the course of practicing their profession even after expiration of their power of attorney, unless such non-disclosure constitutes a violation of *Shari'a* requirements. Similarly, a lawyer shall not, without a legitimate cause, decline to represent their client before the case has been concluded.

Notwithstanding the lawyer-client privilege, a lawyer may disclose certain documents/ information to the extent that such disclosure is required by an official order of a court or other governmental bodies having jurisdiction, if such a disclosure will prevent committing a crime, and finally if the confidential information related to a dispute arises between a lawyer and their client and disclosure is necessary to resolve the dispute, provided that the lawyer notifies the client with reasonable prior written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring the documents/information so disclosed be used only for the purposes for which the law or regulation requires, or for which the order was issued.

Recent cases and/or other legal developments

There do not appear to be any recent cases or other legal developments in Saudi Arabia regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts



Henry Quinlan

Partner

Henry.Quinlan@dlapiper.com

T: +971 4 438 6350



Scotland

Last modified 15 March 2019

Concept of legal professional privilege

The concept of legal professional privilege protects certain documents and information from disclosure in the context of legal proceedings which, in the absence of privilege, such material could require to be disclosed to the other side in litigation / arbitration prior to trial or could be seized / inspected by investigators in most regulatory procedures and could then be relied on as evidence at a trial.

The law of Scotland recognises two main types of legal professional privilege:

- **Legal advice privilege**, which protects confidential communications between client and lawyer for the dominant purpose of seeking or giving legal advice (on any area of the law)
- **Litigation privilege**, which protects confidential communications, including those with third parties, which are made for the dominant purpose of ongoing or expected litigation (ie an adversarial rather than an investigative or inquisitorial process)

Legal advice privilege applies to any communications where legal advice is sought or given and where the advice (or any document within which it is contained) remains confidential between lawyer and client. Litigation privilege covers discussions that take place and documents created in contemplation of litigation. Whether litigation is in contemplation will generally be a question of fact and the issue will often turn on when actual contemplation began.

Legal professional privilege is a substantive legal right (not a procedural rule). It enables a person to refuse to disclose certain documents in a wide range of situations. No adverse inference can be drawn from a valid assertion of legal professional privilege.

Legal professional privilege only protects documents which are confidential. If documents, which would otherwise be privileged, contain information which is already in the public domain or which has been shared with third parties, legal professional privilege will be lost.

The legal professional privilege belongs to the client, not the lawyer, and does not depend upon the document being in the lawyer's custody. Privileged documents can be (and frequently are) held by the client.

As a matter of general principle which may be relevant to the practical application of the rules of privilege, it should be noted that in Scotland the concept of preaction civil disclosure does not exist in the same manner as is found in England and Wales. Scottish procedure dictates that should a party wish sight of a document or other material, then it must generally request this through a formal judicial process known as commission and diligence or through a statutory procedure under the Administration of Justice (Scotland) Act 1972, during which a claim of confidentiality / privilege can be asserted.

Legal professional privilege in the context of civil litigation

Litigation privilege allows a litigant to prepare for litigation (civil or criminal) without fear that any documents produced for that purpose will subsequently have to be disclosed. It is wider than legal advice privilege in scope but only arises once litigation is reasonably contemplated or commenced. From that moment, it covers:

- Confidential communications
- Communications between any of a client, its lawyer and a third party, and
- Communications for the purpose of the litigation

WHAT IS LITIGATION?

Litigation privilege can normally be claimed in proceedings where judicial functions are being exercised by the court or tribunal. It can therefore be claimed in both civil and criminal proceedings and arbitration.

WHEN IS LITIGATION REASONABLY CONTEMPLATED?

The Scottish courts take a broad view as to when litigation is reasonably contemplated. In *Young v. NCB*, Lord Justice Clerk Thomson put it as follows: 'Once parties are at arm's length or are obviously going to be at arm's length the details of their preparation of weapons and ammunition are protected as confidential'. The privilege does not cease to operate because litigation never takes place and continues even after the litigation has been concluded.

COMMUNICATIONS WITH A THIRD PARTY

Unlike legal advice privilege, litigation privilege attaches to communications with third parties and so the concerns outlined above under legal advice privilege relating to the identity of the client do not arise.

'...FOR THE PURPOSE OF THE LITIGATION'

The privilege operates only in respect of documents created for the purpose of the litigation. It will therefore cover prelitigation documents but not, for example, factfinding reports prepared in the immediate aftermath of an accident.

Legal professional privilege in the context of criminal investigations

Regulatory investigations in the UK are not automatically considered to be adversarial from the outset and hence litigation privilege may not arise. The result is that legal advice given in the context of such an investigation will attract legal advice privilege, but documents including notes, interview transcripts and / or expert reports for the purpose of giving advice or evidence may not be privileged and so could be disclosable to a regulator or in subsequent litigation.

Litigation privilege will apply in any case once it is clear that some form of prosecution or litigation arising from the investigation is in contemplation or, at an earlier stage, if the investigation process itself has become sufficiently adversarial so that the company under investigation effectively stands accused of wrongdoing and should, therefore, be able to claim litigation privilege over witness evidence gathered for the purpose of obtaining advice to defend itself.

The rule against selfincrimination states that no person is bound to release any document or information if the document or information would have a tendency to expose them to subsequent prosecution.

In relation to documents, the position regarding execution of a search warrant by Police in respect of files held by solicitors has been recently considered in *Clyde & Co (Scotland) LLP v Procurator Fiscal*, Edinburgh [2016] HCJAC 93 and *H Complainers* (5 February 2016, as yet unreported due to the proceedings not yet having concluded).

In summary, the courts have held that where it is clear that what is to be searched is a solicitors' office and that legal privilege is being asserted, any warrant ought either to have provided for independent supervision of the police search by a Commissioner appointed by the court, or to have contained a requirement that any material seized should be sealed unread and delivered to the court to enable a Sheriff to adjudicate upon the issue in the context of information provided in responding to questions from the Police or Crown, whether an incriminating reply is considered admissible will turn on the context in which it was provided. Should an individual not appreciate the concept of privilege before providing a response, or where privilege is claimed and refused, the position regarding admissibility of the response has yet to be fully tested in Scotland and there is no reported case law on the issue, the likelihood is that English authorities would be followed by a Scottish court on the point to the extent that if privilege is incorrectly refused, information provided in response to questioning will be inadmissible in any subsequent proceedings.

If a witness is aware of privilege but simply does not assert the right, the position in England is that an incriminating answer is admissible either in the present or any future criminal proceedings. The likelihood is that a Scottish court would adopt the same approach, as long as the witness was warned by the presiding judge in advance (*Graham v HM Advocate* 1969 SLT 116).

Legal professional privilege in the context of investigations by the antitrust / competition authority

Distinct from legal professional privilege, Part 9 of the Enterprise Act 2002 ('EA 2002') creates a statutory confidentiality regime covering most competition-related inquiries undertaken by domestic authorities within the UK. This regime can be significant in any litigation following a competition inquiry where disclosure of documents created during the inquiry is sought by a party to the litigation.

The relevant sections of EA 2002 prevent disclosure by any party of documents disclosed to it by an authority in the exercise of its legal functions (without consent from that authority). In practice, this means:

- Documents received from or authored by the authority itself cannot be disclosed
- Documents created by third parties which came to the authority during the investigation and were then disclosed to the company cannot be disclosed (this might include documents from another company subject to the same investigation)
- Documents created by the company under investigation before the investigation and provided to the authority in the course of the investigation may still be disclosed, and
- Documents created during the investigation relating to employee interviews and witness statements; whether such documents can be disclosed will depend on the author of the documents in question. If they were created by the company, then they may be disclosed. If they were created by the authority from interviews / transcripts with company witnesses, they may arguably not be disclosable

The Competition Act 1998 ('1998 Act') is explicit in stating that the power to require the production of documents, either on written notice or during an inspection, does not extend to privileged communications. A privileged communication is defined by section 30 of the 1998 Act to mean a communication:

- Between a professional legal adviser and their client, or
- Made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings which would be protected from disclosure in proceedings in the Court of Session on grounds of confidentiality of communications.

Scope of legal professional privilege

What is protected by legal professional privilege?

LEGAL ADVICE PRIVILEGE

If no adversarial proceedings are in contemplation, legal professional privilege will only attach to documents which constitute confidential communications between a lawyer and their client made for the purpose of giving or obtaining legal advice and documents which evidence such communications, including material forming part of the continuum of those communications. Each part of this test requires further explanation.

In *Three Rivers District Council and Others v The Governor and Company of the Bank of England* [2004] UKHL 48, the House of Lords confirmed that 'legal advice' is not confined to advising the client on the law but includes advice 'as to what should prudently and sensibly be done in the relevant legal context'.

Lord Rodger used a simple but useful test to determine whether the lawyer was providing such advice: whether they had 'put on legal spectacles when reading, considering and commenting on the drafts'. Consequently, presentational advice in the context of an inquiry will be privileged, however if a lawyer acts as a 'man of business' the advice may lack relevant legal context and therefore not be privileged. The privilege does not extend to documents which are already in existence merely because they are sent to a solicitor.

COMMUNICATIONS

Communications must actually transfer information between a lawyer and their client: this is construed to include actual lawyer / client communications (eg phone calls, face-to-face discussions, letters, emails, faxes, etc) and evidence of such communications (eg file notes of phone calls, memos, computer hard drives, video evidence, sound recordings, etc) – the key being that the communication must have the aim of keeping both informed so that advice may be sought and given.

A document which stands in its own right or is not addressed and delivered to a lawyer specifically for advice may not constitute a communication. A statement prepared by an employee at the request of a manager to record the employee's recollection of events is unlikely to benefit from legal advice privilege – even if the employee believes that the document will be passed to lawyers for advice – since it is not a communication with a lawyer.

LAWYER

The protection attracts to all members of the legal profession: solicitors, inhouse lawyers (with the exception the context of an antitrust and competition investigation by the European Commission), barristers within the UK and duly accredited foreign lawyers (whether foreign inhouse counsel who are not required to be a member of their local Bar would still qualify is currently untested). Where appropriate provisions for supervision are in operation, it can also include legal executives, paralegals and trainee solicitors. Care must be taken, when communicating with an inhouse lawyer, to place the communication within the correct lawyer / client relationship. An inhouse lawyer may need to maintain two such relationships; one with the business, in which they are the 'lawyer', and one with external lawyers, in which they (alone or together with others) are the 'client'.

The Supreme Court, in a decision (see **footnote 1**) likely to be persuasive to Scottish judges, has confirmed that legal advice privilege cannot be claimed in respect of confidential communications between accountants and their clients for the purpose of requesting or providing legal advice. Accordingly, advisers other than lawyers are unlikely to be able to claim privilege, irrespective of whether the same advice is sought from both.

CLIENT

Not every employee in a company will be the client for the purpose of attracting privilege. The 'client' will only comprise those few individuals who are authorised to obtain legal advice and who seek and receive legal advice from the lawyer, whether external or inhouse. This might be an *ad hoc* committee or group formed to respond to a specific issue or incident, or it might be members of senior management. Often, however, those with direct knowledge of the facts or matters in issue will not fall within the concept of 'client' and particular care will therefore need to be exercised when interviewing or obtaining information from such employees. The English High Court has refused to apply legal advice privilege to notes taken by lawyers at interviews with their client's employees and ex-employees on the basis that the employees and ex-employees involved in the interviews were not 'the client' to whom advice was being provided.

DOCUMENTS CREATED FOR THE PURPOSE OF GIVING OR OBTAINING LEGAL ADVICE

Legal professional privilege only attaches to communications that give or seek legal advice as to what should prudently and sensibly be done in a relevant legal context (including how best to present facts in light of legal advice given). In determining whether there is a relevant legal context consideration is given to whether the advice relates to 'the rights, liabilities, obligations or remedies of the client either under private law or under public law'. Privilege will not attach to advice which is purely commercial or strategic.

Difficulties arise when determining the status of copy documents and documents which are only privileged in part. Further difficulties can arise if privilege has been impliedly or expressly waived. These issues are beyond the scope of this brief summary. Expert legal advice should be taken.

Are communications with inhouse counsel protected by legal professional privilege?

Yes, except in the context of an antitrust and competition investigation by the European Commission.

An inhouse lawyer must, however, take particular care to ensure that they distinguish clearly between advice which is legal and that which is commercial in nature, since the latter will not attract legal professional privilege. They must also take care when instructing external lawyers to clearly identify and effectively manage the relevant lawyer / client relationships.

Does legal professional privilege apply to the correspondence of nonnational qualified lawyers?

Yes, where the question of disclosure is governed by the law of Scotland. Legal professional privilege applies to advice given by all duly accredited members of the legal profession. It is not necessary for the lawyer to be qualified in Scotland. The question of whether this extends to inhouse counsel in European jurisdictions where those counsel are not required to be members of their local Bar and whose advice in their own jurisdictions would not be protected by local professional secrecy laws remains to be determined by the UK courts.

Where the question of disclosure is governed by European law (such as in the context of an antitrust and competition investigation within the UK by the European Commission), only the advice of an independent lawyer qualified within the EEA is protected by legal professional privilege. To benefit from EU privilege post-Brexit Scottish lawyers will need to maintain an entitlement to practice in another EU member state in the absence of any agreement between the UK and the EU to the contrary.

How is legal professional privilege waived?

Legal professional privilege is waived if the relevant material is placed before a court. It is also lost if the material in the document loses confidentiality or if the document came into being for the purpose of furthering a criminal or fraudulent scheme. A lawyer has a duty to protect a client's legal professional privilege and cannot waive it without the client's express authority.

It is possible to waive legal professional privilege on a selective basis so that disclosure to a third party of a legal professional privileged document will not mean that it ceases to be legal professional privileged for any other purpose. However, for a waiver to be selective, the terms of the disclosure must be clearly established in advance. This is a complex area. Always seek legal advice.

Legal professional privilege in the context of merger control

Competition authorities are increasingly issuing large document requests in complex merger cases, which raises questions relating to legal professional privilege. In a European Commission investigation EU law recognises as privileged the legal advice of independent lawyers qualified to practice in the EEA. It does not recognise any privilege in communications between in-house lawyers and their clients. In domestic investigations the Scottish rules described in the preceding paragraphs apply.

Footnote 1: R. (on the application of Prudential Plc) v Special Commissioner of Income Tax [2013] UKSC 1

Recent cases and/or other legal developments

Holman Fenwick Willan LLP v Procurator Fiscal, Glasgow 2017 HJAC 38: High Court decision relating to the recovery of privileged documents from a solicitor's office. The court held that where a search warrant had been obtained by the Crown for material over which there was an ongoing dispute about legal privilege, with no suggestion that the relevant solicitors' firm were involved in any form of illegality or any averment that it would be likely to destroy or conceal the relevant material, the application for the warrant, without intimation, was oppressive.

Data privilege

Content to follow shortly.

Key contacts



Alistair Drummond

Partner

alistair.drummond@dlapiper.com

T: +44 131 242 5056



James McGachie

Legal Director

james.mcgachie@dlapiper.com

T: +44 131 345 5135



Singapore

Last modified 25 June 2021

Concept of legal professional privilege

The discovery process in civil, criminal and regulatory proceedings in Singapore is subject to common law and statutory rules on legal professional privilege.

In common law, legal professional privilege can take two forms, namely legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications passing between a lawyer and client (or the agent of a client) for the purpose of providing or obtaining legal advice, whether or not litigation is contemplated. It does not protect communications between the lawyer and third parties, unless those third parties were acting as the client's agent at the time. In contrast, where the communication or document was prepared in circumstances where there is a reasonable prospect of litigation, the communication or document will be privileged, even if it passed between a lawyer and a third party that was not acting as the client's agent. This form of privilege is known as litigation privilege.

In terms of the statutory rules, sections 128 and 131 of the Evidence Act (Cap. 97) govern the extent of permissible disclosure of privileged communications. These provisions apply to 'judicial proceedings in or before any court' in Singapore, whether civil or criminal in nature (see section 2(1)).

Section 128 provides that no 'advocate or solicitor' is permitted, without their client's express consent, to disclose any communication made to them in the course and for the purpose of their employment as such advocate or solicitor by or on behalf of their client, or to state the contents or condition of any document, or to disclose any advice given, in the course and for the purpose of such employment.

Section 128A extends this prohibition to any 'legal counsel in an entity'. This includes legal counsel employed by corporate entities that are 'related' within the meaning of section 6 of the Companies Act (Cap. 50).

Section 129 specifies that sections 128 and 128A shall apply to interpreters and other persons who work under the supervision of legal professional advisers.

Section 131 further provides that no person shall be compelled to disclose to the court any confidential communication between them and their 'legal professional adviser'. The Evidence (Amendment) Act 2012 added to the Evidence Act a new section 131(2)(b), which clarifies that the term 'legal professional adviser' includes in-house counsel.

Sections 128 and 128A also provide that they shall not apply to protect from disclosure any communication between an advocate or solicitor and client made in furtherance of any illegal purpose, or any fact observed by an advocate or solicitor in the course of their employment showing that a crime or fraud has been committed since the commencement of their employment.

Discovery and legal professional privilege in civil proceedings

Legal professional privilege is an exception to a litigant's discovery obligations in civil proceedings. The Singapore Rules of Court provide for 'general' discovery (under O. 24, r. 1) and 'particular' discovery (under O. 24, r. 5). Where an order is made for general discovery (which the Court may make on its own motion or upon application by a party), the party against whom the order is made must provide a list of documents which:

- Are or have been in their possession, custody or power

- The party will rely on
- Could adversely affect their own case, or
- Adversely affect another party's case, or support another party's case

If a party makes an application for 'particular' discovery, the Court may make an order requiring any other party to submit an affidavit stating whether any document specified or described in the application is, or has at any time been in their possession, custody or power (and if not, when possession, custody or power over the document was lost). An application for particular discovery must be supported by an affidavit in which the applicant states their belief that the document (or class of document) sought in the application falls within one of the following descriptions:

- A document on which the party relies or will rely, or
- A document which could adversely affect its own case, adversely affect another party's case, or support another party's case

Applications for specific disclosure may also be made in respect of documents that may lead the applicant to embark on a train of inquiry resulting in their obtaining additional relevant information.

Where an order for general or particular discovery has been made, the duty to disclose the documents within the scope of the order is a continuing one that must be complied with throughout the life of the proceedings (O. 24, r. 8). Discovery obligations are taken seriously by the Singapore courts. Lawyers have an ethical duty to inform clients of their responsibilities in the discovery process – to preserve and make available all documents required to be disclosed – and to take the necessary steps to discharge those responsibilities. The Legal Profession (Professional Conduct) Rules require a lawyer to cease acting for a client if the client prevents the lawyer from complying with the duty to disclose documents, and judgments may be set aside (or cases dismissed) if discovery obligations are not met.

Legal professional privilege in criminal investigations

Legal professional privilege applies to criminal proceedings to the same extent and in the same manner as in civil proceedings. Legal professional privilege does not exempt a company from having to comply with a summons or order of court or police for the production of documents for the purposes of advancing criminal investigations. Protection is afforded against the production of such documents only in the prosecutorial process in criminal proceedings, provided legal professional privilege can be established. In *Ravi s/o Madasamy v Attorney-General* [2020] SGHC 221, the Singapore High Court observed that neither Sections 128 and 131 of the Evidence Act (Cap. 97) nor any provisions of the Criminal Procedure Code (Cap. 68) prohibit the seizure and review of legally privileged material by the police. The High Court went on to provide detailed guidance on how a claim of legal privilege may be asserted by the accused over documents lawfully seized by the police and the proper procedure by which the police or the Attorney-General's Chambers should deal with legally privileged material that has been seized in the context of a criminal investigation. In *Public Prosecutor v Soh Chee Wen & Anor* [2019] SGHC 235, the Singapore High Court held that the Prosecution has the right to assert litigation privilege in criminal proceedings. The High Court considered that litigation privilege may extend to written and oral communications between prosecutors/investigators and witnesses in the preparation of conditioned statements and in preparation of witnesses who are to give evidence in court. The High Court held that in order to assert litigation privilege to cover such communication, the Prosecution would have to show that the communications were made at a time when there was a reasonable prospect of litigation and the communications were made for the dominant purpose of litigation.

Legal professional privilege in regulatory investigations by the antitrust authority

In the context of antitrust regulations, the Competition Commission of Singapore (CCS) has broad powers under the Competition Act (Cap. 50B) to require the production of documents and information where it has reasonable grounds for suspecting infringements of the Competition Act.

However, the investigative powers of the CCS are not without limits. Communications between a professional legal adviser and his client, and communications made in connection with, or in contemplation of, legal proceedings or for the purpose of such proceedings, are regarded as privileged (this was clarified in the 2016 publication, *CCCS Guidelines on the Powers of Investigation in Competition Cases*). In particular, section 66(3) of the Competition Act provides that the CCS cannot compel the disclosure by a lawyer of information containing privileged communications made by or to the lawyer. Lawyers may legitimately refuse to disclose such information, but are nevertheless obliged to provide the name and address (if known) of the person to whom, or by or on behalf of whom, that privileged communication was made. We understand that the power to require production of such details will generally be exercised only to test the document's claim to privilege protection.

Documents that a person is required to disclose under the Competition Act, which they have identified as potentially self-incriminating, also may not be used against them in criminal proceedings, other than proceedings under the Competition Act in respect of their failure to produce documents or wrongful destruction of documents. However, such documents are admissible in civil proceedings against them,

whether or not those proceedings are brought under the Competition Act.

Scope of legal professional privilege

What is protected by legal professional privilege?

Legal advice privilege may be invoked by a party to avoid its having to make disclosure in court proceedings of documents recording confidential communications passing between a lawyer and client for the purpose of providing or obtaining legal advice, regardless of when those communications occur. In contrast, litigation privilege is only engaged when there is a reasonable prospect of litigation; documents prepared prior to that point will not be covered by litigation privilege.

The documents protected include communications that transfer information between the lawyer and their client or, only in respect of litigation privilege, a third party, as well as the contents or conditions of any documents with which a lawyer has become acquainted in the course and for the purpose of their professional employment. However, a pre-existing document not covered by privilege does not become privileged merely because it was exchanged between solicitor and client for the purposes of providing legal advice, even if done in anticipation of litigation.

Are communications with in-house counsel protected by legal professional privilege?

Yes. In February 2012, the Evidence Act was amended to include new sections 128A and 131(2)(b), which clarify that legal professional privilege covers communications with in-house counsel, provided that such communications were made to them in the course and for the purpose of their employment in that capacity. Prior to these amendments (introduced by the Evidence (Amendment) Act 2012), it was unclear whether the definition of 'legal professional adviser' in section 131 of the Evidence Act covered communications with in-house counsel. However, the general view, even prior to these amendments, was that, at common law, communications with in-house counsel likely would have been protected from disclosure.

Does legal professional privilege apply to correspondence involving non-national qualified lawyers?

Under Singapore law, legal professional privilege does not distinguish between foreign lawyers and Singapore-qualified lawyers with respect to the scope of protection; it applies equally to communications issued or received by both categories of lawyers.

How is legal professional privilege waived?

At common law and under the Evidence Act, a party may only waive their right to invoke legal professional privilege if they consented to the production or disclosure of the document in question. Consent may be given expressly or impliedly. In order to establish express consent, the courts will usually demand clear evidence of consent, usually in the form of writing.

Inadvertent production or disclosure of a privileged document would mean that the document's quality of privilege would be lost once the document has been inspected. However, even after inspection, there are two situations in which the court may at its discretion restrain the use of inadvertently disclosed documents that were previously privileged:

- The first is where the privileged document was obtained by the opposing party's lawyers by fraud.
- The second is where the opposing party's lawyers carried out inspection of the otherwise privileged document with full knowledge that the production or disclosure of the document was the result of an obvious mistake.

Legal professional privilege in the context of merger control

The CCCS has published its Guidelines on the Powers of Investigation in Competition Cases 2016, and which are, at present, the sole source of recognised principles for assessing the scope and extent of legal professional privilege in merger control procedures in Singapore.

The Guidelines are intended to help businesses understand how the CCCS will administer and enforce infringements and, in respect of privilege, they provide for the following:

- Under section 63 of the Competition Act ("**the Act**"), the CCCS has the power to require the production of specific documents and

information which relate to any matter relevant to the investigation. To exercise this power the CCCS must have reasonable grounds for suspecting that a Section 34, 47 or 54 prohibition has been infringed. The power is exercised by the service of a written notice and can be used on more than one occasion during the course of an investigation.

- The CCCS recognises that the authority to require the disclosure of information and documents is limited by privilege. Therefore, any communication between a professional legal adviser and their client, or communication made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings, which would be protected from disclosure in court proceedings, is excluded from the powers of investigation held by the CCCS. Communications with in-house lawyers and lawyers in private practice (including foreign lawyers) can likewise benefit from privilege.

We should also note that Section 7 of the Guidelines discusses self-incrimination and the disclosure of information by the CCCS. Although not directly relevant to legal professional privilege, it may be helpful to digest for application in certain circumstances.

Recent cases and/or other legal developments

The recent amendments to the Evidence Act, which clarify that the protections under sections 128 and 131 extend to in-house counsel, place renewed emphasis on the purpose test where legal professional privilege is concerned. Per their terms, the protections afforded by sections 128A and 131(2)(b) are available only where communications to and from the in-house lawyer are made 'in the course and for the purpose of his employment as such legal counsel'.

In *Boey Chun Hian v. Singapore Sports Council* [2013] SGHCR 15, the High Court indicated that a large volume of documents could be generated within a corporation, and that many of them may pass through the hands of the in-house counsel. The High Court considered that mere submission of a document to an in-house counsel should not easily attract a claim to legal professional privilege, as the effect would be that an excessive numbers of documents would be excluded from production in discovery, yet would still remain available for use by the party possessing those documents in a manner that would surprise their opponent. The High Court therefore favoured the application of the 'dominant purpose' test to determine whether legal advice privilege attaches to particular documents. This was clearly intended to curtail and discourage excessively broad claims to legal advice privilege when dealing with documents that have been provided to in-house counsel.

In *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442, the Singapore High Court held that the fact that a document was privileged (and illegitimately or inadvertently released to an opposing party) would not in itself be a bar to its admissibility as evidence. The court could, however, exercise its equitable jurisdiction to regulate the improper use of privileged documents that were improperly or inadvertently disclosed to protect its confidential character. In this case, the fact that the privileged documents were obtained as a result of the commission of cybercrime by a third party, was a key factor motivating the court's exercise of equitable jurisdiction to preclude the admissibility of the disclosed privileged documents. The decision of the High Court was upheld by the Singapore Court of Appeal in *Wee Shuo Woon v HT SRL* [2017] SGCA 23.

In the case of *ARX v Comptroller of Income Tax* [2016] 5 SLR 590; [2016] SGCA 56, the Singapore Court of Appeal clarified the scope of the Evidence (Amendment) Act 2012. The decision confirmed that communications with in-house counsel, even if they existed prior to the 2012 amendments, are protected by legal professional privilege. The Evidence Act was held not to detract from the existence of the common law principle that privilege extends to in-house counsel. Furthermore, the Court of Appeal clarified the applicable test for implied waiver of privilege and stated that a fact-sensitive exercise of judgment and objective enquiry is required. The mere reference to a privileged document in legal proceedings, as opposed to disclosure of its contents, did not constitute an implied waiver. When determining whether reference to a privileged document amounts to the existence of implied waiver, a court should examine all circumstances of the case including:

- The materiality of the information in the context of the pending proceedings
- The circumstances under which the disclosure took place
- Whether it may be said that the party had 'relied' or 'deployed' the advice to advance their case
- Whether it can be said that there is a risk that an incomplete and misleading impression had been given

Data privilege

Content to follow shortly.

Key contacts



John Goulios

Partner

john.goulios@dlapiper.com

T: +65 6512 9517



Slovak Republic

Last modified 01 July 2021

Concept of legal professional privilege

Legal professional privilege is not explicitly stipulated in the laws of the Slovak Republic. In general, the right to legal protection is stipulated in Article 47 of the Slovak Constitution (Act No. 460/1992 Coll.).

Act No. 586/2003 Coll. on advocates, as amended, stipulates that the advocate shall not reveal any information relating to the client's representation and shall treat such information as strictly confidential. It should be noted that a violation of this obligation is not a criminal offence and is considered a professional misconduct, possibly leading to disciplinary sanctions. The duty of confidentiality of the advocate applies to all matters related to the performance of their function unless otherwise stipulated by relevant legal regulations. Legal professional privilege does however exist in the context of criminal investigations.

Legal professional privilege in the context of civil litigation

In the course of a civil proceeding, Act No. 160/2015 Coll. the Civil Dispute Procedure Code, as amended, guarantees that during the procedure of examining a witness in civil proceedings, the witness has the obligation to maintain confidentiality if such obligation follows from laws or is recognized by Slovak Republic.

Legal professional privilege in the context of criminal investigations

According to Act No. 300/2005 Coll. Criminal Code, as amended, it is a criminal offence if someone breaches the secret provided in a closed letter or other documents transferred via post, electronic communications or computers. It is also a criminal offence to breach the secret of any document, audio record, record of image or other record, or computer data, all maintained in privacy, in a way that it will be disclosed or accessed by a third person or otherwise used in such way that a person's rights would be damaged in a severe way.

Furthermore, any communication between a client's and their defence counsel (ie the lawyer in criminal proceedings) is protected. Any information obtained from such communication may not be used for the purpose of a criminal proceeding and must be destroyed in the prescribed manner without undue delay.

Legal professional privilege in the context of investigations by the antitrust / competition authority

With regard to the execution of inspections by the Slovak Competition Authority, pursuant to Act No. 187/2021 Coll. on Protection of Competition, as amended, the Authority is entitled to request from natural and legal persons any information and documents concerning an undertaking, as well as other information and documents necessary to the Authority's activities. These persons are required to provide such information and documents to the Office within a period set by the Authority.

Scope of legal professional privilege

What is protected by legal professional privilege?

The express obligation of confidentiality is provided by the Slovak law only with respect to the lawyer/client relationship. This covers the right of the client for the protection of the information the client provided to the advocate in the course of the legal representation and the obligation of the advocate to maintain confidentiality of the obtained information. This obligation of the advocate does not apply in cases where the legal regulations require the advocate to prevent a criminal offence.

An advocate cannot be compelled to produce documents in court proceedings. The advocate can produce such materials only in cases when they are released from the obligation of confidentiality by their client or a client's successor.

In the course of civil proceedings, Act No. 160/2015 Coll. the Civil Dispute Procedure Code, as amended, guarantees the obligation of the witness to maintain confidentiality during their examination in civil proceedings (if such obligation follows from laws or is recognized by Slovak Republic). In the course of a criminal proceeding, any secret information, trade secret, or bank, tax, insurance or telecommunications secret shall be protected. The data which is subject to such secrecy can only be provided before the criminal proceeding or in the preparatory proceeding on request of a prosecutor or the judge. In this respect, communication between the advocates and clients shall also be protected from seizure.

There is no specification of documents which shall benefit from these obligations. Generally, any such documents that include certain confidential information shall be protected, whereas under the advocacy legislature, everything that the advocate learned of due to their engagement as the advocate shall be confidential. In addition, there is no specific time limitation for this obligation. The documents are protected for as long as there is a risk that by breaching the obligation some damage may be caused to the client.

Are communications with in-house counsel protected by legal professional privilege?

Since an in-house counsel is deemed to be an employee, their obligation to maintain confidentiality stems from the general obligation of the employee to maintain confidentiality of any information which they obtained during the performance of their employment. The obligations imposed specifically on advocates do not apply to in-house counsel.

Therefore, unlike an advocate, an in-house counsel is obliged to maintain confidentiality of any information which they obtained during the performance of their employment, whereas the advocate is obliged to maintain confidentiality of all information they obtained in relation to the performance of their function as an advocate.

As regards in-house counsel, the obligation to maintain confidentiality will apply to a foreign in-house counsel, provided they are employed in the Slovak Republic and the Slovak labour law regulations apply to them.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The obligation to maintain confidentiality stipulated in Act No. 586/2003 Coll. on Advocates, as amended, shall also apply to the so-called registered European lawyer (a European lawyer is a national of any EU Member State or a national of any other signatory of the EEA Treaty, who is authorised to pursue their professional activities and provide legal services as a sole practitioner under their home professional title). A registered European lawyer may provide legal services in the Slovak Republic under the terms and conditions laid down in this Act and they are obliged to fulfil the duties and obligations arising for lawyers under this Act, under separate legal rules and the Slovak Bar's internal rules (their duty to comply with the laws and legal rules applicable in their home Member State shall not be affected).

Recent cases and/or other legal developments

Legal professional privilege is not expressly recognised in Slovak legislation. There is unfortunately no case law in this respect, therefore it is difficult to anticipate the standpoint of the Slovak courts on this. According to recent information, however, the Slovak Competition Authority is proceeding in line with the case law of the Court of Justice of the EU, thus its procedure in the course of investigations shall be similar to the procedure of the European Commission in the course of investigations.

In line with this, the company shall prove to the Authority that:

- the respective document related to the subject of the investigation, and
- the document/correspondence relates to the communication between the undertaking and its advocate.

For this purpose, the employees of the Authority conducting the investigations do have the right to look into the document in order to identify to whom this document is designated, but they have no right to investigate the content of such document. If the company will not

allow the Authority's employees to look into the document, it will have to provide to the Authority sufficient evidence that indeed these documents present information relating to the communication with the advocate.

Data privilege

Content to follow shortly.

Key contacts



Michaela Stessl

Country Managing Partner

michaela.stessl@dlapiper.com

T: +421 2 5920 2142



Slovenia

Last modified 14 June 2022

Concept of legal professional privilege

In Slovenia, legal professional privilege can be understood in two contexts. In relation to public authorities, it is regulated by several different laws and regulations, each applicable to a specific field of law, such as criminal, civil and administrative procedure. In relation to clients, legal professional privilege is regulated by the Slovenian Attorneys Act.

Generally speaking, the attorney – client relationship in Slovenia is privileged and protected.

Scope of legal professional privilege

What is protected by legal professional privilege?

Litigation privilege

In litigation there are different scenarios where legal professional privilege may arise.

Civil litigation

Under the Slovenian Civil Procedure Act, an attorney has the right to refuse to testify in court about the facts related to advice given to a client based on two different provisions, namely:

- Acting under a power of attorney (also applicable to laymen); and
- Privilege of attorneys (legal professional privilege).

Legal professional privilege is subject to certain conditions. Most importantly, it only relates to information obtained in legal practice. If a client discloses certain information in a private setting, the information is not covered by legal privilege. However, not only information originating from the client is covered by these provisions, but also any information coming from other sources if it was obtained in the course of legal practice.

Furthermore, due to the obligation to maintain confidentiality under the Slovenian Attorneys Act, an attorney called as a witness against their client must refuse to answer any questions regarding information and matters which are subject to the obligation of confidentiality. This obligation also extends to people employed by the law firm.

The same rules apply to a court which orders document production during civil litigation. Primarily, each party is obliged to produce and present the documents to which it refers as evidence for its arguments. Additionally, under the Slovenian Civil Procedure Act, the court may request an opposing party to disclose a certain document if a party refers to it for evidentiary purposes. As above, an attorney has the right to refuse to provide documents to the court if they relate to advice given to a client. They are also prohibited from producing documents under the confidentiality rules of the Slovenian Attorneys Act.

The same rules apply where a court orders a third party to produce a document during court proceedings. As regards the attorneys, the abovementioned rules apply. An attorney can generally refuse such a request if the document was obtained in the course of legal

practice.

Criminal litigation

Under the Criminal Procedure Act, an attorney is similarly excused from testifying about facts which came to their attention in the course of their legal practice, unless they refer to certain criminal offences defined in paragraph 3 of article 65 of the Criminal Procedure Act, namely sex offences, offences against marriage, family and children, slavery, etc. In such cases, the attorney is obliged to testify. Furthermore, if the attorney wishes to testify regardless of these restrictions, the confidentiality rules of the Slovenian Attorneys Act still apply.

Generally speaking, the premises, devices and documents of an attorney are privileged throughout the criminal procedure and may only be investigated in exceptional circumstances. As a rule, the investigative actions normally take place before the main hearing, ie as part of the criminal investigation. However, a specific investigative action may be undertaken during the main hearing if required. The rules regarding legal privilege in the criminal investigation apply, as described below.

Administrative litigation

In case of litigation in front of administrative courts, the rules relating to legal privilege in civil litigation apply.

Legal advice privilege

The attorney–client relationship is governed by the provisions of the Slovenian Attorneys Act. Under the act, an attorney is obliged to maintain confidentiality regarding any information which was disclosed by a client. This obligation to maintain confidentiality also extends to people employed by the law firm. However, these provisions do not affect external information/document production requests (in litigation or investigations etc) as they are subject to specific rules, as described above.

Legal professional privilege in the context of criminal investigations

During a criminal investigation, the premises, devices and documents of an attorney, attorney candidate (ie an intermediate stage before an associate becomes an attorney) or an associate are generally privileged and can only be investigated based on a court order.

Objects belonging to an attorney, attorney candidate or an associate may only be confiscated based on a court order, in which it is established that specific information cannot be obtained in any other way. Two hours before the confiscation, the court order must be served on the Slovenian Bar Association which must send its representative to attend the investigative action.

The Slovenian Attorneys Act also regulates the investigation of a law firm as a whole rather than a specific attorney. A law firm investigation also requires a court order in which the files and the objects are specified and detailed.

Importantly, if the pre-trial judge overseeing the investigative action establishes that the confiscated object or information was given to the attorney, attorney candidate or an associate by the suspect of the criminal investigation, such object or information is immediately sealed and returned to the attorney, unless the suspect requests otherwise or if the object may be confiscated based on the rules of public policy and public order.

During an investigation, any electronic devices belonging to an attorney, attorney candidate or an associate can only be investigated based on a court order. A representative of the Slovenian Bar Association must be present. Legal professional privilege applies (see above). If the electronic device cannot be confiscated without maintaining the confidentiality of the data, then only the investigating judge (or an expert appointed by such judge) may confiscate the device.

It should also be noted that the confidentiality rules of the Slovenian Attorneys Act still apply and restrict the attorney's actions.

Legal professional privilege in the context of investigations by the antitrust/competition authority

The Slovenian Prevention of Restriction of Competition Act, which regulates the investigations by the Slovenian Competition Protection Agency, contains a specific provision regarding privileged communications. Accordingly, any communication between an attorney and its client (ie a client under investigation) which is being investigated is excluded from the investigation. In case of a disagreement between an attorney and the Competition Protection Agency over the applicability of this exclusion, a sealed document or a copy is sent to the administrative court which decides on this matter. There is no appeal against the decision of the court.

During the minor offence proceedings, which may follow the investigation, the rules regarding the criminal investigation apply, as described above.

Legal professional privilege in merger control procedure

The Slovenian Prevention of Restriction of Competition Act contains no specific provisions regarding legal professional privilege in the context of a merger control procedure.

Are communications with in-house counsel protected by legal professional privilege?

Under Slovenian law, legal professional privilege does not apply to in-house counsel. In order to be subject to legal professional privilege, an individual must be an attorney. However, to register or remain registered with the Slovenian Bar Association and obtain the title of attorney (*odvetnik/odvetnica*), lawyers need to be independent and not under the control of the client. These requirements are not met by in-house counsel as they are normally integrated into the organisation of their client. In-house counsel usually have various functions which extend beyond the services normally provided by a lawyer, sometimes including management responsibilities.

There are no explicit legal provisions protecting communications between in-house counsel and the officers, directors or employees of a company. However, other rules which are not specific to attorneys contain provisions which achieve a similar effect. For example, the Slovenian Employment Relationship Act provides an obligation of an employee (including in-house counsel) to protect the employer's business secrets.

Furthermore, any communications between in-house counsel and officers, directors or employees of the company are subject to a general duty of secrecy. These secrecy obligations, however, are not applicable if the employee is called as a witness in criminal, administrative or civil proceedings. Furthermore, the secrecy obligation normally only lasts for the duration of the respective employment relationship.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Legal professional privilege only applies to attorneys registered with the Slovenia Bar Association and to European attorneys (attorneys from other EU and EEA Member States). If a non-national qualified attorney registers with the Slovenian Bar Association as a foreign attorney (*tuji odvetnik/odvetnica*) or if meeting certain criteria as an attorney (*odvetnik/odvetnica*), then legal professional privilege applies. However, there is no guarantee that the client's communication with other foreign qualified attorneys is protected.

How is legal professional privilege waived?

The client may waive legal professional privilege in relation to its attorney, but this does not mean that the attorney loses their right to refuse to provide evidence or testify in a criminal investigation or litigation against the client. This is because the right to refuse to testify must be exercised in accordance with the professional code of conduct (Slovenian Code of Attorneys' Professional Conduct).

According to this code, an attorney may be released from the duty to maintain confidentiality if disclosure would obviously benefit the client or if disclosure is necessary for important reasons personal to the attorney. However, the client may prohibit the attorney from disclosing information even if such disclosure obviously benefits the client, unless the attorney can show an extraordinary personal benefit to the client.

An exception to legal professional privilege applies in the context of prevention of money laundering and the financing of terrorism. If a client seeks advice relating to money laundering activities, or the financing of terrorism, the attorney is obliged to report such activities. This rule does not apply in respect of facts learned in the preparation of court proceedings. Additional disclosure obligations and procedures in this context also apply.

Legal professional privilege in the context of merger control

The Slovenian Prevention of Restriction of Competition Act contains no specific provisions regarding legal professional privilege in the context of a merger control procedure.

Recent cases and/or other legal developments

In 2016, the Slovenian Constitutional Court published a decision which lays the foundation for the current regime relating to legal professional privilege. The court ruled that an attorney can respect the client's confidentiality only when their own confidentiality is protected. Legal professional privilege may only be limited based on an act adopted by a legislator and in exceptional cases, such as

criminal investigations. The decision resulted in the amendments to the Slovenian Criminal Procedure Act in 2019. Effectively, the level of legal professional privilege was raised considerably.

Data privilege

Content to follow shortly.

Key contacts



Jasna Zwitter-Tehovnik

Partner

jasna.zwitter-tehovnik@dlapiper.com

T: +43 1 531 78 1025



Domen Brus

Associate

domen.brus@dlapiper.com

T: +43 1 531 78 1042



South Africa

Last modified 15 March 2019

Concept of legal professional privilege

Legal professional privilege in South Africa consists of two components:

1. **Legal Advice Privilege:** protects communications between legal advisers and their clients, provided that:
 1. The legal adviser must have been acting in their professional capacity as a legal professional
 2. The communication must have been made in confidence
 3. The communication must have been made for the purpose of obtaining or giving legal advice, and
 4. The advice should not have been sought for an unlawful purpose
2. **Litigation Privilege:** protects communications between legal advisers and / or their clients on the one hand; and third parties on the other hand provided that:
 1. The legal adviser must have been acting in their professional capacity as a legal professional
 2. The communication must have been made in confidence
 3. The communication must have been made for purposes of being placed before the legal adviser in order to enable them to advise
 4. The communication must have been made for the purpose of intended or contemplated litigation, and
 5. The communication / advice should not be for an unlawful purpose

The contents of privileged documents need not be disclosed; however, the existence of a privileged document must be disclosed.

No distinction is drawn between legal professional privilege in the context of litigation, criminal investigations and investigations by the competition authority, as long as either component referred to above is satisfied.

Furthermore, any communications that fall within the ambit of legal professional privilege remain protected during any investigations conducted by the South African Competition Commission pursuant to merger control. Where legal professional privilege is claimed during a search or investigation by the Competition Commission, the investigator may request, by order of the High Court of South Africa, that the allegedly privileged communications be attached and removed by the Sheriff of the High Court for safekeeping until that court determines whether or not the communications are in fact legally privileged.

Scope of legal professional privilege

What is protected by legal professional privilege?

Any communication that satisfies the requirements of legal professional privilege is protected. If a document is not privileged, privilege cannot be created by simply handing over the document in a confidential manner to a legal adviser, as it will not be a communication for the purpose of obtaining legal advice. Documents that come into existence in the business of the client are not protected from disclosure merely because they may reach the hands of a legal adviser or because litigation has commenced.

Are communications with in-house counsel protected by legal professional privilege?

The court in *Mohamed v President of South Africa and Others 2001 2 SA 1145 (C)* found that legal professional privilege can be claimed in respect of communications with internal legal advisers where they amount to the equivalent of an independent external legal adviser's confidential advice. In order for legal professional privilege to apply in this instance, in addition to compliance with the requirements ordinarily applicable, the party claiming the privilege would also need to prove that the communications in question were made in the legal adviser's capacity as such, as opposed to in a general commercial or managerial capacity.

Does legal professional privilege apply to communication with foreign qualified lawyers?

Although the South African courts have not yet pronounced on the issue, it is likely that communications with foreign qualified lawyers, that satisfy the requirements of legal professional privilege, will also be protected.

How is legal professional privilege waived?

Legal professional privilege is for the client to claim and must be claimed before it can exist. Only the client can waive legal professional privilege. This can also be done through an agent of the client. Waiver of legal professional privilege can be express, implied or imputed. It is implied if the person who claims the privilege discloses the contents of a document, or relies upon it in its pleadings or during court proceedings. It would also be implied if only part of the document is disclosed or relied upon. For a waiver to be implied the test is objective, meaning that it must be judged by its outward manifestations. Imputed waiver occurs when fairness requires the court to conclude that privilege was abandoned.

Recent cases and/or other legal developments

- In the matter of *The Competition Commission v. Arcelormittal South Africa Ltd*, delivered by the Supreme Court of Appeal in May 2013, it was held (in the context of the Commission's corporate leniency policy) that reference to a part of a document sufficient to constitute waiver destroys the legal professional privilege attached to the entire document, and not just the part referred to (unless the document consists of severable parts and is capable of severance).
- In *A Company and Two Others v The Commissioner for the South African Revenue Service 2014 (4) SA 549 (WCC)* the court held that where a fee note sets out the substance of the privileged communications in respect of the person seeking or giving of legal advice, or contained sufficient particularity of their substance to constitute secondary evidence thereof, those parts, but not the document as a whole, would be amenable to the privilege. The test was whether, upon an objective assessment, the references disclose the content, and not just the existence, of the privileged material. The privilege should be asserted by blacking out the information, so as to disclose those parts of the document that were not subject to the privilege and covering up those that were, and that the party asserting the legal professional privilege should generally be able to provide a rational justification for such claim without needing to disclose the content or substance of the matter in respect of which the privilege is claimed.
- The right to privilege is also recognised by the Promotion of Access to Information Act 2 of 2000, which was enacted to give effect to the right to access to information. This piece of legislation upholds privilege by firstly excluding its application to pending litigation, where the rules of discovery remain unchanged, and secondly prohibiting access to privileged records.

Data privilege

Content to follow shortly.

Key contacts



Peter Bradshaw

Director

peter.bradshaw@dlapiper.com

T: +27 11 302 0810



South Korea

Last modified 19 July 2021

Concept of legal professional privilege

There are no express provisions regarding attorney-client privilege in Korean law, including with regard to any definition, scope, or applicability.

However, under various laws, there are provisions relating to lawyers' obligations of confidentiality and the right to refuse to give testimony that may be detrimental to a client. Some practitioners therefore take the view that the concept of 'legal professional privilege' is recognised under Korean law as a by-product of those confidentiality obligations.

However, even under such interpretation, privilege would only be recognized as a by-product or derivative effect of the obligation of confidentiality, and therefore it would not be capable of being directly invoked by the client. Moreover, in practice, there have been instances where investigative authorities have expressly refused to acknowledge that documents were covered by legal professional privilege.

There have been continuous legislative attempts to introduce attorney-client privilege into the Korean legal system. In fact, a group of members of the National Assembly introduced two separate bills concerning attorney-client privilege during the 20th National Assembly (2016~2020). These bills suggested amendments to the current 'Attorney-at-Law Act' to include a provision expressly granting the right to refuse disclosure of documents containing privileged communications between an attorney and their client, unless there is a special exception permitting disclosure or the client consents to its disclosure. However, these bills were not passed by the National Assembly and subsequently discarded with the end of the 20th National Assembly's term. Currently in the 21st National Assembly (2020~2024), the 'Attorney-at-Law Act' amendment bill has again been proposed, with the substantively similar contents including the introduction of attorney-client privilege. Whether the proposed bill will be passed by the National Assembly and ultimately enacted is yet to be seen.

The following assumes that legal professional privilege exists in Korea as a by-product of the obligation of confidentiality affecting lawyers.

Legal professional confidentiality in South Korea is regarded as an essential element in establishing a sound lawyer-client relationship based on trust.

In order to facilitate lawyer-client communications, the client's confidences must be protected. Legal advice between lawyer and client is protected through (i) the constitutional right to assistance of counsel (Constitution of the Republic of Korea – Article 12(4)), (ii) the lawyer's right to resist seizure of articles held in their custody in consequence of a mandate they have received in the course of their profession (Korean Criminal Procedure Act – Article 112), (iii) the lawyer's right to refuse to testify in respect of secrets of other persons of which they obtained knowledge in consequence of a mandate they received in the course of their profession (Criminal Procedure Act – Article 149).

The Foreign Legal Consultant Act has codified the rule of confidentiality as applied to communications with non-national qualified lawyers (The Foreign Legal Consultant Act – Article 30).

Correspondence between in-house counsel and their clients is not expressly denied protection by legal professional confidentiality. In the case of in-house counsel, the existence of privilege is subject to stricter examination. In other words, one would have to consider that there is a strong opinion against protecting lawyer-client privilege between in-house counsel and the company because in-house counsel has a dual position as an employee and counsel at the same time.

Overall, there is increasing demand for the scope of protection afforded by the principle of confidentiality to be broadened to cater for the growing diversity of legal professionals.

In South Korea, the rule of confidentiality for legal professionals is primarily set out in the form of a duty-violation which is punishable by law. Article 317 of the Criminal Act makes it a crime for a lawyer, someone in an assisting capacity, or any person formerly engaged in the profession to disclose another's secret which has come to their knowledge in the course of practice of their profession. The article stipulates that such disclosure shall be punishable by:

- imprisonment or imprisonment without prison labour for not more than three years;
- suspension of qualifications for not more than ten years; or
- a fine not exceeding seven million KRW.

Under Article 26 of the Attorney-at-Law Act and Article 18 of the Korean Bar Association's Ethics Code for Lawyers, the duty of confidentiality is regarded as one of the most fundamental duties in shaping lawyer-client relationships.

The Korean Bar Association and the Ministry of Justice have each established their own Attorney Disciplinary Committees, in which disciplinary action may be taken against lawyers violating the applicable rules (Attorney-at-Law Act – Article 92).

Legal professional 'confidentiality,' as discussed below, is set out in the Civil Procedure Act and the Criminal Procedure Act. The obligation of confidentiality is only subject to certain permitted exceptions including obtaining the client's consent or disclosure being necessitated by matters of public interest.

Legal professional confidentiality in the context of civil litigation

Article 315 of the Civil Procedure Act stipulates that *'a witness may refuse to testify if an attorney-at-law, patent attorney, ... or a holder of other post liable for keeping secrets under statutes, ... or a person who used to be in such post, is examined on matters falling under the secrets of their official functions.'*

However, exceptions to the general rule above include situations where:

- a public interest of grave importance is at stake;
- the client has consented; or
- a lawyer is defending their own rights.

Legal professional confidentiality in the context of criminal investigations

Pursuant to Article 112 of the Criminal Procedure Act, a person who is or was a licensed lawyer may resist seizure of articles entrusted to them by their clients on the basis that they are confidential. Article 149 of the Criminal Procedure Act states that a lawyer may refuse to testify regarding a client's confidential information, where this was obtained in the course of performing their legal duties. Exceptions to the confidentiality obligation may apply if the client has consented, or if the matter is one of grave public concern.

Legal professional confidentiality in the context of investigations by the competition authority

If the case leads to an administrative lawsuit or a criminal lawsuit, legal professional confidentiality, as outlined above, will apply. Otherwise, the general rules of confidentiality embodied in the Criminal Act and the Attorney-at-Law Act will apply. Article 50-2 of the Monopoly Regulation and Fair Trade Act requires public officials in charge of an investigation to conduct their investigations within applicable legislative limits in order to enforce the Act. Article 50-2 goes on to state that public officials are prohibited from abusing their investigative authority for any other purpose, etc. While this article may be open to interpretation, investigations carried out by the antitrust authority will be within necessary limits to prevent any hindrance to a lawyer's ability to exercise their duty of legal professional confidentiality.

Scope of legal professional privilege

What is protected by legal professional confidentiality?

The procedural laws mentioned above form the basic scope of legal professional confidentiality in South Korea. Article 18 of the Korean Bar Association's Ethics Code for Lawyers further illustrates the scope of legal professional confidentiality with regard to the 'work product

doctrine' – a concept which originated from the 1947 case of *Hickman v. Taylor*, in which the Supreme Court affirmed a decision of the United States Court of Appeals for the Third Circuit that excluded from discovery the oral and written statements made by witnesses to a defendant's lawyer.

Paragraph 1 of Article 18 states the general rule: *'Attorneys shall not divulge or unfairly utilize confidential information of the client obtained in the course of performing their duties.'* Paragraph 2 and 3 embody the 'work product doctrine,' in which the Code prohibits disclosure of *'correspondence with clients and documents/articles submitted by clients'* (ordinary work product; Paragraph 2) and *'documents, memos, or other similar materials produced by attorneys'* (opinion work product; Paragraph 3).

Exceptions to the rule on confidentiality are set out in Paragraph 4 of Article 18. Relevant information may be disclosed or utilised to the minimum extent necessary where: (i) a matter of grave public concern is at issue; (ii) the client has given consent; or (iii) it is necessary for the lawyer to defend their own rights.

Korean law does not recognize the concept of 'attorney client privilege,' which gives 'clients' the right to refuse disclosure of confidential communications between the client and their lawyer. In 2012, the Supreme Court of Korea overturned a lower court decision which sought to derive attorney client privilege from the Korean constitution.

However, legal professional 'privilege' can still be exercised under Criminal Procedure Act Articles 112 and 149, and Civil Procedure Act Article 315 in terms of rights of 'attorneys' to refuse testimony regarding client confidences, and to resist seizure of clients' articles.

Are communications with in-house counsel protected by legal professional confidentiality?

In-house counsel are not explicitly excluded from the protections offered by legal professional confidentiality. However, there is a growing demand for the application of legal professional confidentiality to in-house counsel to be expressly recognised. On February 24, 2014, the Korean Bar Association's Ethics Code for Lawyers was amended to include a declaration that maintaining independence within the company is one of the most fundamental duties of in-house counsel (the Korean Bar Association's Ethics Code for Lawyers – Article 51). In effect, this revision highlights that in-house counsel are independent from the corporate entity, and thus strengthens the claim that the same principles of professional confidentiality which apply to lawyers in private practice should also apply to in-house counsel.

In practice, however, when a search and seizure is conducted against a corporation, any legal opinions/advice from in-house counsel are not protected by legal professional confidentiality, and may be used and investigated by the investigative authorities. The Korean courts do not sanction such practice.

Does legal professional confidentiality apply to the correspondence of non-national qualified lawyers?

There are no laws or cases that resolve these issues in the context of criminal procedure. However, in civil procedure, legal professional confidentiality may apply to any communications with non-national qualified lawyers. Under Article 315 of the Civil Procedure Act, a witness may refuse to testify if a lawyer or a *'holder of other post liable for keeping secrets under statutes'* is examined on matters pertaining to such secrets. Under Article 30 of the Foreign Legal Consultant Act, a foreign legal consultant has a duty to keep clients' secrets confidential. Therefore, foreign legal consultants also enjoy legal professional confidentiality, and the right to refuse testimony.

The rule of confidentiality is embodied in the Foreign Legal Consultant Act as one of the primary duties of the Foreign Legal Consultant. According to Article 30 of the Foreign Legal Consultant Act, *'no person who is or was a foreign legal consultant shall disclose any confidential matter of which they become aware in relation to their duties.'* This rule shall not apply where disclosure of confidential matters is specifically prescribed otherwise by another law.

The law takes violation of duty very seriously. According to Article 47 of the Foreign Legal Consultant Act, anyone who discloses any confidential information in violation of Article 30 and any person who obtains and uses confidential information for any illegal gain, with knowledge of such violation, may be liable to imprisonment with prison labour for not more than five years, and/or a fine not exceeding 30 million KRW.

How is legal professional confidentiality waived?

There are a number of situations in which legal professional confidentiality may not apply or may be waived. For example, legal professional confidentiality can be waived if necessary steps were not taken to ensure that the communications, both written and oral, were undertaken in confidence, or if the client or the lawyer voluntarily discloses confidential information during an investigation.

Recent cases and/or other legal developments

On May 17, 2012, the Supreme Court of Korea ruled on whether a legal memorandum which contained a client's admission of guilt could be used as incriminating evidence in court (Case Number: 2009 Do 6788). The court held that Article 149 of the Criminal Procedure Act granted lawyers the right to refuse testimony when asked whether the lawyer had prepared the legal memorandum. However, if the lawyer acknowledges that they produced the legal memorandum, thereby waiving the right to refuse testimony, then the legal memorandum can be used as incriminating evidence.

The court emphasized that the inadmissibility of the legal memorandum was not by virtue of 'lawyer-client privilege,' explaining that lawyer-client privilege does not extend so far as to protect clients seeking routine legal advice against whom investigations/trials have not yet commenced. The reluctance of the Supreme Court of Korea to rely on the principle of lawyer-client privilege in reaching its decision has invited some criticism from the Korean legal community.

In August 2016, the Korean Prosecution instituted an investigation against the owner family of the Lotte Group for tax evasion. During that process, the Prosecution reportedly summoned as witnesses and questioned the lawyers from the law firm that provided legal advice to the owner family, and also applied for a search warrant in respect of the tax related materials held by the owner family. The court issued the warrant, and given the impending threat of additional warrants being issued against the law firm, the law firm had to 'voluntarily' submit its materials related to this case.

The Korean Bar Association issued a statement criticizing the actions of the Prosecution for such investigative practices.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

There are no express provisions regarding attorney-client privilege in Korean law, including with regard to any definition, scope, or applicability.

However, under various laws, there are provisions relating to attorneys' obligations of confidentiality and the right to refuse to give testimony that may be detrimental to a client. These include:

- the constitutional right to assistance of counsel (Article 12(4) of Constitution of the Republic of Korea)
- attorneys' duty of confidentiality (Article 26 of the Attorney-at-Law Act)
- attorneys' right to resist searches and seizures (Article 112 of the Criminal Procedure Act)
- attorneys' right to refuse testimony (Article 315, Paragraph 1 of the Civil Procedure Act)
- attorneys' right to refuse to testify in respect of secrets of other persons of which they obtained knowledge in consequence of a mandate they received in the course of their profession (Article 149 of Criminal Procedure Act)
- attorneys' right to refuse production of documents (Article 344, Paragraph 1, Subparagraph 3, Item C of the Civil Procedure Act)

The Foreign Legal Consultant Act has codified the rule of confidentiality as applied to communications with non-national qualified attorneys (Article 30 of the Foreign Legal Consultant Act).

Some practitioners therefore take the view that the concept of legal professional privilege is recognized under Korean law as a by-product of those confidentiality obligations.

There have been continuous legislative attempts to introduce attorney-client privilege into the Korean legal system. In fact, a group of members of the National Assembly introduced two separate bills concerning attorney-client privilege during the 20th National Assembly (2016~2020). These bills suggested amendments to the current Attorney-at-Law Act to include a provision expressly granting the right to refuse disclosure of documents containing privileged communications between an attorney and their client, unless there is a special exception permitting disclosure or the client consents to its disclosure. But these bills were not passed by the National Assembly and subsequently discarded with the end of the 20th National Assembly's term. Currently in the 21st National Assembly (2020-2024), a proposed amendment to the Attorney-at-Law Act would expand Article 26 on the attorney's duty of confidentiality to include the protection of clients' rights via attorney-client privilege. The amended Article 26 would prevent the disclosure of:

- confidential communications between an attorney and a client relating to a matter;
- any material provided by a client to an attorney relating to a matter; and
- any material prepared by an attorney relating to a matter, unless
- the client consents to such disclosure;
- there is significant public interest for disclosure, such as the client obtaining legal advice for criminal purposes; or
- the attorney must disclose such material or communications to defend themselves in a dispute with the client.

Further, the amendment would prohibit such protected communications and materials from being used as evidence in any judicial or administrative proceeding. However, whether the proposed bill will be passed by the National Assembly and ultimately enacted is yet to be seen.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

As mentioned above, there are no express provisions regarding attorney-client privilege in Korean law.

The proposed amendment to the Attorney-at-Law Act providing for such privilege does not stipulate any particular time period for asserting privilege.

c) Are communications to / by companies and in-house counsel protected by privilege?

Correspondence between an in-house counsel and their clients is not expressly denied protection by legal professional confidentiality. In the case of in-house counsel, the existence of privilege is subject to stricter examination. In other words, one would have to consider that there is a strong opinion against protecting attorney-client privilege between in-house counsel and the company because in-house counsel has a dual position as an employee and counsel at the same time.

The proposed amendment to the Attorney-at-Law Act providing for such privilege does not differentiate between outside and in-house counsel with respect to asserting privilege.

d) Are there any specific requirements of a privileged incident response engagement letter?

The proposed amendment to the Attorney-at-Law Act providing for such privilege does not provide for any specific requirements regarding a privileged incident response engagement letter. However, should the proposed amendment become law, it would be advisable for such letters to include statements that the third party is involved for the attorney to advise the affected entity, to maximize the chance of protecting any communications and material with privilege.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

The proposed amendment to the Attorney-at-Law Act providing for such privilege may protect such material, as long as it is provided to or prepared by the attorney. However, the proposed amendment is silent on the scope of such privilege, such as whether the copy of the material provided to the attorney still in the client's possession is also protected by privilege, or whether material prepared by third parties who are retained by the attorney for a matter is also protected by privilege.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

Please see our response to question 2a above.

c) How are seized documents put into evidence in a criminal / civil procedure?

Pursuant to Article 112 of the Criminal Procedure Act, a person who is or was a licensed attorney may resist search or seizure of articles entrusted to them by their clients on the basis that they are confidential.

In practice, however, when a search or seizure is conducted against a corporation, any legal opinions/advice from in-house counsel are not protected by legal professional confidentiality, and may be used and investigated by the investigative authorities. The Korean courts do not sanction such practice.

Therefore, documents obtained via seizure by investigative agencies can be used as evidence in the same manner as other evidence according to the relevant evidentiary laws in either the Civil Procedure Act or the Criminal Procedure Act.

The proposed amendment to the Attorney-at-Law Act providing for such privilege would prevent such documents from being used as evidence. One of the exceptions to privilege ((a) the client consents to disclosure, (b) there is significant public interest for disclosure, such as the client's obtaining legal advice for criminal purposes, or (c) the attorney must disclose such material or communications to defend him/herself in a dispute with the client) would have to be met for such material to be used as evidence in any judicial or administrative proceeding.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

There are a number of situations in which legal professional confidentiality may not apply or may be waived. For example, legal professional confidentiality can be waived if necessary steps were not taken to ensure that the communications, both written and oral, were undertaken in confidence, or if the client or the attorney voluntarily discloses confidential information during an investigation.

The proposed amendment to the Attorney-at-Law Act providing for such privilege provides for limited exceptions to such privilege, ie:

- the client consents to disclosure;
- there is significant public interest for disclosure, such as the client obtaining legal advice for criminal purposes; or
- the attorney must disclose such material or communications to defend themselves in a dispute with the client.

In addition, communications between attorneys and clients must be confidential to be protected (the same condition is not stipulated for material provided by the client to the attorney, or material prepared by the attorney in the current amendment). Therefore, under the proposed amendment, the client would have to ensure that communications with the attorney are confidential to maximize the scope of privilege.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

If a company needs to rely on the findings of internal investigations and use them in a data breach litigation as favorable evidence, such reliance and use can be deemed as consenting to disclosure under the proposed amendment to the Attorney-at-Law Act. Yet, it is unclear as to whether a concept called "issue waiver" would apply under the current version of the amendment.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

The amendment to the Attorney-at-Law Act does not have express provisions. However, whether notification to or sharing of the information constitutes a waiver will depend on the scope and nature of the information being shared with affected individuals or third parties in individual cases. Therefore, to avoid being deemed as an inadvertent waiver, one should exercise prudence and care when sharing the contents of such information.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

We have not located any court decision in which the issue of data breach privilege was addressed.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/ cross-border scenario?

South Korea is not a multi-state nation, so the question would be inapplicable. The proposed amendment does not expressly contemplate cross-border scenarios.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

The proposed amendment does not have express provisions governing the situation above. Therefore, whether the privileged data in another jurisdiction would be treated as privileged in our jurisdiction is up to judicial determination through case laws.

d) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

The proposed amendment does not have express provisions governing the situation above. In a similar vein, it also remains to be seen what (additional) elements our courts would require so privileged data in a foreign jurisdiction would remain privileged in our jurisdiction.

Key contacts

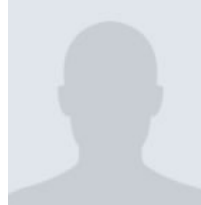


Daniel Lee

Country Managing Partner

daniel.lee@dlapiper.com

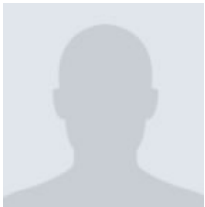
T: +82 2 6270 8899



Kyunghoon Lee

khl1@leeko.com

T: +82.2.772.4419



Jaewoo Kwak

jaewoo.kwak@leeko.com

T: +82.2.772.4985



Spain

Last modified 15 November 2021

Concept of legal professional privilege

Spanish general rules regarding professional conduct establish that attorneys are subject to duties of confidentiality and secrecy and, following that reasoning, documents and communications exchanged between lawyer and client are protected (Article 542.3 of the Judiciary Law, articles 21 et seq. of the General Regulation of the Legal Profession, the '**GRLP**').

Spanish regulations focus on the obligation to maintain professional secrecy, which guarantees the ability to discuss freely with a lawyer the issues regarding a legal case without the risk of interference by public authorities. Professional secrecy is a fundamental part of the right to defence as guaranteed by the Spanish Constitution in Article 24. And, in this context, article 23 GRLP confirms that communications between lawyers and their clients shall be kept confidential.

The Spanish GRLP was updated in July 2021. Insofar as legal professional privilege is concerned, the two most relevant changes are:

- lawyers can ask for the bar association's dean to be present in case there is a search in her/his office, and
- clients can expressly authorize their lawyers to waive their duty to secrecy.

It is important to note that Spanish regulations do not distinguish between in-house and external lawyers. Both are subject to the same rights and obligations and in-house lawyers are expressly recognised as members of the legal profession subject to the same legal regulations and principles that apply to the wider profession, including professional secrecy. However, as explained below, not all regulators in Spain are strictly following this approach.

Legal professional privilege in the context of civil litigation

From a civil perspective, there is national case law that states that a lawyer, in application of professional secrecy, has the right not to stand as a witness in a trial and if a lawyer stands as a witness, they have the right to withhold confidential information belonging to their client.

Court rulings have held that information or evidence obtained as a result of a breach of legal professional privilege is invalid in Court and that lawyers are not obliged to provide information/documentation received from the client in preliminary proceedings such as pre-action disclosure.

Pre-trial discovery proceedings in Spain

Spain has recently incorporated pre-trial discovery into sections 283-bis(a) to 283-bis (k) of the Spanish Law on Civil Procedure (hereinafter, the '**SLCP**'), in line with the EU Damages Directive.

Section 283-bis(b) of the SLCP has incorporated the Damages Directive's rules on access to confidential information. Evidence subject to legal privilege or professional secrecy is accordingly protected. Depending on the specific circumstances of each case, the Court may grant particular measures in order to protect the confidentiality of certain information (such as drafting a non-confidential version of a resolution redacting confidential information or restricting public access to hearings).

Section 283-bis(k) of the SLCP also sets out the consequences of non-compliance with obligations of confidentiality. The aggrieved party

may request that the Court impose any of the following measures:

- Dismissal of the legal action or evidence in question
- Holding the person in breach liable for the damage caused by the disclosure; and
- Payment of costs.

Depending on the specific circumstances of each case, the Court may impose a fine between 6,000 and 1,000,000 Euros on the person in breach.

Legal professional privilege in the context of criminal investigations

From a criminal perspective, professional secrecy between lawyer and defendant is also protected and cannot be violated by the parties, courts, public prosecutors or police/judicial authorities. Note, also, that the unlawful disclosure of information by lawyers is a punishable act.

In addition, lawyers must not use information entrusted to them by a client as a result of their professional activity where such use would be contrary to the client's best interests. This is expressly set out in Article 416.2 of the Spanish Criminal Procedure Act and supported by case law of the Supreme Court.

The lawyer's duty and right to professional secrecy includes information from the client, as well as the opposing party, colleagues and all facts and documents of which he has become aware or which he has received in the course of his professional duties.

The lawyer may not provide the court or his client with letters, communications or notes received from the lawyer of the other party, unless expressly authorised to do so by their lawyer.

Conversations held with clients, opposing parties or their lawyers, in person or by any telephone or electronic means, may not be recorded without the prior agreement of all those involved and, in any case, shall be covered by professional secrecy.

The case law of the Supreme Court as well as of the Constitutional Court (Tribunal Constitucional) states that the only valid interception of communications between lawyer and client during a criminal investigation is where there is some incriminating evidence against the defence lawyer.

Professional secrecy can be waived on an extraordinary basis when the lawyer exceeds their legal duty and willingly cooperates in criminal activities.

Legal Professional Privilege in the context of investigations by the competition authority

From a competition law perspective, the above considerations are also applicable.

However, the Spanish competition authority takes the view, following rulings from the European Court of Justice (e.g., Akzo judgment), that communications with in-house lawyers are not covered by legal professional privilege. There are queries as to whether this position is fully aligned with Spanish legislation, but case law has yet to fully clarify the issue.

Legal Professional Privilege in the context of merger control procedures

As is the case for merger control procedures before the European Commission, the Spanish competition authority is increasing the volume of documentation requested for the assessment of transactions. This is related to the sophistication and complexity of the transactions and the assessment methods in recent years as well as the markets in which the transactions take place.

Notwithstanding the above, to date there is no particular case law in Spain dealing with legal professional privilege in the context of merger control; privileged information receives similar treatment in the context of both sanctioning and merger control procedures.

Scope of legal professional privilege

What is protected by legal professional privilege?

The general rule is that any spoken or written communications, documents or correspondence exchanged between a lawyer and their client, opposing parties and other lawyers within the context of a lawyer-client relationship must be kept confidential. Any breach of this

duty could lead to the lawyer being held criminally liable and to sanctions being imposed by the Bar Association, as well as by any other potential authority related to the matter.

In the particular case of competition law, it is also understood that any internal document that merely reproduces advice provided for an external lawyer shall be covered by professional secrecy, as may be inferred from decisions issued by the Spanish Competition Authority. In this regard, it is important to highlight that when a dawn raid inspection is carried out, the raided company is required to explain and demonstrate to the authority the reasons that justify the consideration of this type of information as information protected by the professional secrecy (e.g., reproducing external legal advice). Once it is demonstrated that those documents are privileged, the officers of the Spanish authority should immediately return those documents to the raided company and exclude them from the scope of the investigation.

In this regard, the Supreme Court has recently confirmed the above. Namely, arguing that certain document is covered by the legal privilege will not suffice if no arguments for such coverage are provided to the officers of the CNMC (judgment issued on 21 September 2015).

Are in-house counsel protected by legal professional privilege?

As noted above, Article 39 of the General Regulation of the Legal Profession (*Estatuto General de la Abogacía*) provides that in-house counsel benefit (in the same way external counsel do) from the general principles of freedom and independence. This legal provision does not distinguish between external and in-house counsel, which leads to the conclusion that both are subject to identical duties and rights in the framework of the performance of their legal services.

Nevertheless, in the specific case of *Spanish competition law*, the Spanish Competition Authority usually adopts the position during inspections that communications between internal counsel and company employees are not protected by professional secrecy as a result of the Akzo judgment mentioned above.

This approach has been challenged before the Spanish Courts and although the issue has not been fully clarified yet, case law states that there is no infringement of professional secrecy when internal communications with in-house lawyers seized during inspections are not used by the competition authority to support allegations of infringement of competition law.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Professional secrecy applies irrespective of the nationality of the lawyer. Therefore, non-national qualified lawyers have the same protection as national ones.

Recent cases and/or other legal developments

From a criminal law perspective, even judges have been prosecuted for breaching professional secrecy between lawyer and defendant, for example by taping their private conversation without sufficient legal grounds. The Supreme Court recognises the right of a lawyer to refuse to testify against their client on the basis of information obtained as a result of their professional activity. More recent Supreme Court case law confirms that:

- The basis of the obligation is the trust and confidentiality of the client relationship.
- A breach of this duty implies damage to the client's rights of confidentiality and to effective legal protection;
- The obligation begins when a lawyer is instructed by a client. This is to ensure an adequate defence in the future process, which may require defendants to provide their lawyers with all available information required to guarantee an effective defence;
- Lawyers are also not required to report any incriminating or damaging information in accordance with art. 263 of the Spanish Criminal Procedure Act.

From the civil perspective, there are relevant precedents such as judgment number 6/2018, issued by the High Court of Valencia (*Audiencia Provincial*) on 16 January (appeal number 355/2017). In this case, a lawyer acted as a witness. In the hearing, the lawyer recognised that he was appointed as a lawyer by the plaintiff in criminal proceedings against the defendant and that an amicable settlement had been agreed between both parties (plaintiff and defendant). By means of this agreement a debt was recognised and the criminal complaint filed by the plaintiff was withdrawn. The Court held that, these statements did not infringe the lawyer's obligations of professional secrecy.

A more recent precedent was issued by the High Court of *A Coruña* on 25 January 2021. The court pointed out that the right to professional secrecy is not a right, but an absolute obligation of confidentiality and it is a right of the client. So, to respect this right, the lawyer cannot be forced to testify. The only exception would be that the client exempts the lawyer from this duty for his own protection. Furthermore, the judge stated that any response given by the lawyer in those circumstances would be a violation of fundamental rights and should be inadmissible.

From an antitrust perspective, the Spanish Competition Authority had the opportunity to decide on the application of legal privilege to competition procedures in Spain in a decision issued in December 2020 (Case R/AJ/079/20 Albia). In particular, the Spanish Competition Authority obtained certain evidence related to potential infringements during a merger control procedure in the funerary services sector (Case C/1086/19 *Santa Lucía/Funespaña*). That evidence allowed the authority to open an investigation and conduct a dawn raid on Albia's premises, which was subsequently appealed by the company under investigation.

In that context, Albia filed an appeal and claimed, among other things, that the Spanish Competition Authority had breached legal privilege on the basis that European case-law (i.e., Akzo judgment) on this matter did not apply. From their perspective, the difference between legal privilege for in-house lawyers and external lawyers is not valid. This argument -together with the entire appeal- was rejected by the Spanish Competition Authority and it remains to be seen if the defendant appeals.

Data privilege

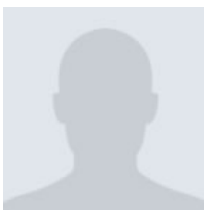
Spanish Data Protection Laws (including both EU General Data Protection Regulation 2016/679 "**GDPR**" and Spanish Fundamental Act 3/2018 on the Protection of Personal Data and the Guarantee of Digital Rights "**NLOPD**") include some provisions regarding "legal and professional obligations of secrecy". Sometimes, professional secrecy is considered a safeguard of the rights and freedoms of the data subject, operating as a limit to the processing of sensitive personal data (e.g. Article 9.2.(i) of the GDPR). In other cases, professional secrecy operates in the opposite direction: processing may be lawful only if the data are processed by professionals under a secrecy obligation (e.g. Article 9.3 of the GDPR). In some cases, professional secrecy obligations may act as an exception to reporting obligations (e.g. Article 14.5 (d) of the GDPR).

The Data Protection Officer is made subject herself/himself to a duty of professional secrecy (Article 38.5 of the GDPR) when conducting her/his activities but this does not prevent the officer from investigating the data processing activities of a controller who objects on the basis of professional secrecy owed to company employees or representatives (Article 36.3 of the NLOPD). The same applies to the staff of the Spanish data protection supervisory authorities.

Article 90 of the GDPR allows Spanish authorities to issue new legal provisions harmonizing data protection laws and legal or professional secrecy duties. In addition to the points discussed above, Spain has made intense use of this delegation, clarifying that data protection and professional secrecy obligations are separate and compatible (Article 5 of the NLOPD) or requiring processing by external data processors to apply enhanced professional secrecy rules (Article 28.2 of the NLOPD), for example. Other harmonization rules that are specific to certain professions, (e.g. the medical profession), are also contained in the NLOPD.

Due to the relatively recent date of entry into force of both the GDPR and the NLOPD, case law on these matters still remains limited.

Key contacts



Joaquín Hervada

Partner

joaquin.hervada@dlapiper.com

T: +34 91 788 7311



Sri Lanka

Last modified 14 June 2022

Concept of legal professional privilege

In Sri Lanka, the concept of legal professional privilege stems almost exclusively from legislation. In particular, it comes from the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 of Sri Lanka (the Supreme Court Rules) and the Evidence Ordinance No.14 of 1895 of Sri Lanka (as amended) (the Evidence Ordinance).

Scope of legal professional privilege

What is protected by legal professional privilege?

While neither the Evidence Ordinance nor the Supreme Court Rules explicitly reference the term “legal professional privilege,” legal professional privilege operates in Sri Lanka in a similar manner to other common-law jurisdictions.

Evidence Ordinance

Under the Evidence Ordinance, no attorney is permitted, unless with a client’s express consent, to disclose:

- Any communications made to them in the course of, and for the purpose of, their employment
- The contents or conditions of any document with which they have become acquainted in the course of, and for the purpose for, their professional employment; or
- Any advice given by them to their client in the course of, and for the purpose of, their employment.

Such limitations also apply to interpreters and the clerks or servants of the Attorney-at-Law and notaries.

The Evidence Ordinance also stipulates that no one shall be compelled to disclose to the court any confidential communication which has taken place between them and their legal professional advisor, unless they offer themselves as a witness. In which case, they may be compelled to disclose such communications to the court only if it is necessary to explain any evidence which they have given.

Supreme Court Rules

The Supreme Court Rules stipulate that an attorney must keep in strict confidence “all information, whether oral or documentary, acquired by him from, or on behalf of, his client in any matter in respect of and concerning the business of his client.” While this is framed as a “duty of confidentiality,” it is not very different from the concept of legal professional privilege that arises in other common law jurisdictions.

According to Rule 2 of the Supreme Court Rules, the duty of confidentiality (i.e. legal professional privilege) will extend to all attorneys admitted and enrolled by the Supreme Court of the Democratic Socialist Republic of Sri Lanka. In addition, under Section 2 of the Evidence Ordinance, this concept applies to all judicial proceedings, both civil and criminal, with the exception of proceedings before a court martial or arbitrator.

The duty of the attorney to refrain from disclosing such confidential information survives not only during the existence of their

professional relationship with their client, but also after the attorney ceases to act for the client and after the death of the client.

The duty also extends to partners, associates and employees of the attorney. If such an individual becomes aware of such confidential information, the attorney would be obliged to take all reasonable steps to prevent the disclosure of the confidential information. This duty also continues beyond the termination of the attorney's relationship with such people.

An attorney who possesses privileged information concerning their client is barred from undertaking any other professional matter, where such privileged information could be used against the client.

Are communications with in-house counsel protected by legal professional privilege?

Yes, communications with in-house counsel are protected by legal professional privilege. The Supreme Court Rules are applicable to all attorneys admitted and enrolled by the Supreme Court of Sri Lanka. As such, there is no distinction between in-house counsel and any other attorney, provided they are admitted and enrolled by the Supreme Court of Sri Lanka.

As a result, all communications with attorneys, including in-house counsel, will be protected by legal professional privilege if the communications arise in the course of an attorney-client relationship.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The scope of the Supreme Court Rules is limited to attorneys who have been admitted and enrolled by the Supreme Court of Sri Lanka. As such, the legal professional privilege afforded will be applied to correspondence between a client and their attorney when the attorney falls within the scope of the Supreme Court Rules, i.e. they are admitted and enrolled by the Supreme Court of Sri Lanka.

Therefore, legal professional privilege will not extend to correspondence with non-national qualified lawyers.

How is legal professional privilege waived?

For legal professional privilege to be waived, the express consent of the client should be obtained. The Supreme Court Rules permit disclosure if it is expressly or impliedly authorised by an attorney's client in writing or in the event of the death of their client, by the legal representative of the client. Even then, the attorney must be careful to disclose only information deemed necessary in the circumstances.

However, both the Supreme Court Rules and the Evidence Ordinance provide that the client's consent is not required for waiver of legal professional privilege if the confidential communications are made in furtherance of an illegal purpose, or where disclosure is necessary to prevent the commission of a crime or fraud.

In addition, the Supreme Court Rules allow attorneys to disclose confidential information in order to defend themselves, their associates or their employees against any allegation of misconduct or malpractice made by a client, or to prevent the commission of a crime, fraud or illegal act.

Furthermore, in the case of a joint retainer, or where the client has a joint interest with others, disclosure of the confidential information is allowed to the members of the joint retainer or to those having a joint interest with the client.

The Prevention of Money Laundering Act No. 5 of 2006 and Financial Reporting Act No. 6 of 2006 of Sri Lanka also make allowances for the Financial Intelligence Unit of Sri Lanka to require an attorney to disclose privileged communications, if such communications were made for the commission or for furthering the commission of any illegal or unlawful activity.

According to the Evidence Ordinance, privilege is not considered waived purely on the grounds of a party giving evidence, voluntarily or otherwise. However, if a party agrees to appear as a witness, the court can compel them to disclose confidential communications if the court deems it necessary to explain any evidence given.

Legal professional privilege in the context of merger control

There are no specific legal professional privilege requirements in the context of merger control under Sri Lankan law. However, the general duty of nondisclosure of privileged information will be applicable when communications arise in the course of an attorney-client relationship.

Recent cases and/or other legal developments

There have been no recent cases or legal developments impacting the application of legal professional privilege in Sri Lanka.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

No, there are no specific or additional legal privileges afforded to internal investigations. Under Rule 2 of the Supreme Court Rules and Section 2 of the Evidence Ordinance, legal professional privilege will be applicable in the same manner for both civil and criminal proceedings.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

There are no specific time periods which apply to legal privilege, irrespective of whether the attorney is involved in litigation or providing legal advice.

As stated above, the duty of nondisclosure of privileged information conferred on an attorney will continue after their professional relationship with the client has ceased to exist and indefinitely thereafter, even after the death of the client.

c) Are communications to / by companies and in-house counsel protected by privilege?

Yes, as stated above, all communications with an attorney falling within the description of Rule 2 of the Supreme Court Rules will be protected by legal professional privilege. The fact that the attorney is acting in their capacity of an in-house counsel has no bearing on the protection afforded to the communications between the said attorney and their clients, provided the attorney in question is admitted and enrolled by the Supreme Court of Sri Lanka.

d) Are there any specific requirements of a privileged incident response engagement letter?

No.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

If the notes, transcripts and reports were prepared by a third party, who does not fall within the description of an attorney as envisaged by the Supreme Court Rules, they will not be protected under privilege, even if the documents were subsequently used by an attorney for the purpose of giving legal advice. In other words, to benefit from the protection of privilege under Sri Lankan law, the relevant documents will need to be prepared by an attorney.

However, if the notes, transcripts of employee interviews (where it is retained by the attorney to carry out such interviews) and reports were prepared by the attorney for the client, they would be protected under legal professional privilege.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No, for the purposes of privilege, it does not matter whether the documents are located at the premises of the client or the lawyer.

c) How are seized documents put into evidence in a criminal / civil procedure?

Documents may be seized in the manner provided for under the Code of Criminal Procedure Act No. 15 of 1979 or the Prevention of Terrorism Act No. 48 of 1979.

Objections against the admissibility of such documents can be made by making an application to the Sri Lankan courts under the

Evidence Ordinance, under grounds such as privilege or irrelevance of the document to the case in question. The admissibility of the seized documents as evidence and the veracity of the objections will be determined by the presiding Judge.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

See the answer to the above question "[How is legal professional privilege waived?](#)"

In order to ensure privilege is not lost, a client can make a stipulation within the Letter of Engagement or Non-Disclosure Agreement between himself and the attorney which states that no disclosure of information or documentation is to occur except with prior written consent from the client. This would preclude the attorney from relying on implied consent as a basis for privilege to be waived.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and, if so, does that mean privilege has been waived?

There is no mandatory requirement for a company to rely on the findings of an internal investigation in the course of a data breach litigation.

Note, however, that Sri Lanka does not currently have any specific laws or rules relating to data breaches, therefore, data breach litigation is rare in Sri Lanka. The Personal Data Protection Bill is currently pending enactment by Sri Lanka's Parliament.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

As mentioned above, internal investigations which are conducted by individuals who are not attorneys in Sri Lanka, will not be considered as privileged.

In the event the internal investigation is conducted by an attorney, notifying those affected only of the findings, as opposed to the contents or any extract of the internal investigation report, will not result in the loss of privilege of the internal investigation report.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last 5 years? If so, please provide details.

There are no public court records (ie judgments issued by the Supreme Court and Court of Appeal of Sri Lanka) of any data breach privilege cases in Sri Lanka within the last five years.

b) In data breach litigation, does a company ever need to rely on the findings of internal investigations and, if so, does that mean privilege has been waived?

There is no mandatory requirement for a company to rely on the findings of an internal investigation in the course of a data breach litigation.

Note, however, that Sri Lanka does not currently have any specific laws or rules relating to data breaches, therefore, data breach litigation is rare in Sri Lanka. The Personal Data Protection Bill is currently pending enactment by Sri Lanka's Parliament.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

No, the fact that data is considered privileged outside the Sri Lankan jurisdiction would not necessarily make the data privileged within Sri Lanka, unless the elements of legal professional privilege under Sri Lankan law have been met.

d) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

If data is considered to be privileged under Sri Lankan law, then irrespective of whether the investigation takes place within or outside of Sri Lanka, legal professional privilege can be invoked by the party in question.

Practical steps, such as marking the privileged information as “Privileged and Confidential,” or the signing of a Non-Disclosure Agreement with the parties in question may assist in protecting the privilege afforded to the information in question.

This would be subject to the exceptions set out above relating to the disclosure of crime, fraud or furtherance of an illegal purpose, and subject to relevant local laws in the jurisdiction where the civil/criminal investigation takes place.

Key contacts



Maurice Burke

Head of Investigations, Asia
maurice.burke@dlapiper.com
T: +65 6512 9560



Rishikeesh Wijaya

Associate
rishikeesh.wijaya@dlapiper.com
T: +65 6512 9515



Sweden

Last modified 19 November 2021

Concept of legal professional privilege

Legal professional privilege in the Swedish legal system is regulated in the Swedish Procedural Code.

Chapter 36 Section 5 of the Swedish Procedural Code provides, with respect to testimony, that advocates (ie members of the Swedish Bar Association) and their associates may be heard as witnesses regarding matters which have been confided to them in their professional legal capacity or which they have learned of in connection therewith only if there is an obligation to do so pursuant to Swedish law or if the party, for whose benefit the confidentiality applies, provides its consent to the testimony.

The main derogation from this is where the criminal offence which the defendant is being tried for carries a minimum two years prison sentence.

With respect to documentation, Chapter 38 Section 2 provides a general obligation to provide any documentation which may be evidentiary. However, advocates and their associates or trial lawyers who are not advocates may not disclose documents (electronic or physical) if the contents thereof may be assumed to be such that advocates and their associates may not be called to testify regarding it pursuant to Chapter 36 Section 5 mentioned above. If the document is held in the possession of the defendant, to whom the benefit of the confidentiality applies, the defendant is not obligated to provide the document.

Thus, legal professional privilege does indeed exist also in the civil litigation context. It protects communications with advocates and trial attorneys (even if they are not advocates) but not with non-advocate lawyers, such as in-house counsel. Non-advocate lawyers may therefore be both obliged to testify to such matters and / or disclose such documentation which would otherwise have been protected if disclosed to an advocate. As mentioned above, however, advocates' legal privilege is not absolute and exceptions to this may be provided in Acts.

Legal professional privilege in competition law investigations

With respect to investigations under the Swedish Competition Act, the Swedish Competition Act provides in Chapter 5 Section 11 that the Competition Authority is not authorised to order a company or other entity / person or its advocate(s) to provide written information or documentation which is protected by legal professional privilege according to Chapter 36 Section 5 of the Swedish Procedural Code. With respect to on-site legal investigations, ie 'dawn raids', the Competition Authority may not review or take copies of information which is covered by legal professional privilege according to Chapter 36 Section 5 of the Swedish Procedural Code. Although this might not be an issue in practice it should be noted that the provision in Chapter 5, Section 11 explicitly only concerns written documents. Following this it is not clear how it would apply to electronically stored material and which can be read, listened to or otherwise perceived only by means of technical aids eg e-mails that have not been printed.

If the Competition Authority considers that a particular document should be covered by an investigation and the investigated party claims that the document is protected according to the legal professional privilege, the document shall immediately be sealed and promptly submitted to the Patent and Market Court by the Competition Authority. The Patent and Market Court shall without delay examine whether the document shall be covered by the investigation or if it is protected under the legal professional privilege and therefore excluded.

As regard testimony the legal professional privilege provided in Chapter 36 Section 5 of the Swedish Procedural Code for testimony

applies also with respect to investigations by the Swedish Competition Authority. As mentioned above, the legal professional privilege provided therein is not absolute and derogations may be provided in Acts. However, the Swedish Competition Act does not provide for any such derogations.

Although not explicitly mentioned, if the Competition Authority orders a party to provide written information in a merger control procedure the same principles described above apply.

Scope of legal professional privilege

The scope of legal privilege in Sweden is the same, regardless of whether the context is civil litigation, criminal investigations or competition law investigations.

What is protected by legal professional privilege?

Any document or information in any format which has been confided to an advocate in their professional capacity is protected by Swedish legal professional privilege.

Are communications with in-house counsel protected by legal professional privilege?

In-house counsel in Sweden are not members of the Swedish Bar Association, and therefore not advocates. Consequently, communications with in-house counsel are not protected.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Communications with foreign lawyers which are the equivalent of advocates are also protected by Swedish legal professional privilege. As mentioned above, Swedish legal professional privilege may either be waived due to the client's consent or if derogations from the legal professional privilege are provided in Swedish Acts.

Recent cases and/or other legal developments

Swedish legal professional privilege has most recently been discussed in a case following the Swedish Competition Authority's dawn raid on Swedish postal companies (decision number Å 6673-11 of 22 June 2011). In the decision by the District Court of Stockholm, the Court provided that Swedish legal professional privilege should be interpreted in accordance with EU law. The Court held that a minimum, but not maximum, level of privilege was provided for in the European Court of Justice's decision in the AM & S Europe case (case 155/79). However, it was maintained by the Court that Swedish legal professional privilege was more far reaching than the minimum EU standard in so far as Swedish legal professional privilege protects almost every document which has been confided to an advocate in their professional legal capacity. In order for the protection provided not to be hollowed out, the Court furthermore held with reference to Swedish Supreme Court decision NJA 1990 s 537 and NJA 2010 s 122, which held that it was only 'to a modest extent' necessary to show that the document was protected by legal professional privilege. In that case, the in-house counsel, who was not an advocate, had prepared a document of interest to the authority. The in-house counsel could however provide an email which indicated that the memorandum had been confided to the company's external counsel, an advocate, and therefore the Court deemed the document protected by legal professional privilege.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

The general rule on legal privilege in Sweden is the following: An advocate has a duty of confidentiality in respect of matters disclosed to the advocate within the framework of the legal practice or which in connection therewith becomes known to the advocate. Exceptions from the duty of confidentiality apply if the client consents thereto or where a legal obligation to provide the information is at hand.

An exception also applies if disclosure is necessary to enable the advocate to avert complaints by the client or to pursue a justified claim for compensation in respect of the mandate concerned.

This general rule also applies in the contexts mentioned and there is thus no specific legal privilege arising in the contexts mentioned.

"Matters disclosed" is given a wide interpretation and includes everything disclosed to the advocate, including but not limited to correspondence, notes and reports made/prepared by the advocate, the client, the opponent or a third party.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

No there are no specific time periods and the legal privilege applies also after a specific matter/instruction has been concluded and ended.

c) Are communications to/by companies and in-house counsel protected by privilege?

Yes, all communications to/by an advocate within the framework of the legal practice is protected by privilege including communications to/by companies and in-house legal counsel.

d) Are there any specific requirements of a privileged incident response engagement letter?

No.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, all communications to/by an advocate within the framework of the legal practice is protected by privilege.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No, if the documents are subject to legal privilege this should not matter. Having said this, there are cases in Sweden in which the legal privilege has in fact been broken when the documents are located at the premises of the client or a third party, especially in connection with seizures and investigations carried out by Swedish public authorities/agencies. On a related note, Stockholm District Court has ruled (T 7678-18) that mirroring of a hard drive at a parent company's address, where two defendants that were board members of the subsidiary subjected to seizure, also had their workplaces, did not mean that the mirroring occurred with a third party. Furthermore, Stockholm District Court stated that legal privilege should not be considered broken as a consequence of information being available both with the subsidiary and the parent company.

c) How are seized documents put into evidence in a criminal/civil procedure?

If documents in possession of an advocate or the client lawfully have been seized in connection with criminal or some types of administrative proceedings, then the public prosecutor or the public authority /agency concerned may rely on and present the documents in Swedish criminal or administrative proceedings. Depending on the content in the seized documents, the court may decide that the content of the seized documents should be treated as confidential in the court proceedings.

There are no means available for carrying out and executing a forced seizure of documents within the framework of Swedish civil proceedings. Instead, a party in civil proceedings may ask the court to order the other party to present certain specified documents, an Edition Order. If an Edition Order is issued and the documents are not presented, the other party may be called to a hearing and under oath declare that the party is not in possession of the documents. However, an Edition Order may not be granted against an advocate or concern documents that are subject to legal privilege.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Yes, waiver of legal privilege is always possible by the party or parties protected by the legal privilege. If a waiver is given it is pertinent to consider what the waiver should encompass and to document this in clear language.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

Yes, we can envisage that there might be situations in which a company needs or wants to rely findings of internal investigations and if so, this could be construed as that privilege being waived by the company concerning the findings revealed/disclosed.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

It is difficult to provide a general answer to this. The company notifying affected individuals or sharing findings with third parties could, if the company wants to mitigate the risk for this being construed as a waiver, state to the individuals/third parties that the findings of internal investigations disclosed are strictly confidential and that they may not be disclosed by them to any one unless there is a legal obligation to do so such as a binding court order to this effect or if express consent hereto is obtained.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

No.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

Not that we are aware of. However, the Swedish Bar Association position is that the laws and regulations on legal privilege that apply for non-Swedish advocates should be recognised and upheld in Sweden.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

It is difficult to provide a general answer to this. We trust that if the privileged data deriving from outside Sweden would also classify as privileged data in Sweden, then the answer should generally be yes. Other situations are difficult to assess without knowing and considering the specific circumstances and facts.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

A non-Swedish court or a non-Swedish public authority/agency cannot enforce an order to disclose privileged data directly against a Swedish advocate or a person residing in Sweden or a Swedish legal entity. They can possibly seek assistance from Swedish courts and/or authorities/agencies to do so, if there is a treaty on legal aid in place that deals with privileged data. Even if so, material Swedish laws and regulations concerning privileged data will in all likelihood be upheld.

Key contacts



Arthur Csatho

Partner

arthur.csatho@se.dlapiper.com

T: +46 8 701 78 21



Elfrida Skowronski

Senior Associate

elfrida.skowronski@se.dlapiper.com

T: +46 8 701 78 61



Thailand

Last modified 01 July 2021

Concept of legal professional privilege

In Thailand, legal professional privilege does not operate only as a rule of evidence, but is a substantive right. This means that legal professional privilege can protect a lawyer from having to disclose the clients' confidential information or documents in a broad range of situations.

A lawyer has a duty not to disclose any information obtained from the client during the course of performing their duties as a lawyer in accordance with Clause 11 of Regulation on Lawyers Conduct B.E. 2529, which provides that a lawyer is required to keep any information obtained from the client confidential, unless they have obtained prior consent from the client or an authorization from the court to disclose such information.

Whether a Thai lawyer does or does not appear in court does not impact their duty to keep their client's information confidential. In our view, it appears that Clause 11 does not impose the requirement of confidentiality and as such, it remains unclear whether or not communications already in the public domain ceased to be protected under legal professional privilege. Based on a strict reading of Clause 11, a communication between lawyer and client, whether or not confidential, will attract legal professional privilege.

This interpretation is in line with the fact that there are no express laws or regulations concerning the distinction between information received by a lawyer for the purpose of court proceedings and information received for some other purpose. It is not necessary that a lawyer receives information from their client for the purpose of court proceedings; any information concerning a client's case is always considered confidential, including any information from sources other than from the client.

The legal professional privilege is imposed by statutes under Section 92 of the Thai Civil Procedure Code and Section 231 of the Thai Criminal Procedure Code, which divided legal professional privilege into two categories:

- Legal professional privilege in civil litigation, and
- Legal professional privilege in criminal litigation

Legal professional privilege in the context of civil litigation

Section 92 of the Thai Civil Procedure Code can be summarised as follows, when any party or person is legally required to give testimony or produce any kind of evidence before a Thai court and such testimony or evidence may entail the disclosure of:

- Any official document or fact which relates to the affairs of the State and is by nature to be temporarily or permanently kept secret and which is in the keeping of;
- Is known to such party or person by virtue of their official appointment or any other official or semi-official capacity;
- Any confidential document or fact which was entrusted or imparted by a party to them in their capacity as a lawyer; or
- Any invention, design or other work protected from publicity by law.

The said party or person is entitled to refuse to give such testimony or to produce such evidence unless they have obtained permission from the competent official or person concerned.

Legal professional privilege in the context of criminal litigation

Section 231 of the Thai Criminal Procedure Code can be summarised as follows, when any party or person is legally required to give or produce before a Thai court any kind of the following evidence:

- Document or fact which is confidential official information;
- Confidential document or fact which has been acquired by or made known to them by virtue of their professional or duty; or
- Process, design or other works protected from publicity by law.

Such party or person is entitled to refuse to give or produce such evidence unless they have obtained the permission from the authority or the person involved with such confidential information.

However, under both Sections, the court has the power to summon the authority or persons concerned to appear before the court and give an explanation as to why legal professional privilege attach to the communication. The court may exercise such power in order to decide whether the non-disclosure is well-grounded or not. Where the court is satisfied that the refusal is not well-grounded, the court has the power to issue an order to such party or person to give such testimony or produce such evidence. This means that the court could override the protection afforded by legal professional privilege.

Legal professional privilege in the context of investigations or merger control by the competition authority

Legal professional privilege does not exist in the context of investigations or merger control by the competition authority. Under Section 63 of the Thai Trade Competition Act B.E. 2560, the authority has the following powers:

- To issue a subpoena for any person to give an oral presentation and provide factual information or provide an explanation in writing or to send accounts, registrations, documents or any evidence for examination or consideration;
- To enter places and venues of operation, production, sale, purchase, storage of goods, service provision of a business operator or any person, or other places where it is reasonable believed that there is a violation of provision under this Act in order to conduct an examination under this Act to search and seize, or gather documents, accounts, registrations, or other evidence for the benefit of examination and proceeding with a case under this Act.

In this case, the authority shall have the power to inquire into factual information or call for account, registrations, documents or other evidence from business operators or relevant persons, as well as instruct any person on the premises to act as necessary.

- To collect or bring goods in the required quantity as a sample for examination or analysis without paying for the goods. This shall be carried out in accordance with the criteria prescribed in the Commission's notification.

However, according to Section 76 of the Trade Competition Act of Thailand B.E. 2560, facts given to the competition authority regarding the business or operation of a business operator that is factual information normally reserved and not revealed by a business operator, or known due to performance of duties under this Act will be kept confidential and not be disclosed unless the disclosure is made in the performance of official duties or for the purpose of investigation or trial. Any person who breaches this provision shall be subject to an imprisonment of not more than one year or a fine of not more than THB 100,000, or both.

Scope of legal professional privilege

According to Clause 11 of Regulation on Lawyers Conduct B.E. 2529, a lawyer is required to keep information obtained from the client confidential, unless they have obtained prior consent from the client or an authorization from the court to disclose such information. Any lawyer who violates the legal professional privilege under this regulation is subject to the following punishment under Section 52 of the Lawyer Act B.E. 2528 (1985) ('Lawyer Act'):

- Probation;
- Prohibition from practising as a lawyer for a period of up to 3 years; or
- Removal of name from the list of registered lawyer.

Section 4 of the Lawyers Act provides that a lawyer means a person who is registered as a lawyer and obtained a lawyer license issued by the Lawyers Council of Thailand. In practice, legal practitioner may be divided into two categories. Firstly, those who are of Thai nationality and obtained lawyer license issued by the Lawyers Council of Thailand ('Licensed Lawyer') satisfy the meaning of 'lawyer' for the purposes of Section 4 of the Lawyers Act. Secondly, one does not have to be a Registered Lawyer to give legal advice in Thailand (ie acting as a solicitor) ('Non-Licensed Lawyer').

Therefore, it appears that Clause 11 of the Regulation on Lawyers Conduct does not apply to Non-Licensed Lawyer, such as an legal advisor or legal consultant. Nevertheless, Non-Licensed Lawyer can be exposed to potential tortious and/or criminal liability under Section 420 of the Thai Civil and Commercial Code and Section 323 of the Thai Penal Code respectively for the disclosure of clients' confidential information.

Section 420 of the Thai Civil and Commercial Code provides that *'A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefor.'*

Section 323 of the Thai Penal Code provides that *'Whoever knows or acquires any confidential information of another person as it is made known to them in the course of their occupation as a doctor, a pharmacist, a druggist, a midwife, a nurse, a priest, an advocate, a lawyer or an auditor, or by reason of being an assistant in such profession: and then discloses such confidential information in a manner likely to cause damage to any person shall be liable to imprisonment for not exceeding 6 months or a fine of not exceeding THB 1,000, or both.'*

A person who receives training in the occupation referred to under the first paragraph discloses confidential information of another person which has come to their knowledge or which they have acquired from the training in a manner likely to cause damage to any person shall be liable to the same punishment.'

Therefore, although legal professional privilege does not apply to the Non-Licensed Lawyer, Non- Licensed Lawyer is nevertheless obliged to maintain confidential information obtained from the clients. Failure to do so may attract penalty under Section 420 and Section 323 above.

Recent cases and/or other legal developments

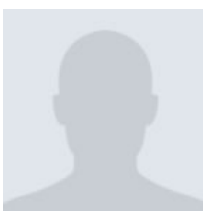
In 2002, there was a case in which a lawyer was punished by the Lawyer Conduct Committee due to his violation of Clause 11 of the Regulation of Lawyer Conduct.

Pertaining to the probe conducted by the Lawyer Conduct Committee, they found that he had disclosed confidential information obtained from his client to the adverse party which caused damages to the client. The Lawyer Conduct Committee then ordered the removal his name from the lawyers' register.

Data privilege

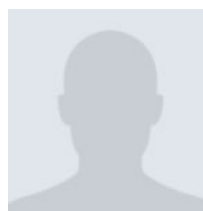
Content to follow shortly.

Key contacts



Timothy Tan

Co-Country Managing Partner
timothy.tan@dlapiper.com
T: +66 2 686 8500



Waranon Vanichprapa

Co-Country Managing Partner
waranon.vanichprapa@dlapiper.com
T: +66 2 686 8555



Turkey

Last modified 21 October 2015

Concept of legal professional privilege

There are no specific provisions regarding legal professional privilege under Turkish law. The Legal Profession Law and the Turkish Criminal Procedure Law provide some guidance as to the protection of confidential and privileged information.

First, the Legal Profession Law regulates a lawyer's duty of confidentiality. Article 36 of the Legal Profession Law indicates that a lawyer is prohibited from disclosing information received from the client while performing their duties as a representative of the client and/or a member of the Turkish Bar Association. This provision regulates the general duty of confidentiality generally which exists also in the relevant laws of the other professions (ie doctors and certified public accountants).

Secondly, Article 130 of the Turkish Criminal Procedure Law titled 'The search and seizure in lawyers' offices, and seizure of mail' directly regulates that: 'If the lawyer whose office is searched or the president of the Bar or the lawyer representing him objects to the search in respect of the items to be seized, at the end of the search, by alleging that those items are related to the professional relationship between the lawyer and his client, then those items shall be put in a separate envelope or a package and be sealed by the present individuals and, in the investigation phase, the judge of peace in criminal matters, or the judge or the Court in the prosecution phase, to give the necessary decision on this matter. If the judge establishes that the seized items are privileged by the lawyer client relationship, the seized object shall be promptly returned to the lawyer and the transcripts of the interactions shall be destroyed. The decisions mentioned in this subparagraph shall be issued within 24 hours.'

Under the above article, the lawyer is entitled not to permit the confiscation of a document relating to a client through claiming legal professional privilege. In such a situation, the document should be sealed in an envelope and the Court will decide if the claimed document is indeed protected by legal professional privilege. Legal professional privilege should be claimed directly by the lawyer.

Additionally, the Supreme Court accepted in one of its decisions (which is explained in detail below) the duty of confidentiality within the scope of Article 6/3 (c) of the European Convention on Human Rights.

Since the duty of confidentiality is considered as a public interest in Turkish law, it is applicable in all litigation and investigations, including competition investigations. Legal professional privilege as described above applies in civil litigation, criminal trials and competition investigations. Accordingly, the Turkish Competition Board acts in accordance with these general rules in the scope of its administrative procedures.

Scope of legal professional privilege

What is protected by legal professional privilege?

Legal professional privilege applies to all information exchanges between a client and their lawyer regarding the client's right of defence, without any time limitations. The Constitutional Court accepts that all information regarding health conditions, economic conditions and personal information, including the client's whereabouts and addresses the lawyer obtained in relation to their profession, falls within the scope of the legal professional privilege.

Are communications with in-house counsel protected by legal professional privilege?

In order to claim that a document falls within the scope of legal professional privilege, the lawyer must be an outside counsel member of the Bar, and the relevant document must be produced in the scope of a lawyer/client relationship.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The rules on legal professional privilege are also applicable to lawyers not qualified in Turkey but carrying out business in Turkey pursuant to the Legal Profession Law, as they are subject to the professional rules contained in the Legal Profession Law.

How is legal professional privilege waived?

The Legal Profession Law states that legal professional privilege protection might be waived where this is in the client's best interest.

Recent cases and/or other legal developments

The Turkish Competition Board evaluated legal professional privilege in one of its decisions (dated 13.10.2009 and numbered 09-46/1154-290) and followed an approach similar to that of the European Commission. The Competition Board indicated in its decision that, in order to deem the information privileged, the lawyer shall be independent, and the relevant document must be produced in the scope of a lawyer/ client relationship. Secondly, the Competition Board indicated that the information must be subject to the right of defence of the client.

Additionally, there must be a causal link between the lawyer's practice and the information obtained in order to deem such information privileged.

In a decision by the Constitutional Court (dated 14.11.2011, merit number 2009/19013 and decision number 2011/21017), it was held that the Supreme Court deems that the lawyer can avoid disclosing the whereabouts of their client as per their obligations regulated in the Legal Profession Law and European Convention on Human Rights. The Constitutional Court stated that the trust and loyalty is in the nature of the 'client-lawyer relationship'. Moreover, according to the decision, the parties may raise their objections not only to the judiciary bodies of the Turkish Republic but also to the administrative bodies.

Data privilege

Content to follow shortly.



Ukraine

Last modified 15 March 2019

Concept of legal professional privilege

The principles and content of legal professional privilege in Ukraine are established by the Law of Ukraine 'On Advocacy and Legal Practice in Ukraine' No. 10424 dated 5 July 2012. Based on the legislation, the legal professional privilege (where it applies, as specified below) will exist in all types of legal proceedings (criminal, civil, competition, etc). The legislation does not distinguish between the types of legal proceedings to which legal professional privilege can apply. The Criminal Procedural Code of Ukraine contains a direct statement that a lawyer shall keep the information on the client (suspect, defendant) privileged.

Scope of legal professional privilege

Legal professional privilege can only be attributed to the information obtained by the members of the Ukrainian Bar Association – independent lawyers (attorneys-at-law) or members of an advocacy bureau or union, ie the information obtained by the ordinary lawyers or law firms. In-house lawyers or foreign lawyers who are not the members of the Ukrainian Bar are not protected by legal professional privilege.

Legal professional privilege covers any information that has become known to the lawyer, lawyer's assistant or intern, or other person who has a working relationship with a lawyer, law office or partnership. Such information in particular includes:

- information on the client
- information on the matters that the client referred to a lawyer, and
- content of the advice and clarifications obtained from the lawyer, all documents compiled (drafted) by the lawyer and documents and information obtained by the lawyer in the process of fulfilment of their professional obligations, including documents in electronic form.

The lawyer must not without the consent of the client disclose privileged information or use it in their own interest or in the interest of any third parties.

It is prohibited to demand from a lawyer (or their assistant or intern) that they provide information covered by legal professional privilege. The lawyer cannot be interrogated except for cases when the person who entrusted certain information (the client) released the lawyer (from obligations to keep the information privileged).

The state authorities (investigators) are prohibited from involving a lawyer in any confidential cooperation in the process of investigation if such cooperation might lead to the disclosure of privileged information. Legal professional privilege might be waived:

- upon the written consent of the client, and
- the lawyer might disclose the privileged information to the extent required to protect their own rights as a lawyer, eg if there is a disciplinary or criminal case brought against them.

Recent cases and/or other legal developments

No details for this country.

Data privilege

Content to follow shortly.



United Arab Emirates

Last modified 21 February 2022

Concept of legal professional privilege

By way of its constitution dated 2 December 1971, the UAE encompasses seven distinct emirates: Abu Dhabi; Dubai; Sharjah; Ras Al Khaimah; Ajman; Um Al Quwain; and Al Fujairah.

While the key tenets of the legal system of the UAE are based upon *Shari'a* law ("**Islamic Religious Law**"), much of the UAE's legislation derives from a mix of European (most notably French) and Islamic concepts of Civil Law, being based loosely on the Egyptian Legal Code.

Dual courts (both *Shari'a* and Civil) operate in the UAE each dealing with different areas of the law. In short, *Shari'a* courts are generally confined to social laws (such as family law) whereas commercial matters are generally now dealt with by the civil courts. In addition, a federal judicial system operates within the UAE, but certain Emirates (such as Dubai and Ras al Khaimah) have their own separate judicial frameworks, operating in parallel to the federal system.

The Federal Supreme Council is the highest constitutional authority in the UAE and has overarching responsibility for initiating, sanctioning and promulgating federal legislation in the UAE.

In many civil law jurisdictions in the region, the concepts of legal professional privilege and "without prejudice" communications do not exist *per se*, and the parties have the right to use any document which may support their position in civil litigation. This is the position in the UAE, which does not have any express provision in respect of legal professional privilege. Instead, lawyer-client legal professional privilege is interpreted under Islamic Religious Law.

Indeed, lawyers in the UAE are bound by duties of confidentiality, which in many cases, incorporate concepts similar to legal professional privilege.

Scope of legal professional privilege

Legal professional privilege protects all communications between a professional legal adviser and their client from being disclosed without the permission of the client. The privilege is solely for the benefit of the client and not the lawyer. The objective of this legal principle is to protect one's access to the justice system by ensuring individuals can disclose all relevant information to their legal advisers without the fear that this disclosure may result in negative repercussions or prejudice them in the future.

A lawyer ceases to be bound by the requirements of legal professional privilege if the lawyer can demonstrate that documentation or information:

- Was in the public domain at the time it was disclosed to the lawyer;
- Entered the public domain subsequent to the time it was disclosed to the lawyer through no fault of the lawyer; or
- Was in the lawyer's possession free of any obligation of confidence at the time it was disclosed to the lawyer, evidenced by contemporaneous records.

Notwithstanding lawyer-client privilege, a lawyer may disclose certain documents / information to the extent such disclosure is required by a valid order of a court or other governmental body having jurisdiction, provided that the lawyer provides the client with reasonable prior

written notice of such disclosure and makes a reasonable effort to obtain a protective order preventing or limiting the disclosure and/or requiring that the documents / information so disclosed be used only for the purposes required by law or regulation.

In the UAE, there is no process of discovery and / or inspection of documents as part of the litigation process. Instead, each party will simply file the documents that it seeks to rely on and there is no obligation on a party (subject to a court order) to file a document which is damaging to its case.

As is the position with most civil law jurisdictions in the Middle East, there are no express privilege rules in the UAE and parties are able to, in theory, admit into evidence any document which may support their position. Instead, the concept of legal professional privilege in the UAE is limited only to the professional relationship between a lawyer and their client, through the lawyer's obligation to keep confidential all communications made between a lawyer and their client for the purposes of litigation. However, Article 42 of UAE Law No. 23 of 1991 states that *"an attorney is to keep confidential the communications made in furtherance of their professional representation of a client, unless such disclosure is required to prevent the perpetration of a crime."* The Code of Ethics further states *"such information is to be kept confidential regardless of whether the representation is advisory/non-contentious or contentious in nature."*

Indeed, lawyers must not disclose confidential information provided to them by their client without the client's express permission pursuant to the *Federal Law on the Regulation of the Legal Profession*.

It appears that the same privilege protections do not apply to in-house legal counsel advising officers, directors or employees of the company as they are not independent of the client. However, to protect information or communications passing between in-house counsel and the employer, it may be possible for a confidentiality agreement to be put in place.

The Dubai International Financial Centre ("**DIFC**") is an 'opt-in' jurisdiction subject to the DIFC Courts. "Privilege" is defined in the *Rules of the DIFC Court 2018 (28.28(2))* as *"the right of a party to refuse to disclose a document or to produce a document or to refuse to answer questions on the ground of some special interest recognised by law"*.

However, the DIFC Courts have not produced any practice directions in relation to the application of this rule nor have the courts been required specifically to rule on the issue of legal professional privilege in the DIFC. While it may be expected that the concept of legal professional privilege would be more widely applicable within the DIFC (largely due to the common law basis of its jurisdiction), parties cannot rely on this until the DIFC Courts issue guidance on the application of legal professional privilege in the DIFC.

Legal professional privilege in the context of merger control

Legal professional privilege has not been clearly defined within the context of merger control in the UAE.

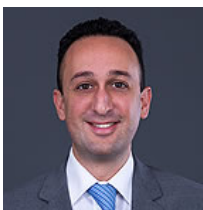
Recent cases and/or other legal developments

There do not appear to be any recent cases or other legal developments in the UAE regarding legal professional privilege.

Data privilege

Content to follow shortly.

Key contacts



Peter Anagnostou

Senior Legal Consultant

peter.anagnostou@dlapiper.com

T: +971 4 438 6392



United States

Last modified 15 March 2019

Concept of legal professional privilege

Legal professional privilege in the US is embodied in rules of professional conduct for lawyers (lawyer-client confidentiality) and rules of evidence and procedure applicable in the courts (the attorney-client legal professional privilege and the work product doctrine).

While the American Bar Association has promulgated the Model Rules of Professional Conduct ('Model Rules'), each of the 50 states in the US has jurisdiction over the lawyers practising in that state and may have adopted rules with slight variations from the Model Rules. In addition, while there are Federal Rules of Evidence and Federal Rules of Civil Procedure applicable in federal courts throughout the US, each state has its own rules of evidence and procedure which may vary from their federal counterparts. This summary is based upon the Model Rules and the Federal Rules of Evidence and Civil Procedure, except with respect to the discussion of legal professional privilege as it applies to non-national lawyers set forth below.

Ethical duties in the US relating to attorney-client privilege and lawyer-client confidentiality have their roots in early English law. Their concepts are now embodied in Model Rule 1.6. Under the Federal Rules of Evidence, Rule 501, federal common law governs the attorney-client legal professional privilege and the work product doctrine unless the US Constitution, federal statutes or court rules provide otherwise. Legal professional privilege applies to civil matters, criminal matters and antitrust enforcement.

Scope of legal professional privilege

What is protected by legal professional privilege?

The following three areas of law embody the scope of legal professional privilege:

RULE OF CONFIDENTIALITY

Under Rule 1.6 of the Model Rules, confidentiality is a fundamental principle in the relationship between a lawyer and client whereby, in the absence of client consent or other applicable exceptions (described below), the lawyer may not reveal information relating to client representation. Confidentiality may apply whether or not the source of the information was the client. Therefore, communication with representatives of the client, or between the lawyer and persons retained by them, may also be protected by the privilege. For example, if a lawyer engages a consultant or expert to assist in preparation for litigation on behalf of a client, the communication of the consultant to the lawyer can also be privileged. This rule is meant to establish a relationship of trust between the lawyer and the client; it encourages the client to seek legal assistance and to communicate fully and frankly.

Under Rule 1.0(e), in order for the client to give informed consent to waive the privilege, the lawyer must communicate adequate information to the client about the material risks of and reasonable alternatives to waiving confidentiality. Unless confidential information otherwise becomes general knowledge, it remains confidential throughout the entirety of representation and thereafter.

Rule 1.6(b) enumerates exceptions to the rule of confidentiality, which are more likely to arise in criminal matters and in antitrust enforcement. A lawyer may reveal information relating to the representation of a client to the extent the lawyer believes necessary to:

- Prevent reasonably certain death or substantial bodily harm
- Prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services
- Prevent, mitigate or rectify substantial injury to financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services
- Establish a claim or defence on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defence to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's presentation of the client, or
- Comply with other law or a court order

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is an evidentiary rule that protects confidential communication between clients and their lawyers made in furtherance of obtaining legal services. It applies specifically to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The attorney-client privilege is distinguishable from the rule of confidentiality because it only applies to confidential communication between the lawyer and the client, and not all confidential information provided by the client. Communication between lawyers and clients is often marked 'lawyer-client' privilege to readily distinguish such communication, although such labelling is not mandatory for the privilege to be applicable.

Some courts have found that the attorney-client privilege may be lost if the attorney or the client discloses privileged communication, even if disclosure was inadvertent.

WORK PRODUCT DOCTRINE

The work product doctrine protects from discovery by opposing counsel material that an attorney (or the client, at the direction of an attorney) has prepared in anticipation of litigation. There are two types of work products – opinion work product and ordinary work product. Opinion work product includes an attorney's mental impressions, attorney notes and documents reflecting strategies. Ordinary work product includes factual information separate and apart from legal analysis, such as transcripts of witness interviews, reports of non-testifying experts and financial records from the client. Courts tend to give greater protection to opinion work product. Under Rule 26 of the Federal Rules of Civil Procedure, an opposing party in litigation may get access to lawyer work product if it can show that it 'has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means'.

Are communications with in-house counsel protected by legal professional privilege?

Courts have taken two approaches to legal professional privilege between in-house counsel and corporate employees. Some courts have adopted the 'control group test', which limits privilege to communication between in-house counsel and corporate employees who have authority to control or participate in the corporation's legal affairs. Under this approach, communication from individuals outside the control group is not protected. Other courts have adopted the 'subject matter test', which limits privilege to communication from corporate employees for the specific purpose of securing legal advice for the corporation. Communication with in-house counsel that relates to business as opposed to legal advice will likely not be protected by privilege.

In the seminal case of *Upjohn v. United States*, the US Supreme Court found that, for purposes of federal law, communication was privileged when it was for the specific purpose of securing legal advice for the corporation and was within the scope of the communicating employee's corporate duties (449 U.S. 383, 394 (1981)). In *Upjohn*, communication from lower level employees to general counsel in the form of a confidential questionnaire to learn the extent of any illegal payments was considered to be privileged information.

Some corporations choose to waive the attorney-client privilege when they are under pressure from the government to do so during a criminal investigation. This has been the topic of much debate, and the US Department of Justice has altered its policies to reduce the pressure on corporations to waive the privilege.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Perhaps under such circumstances, US courts apply a choice-of-law analysis to determine whether domestic or foreign law governs the question of privilege. Otherwise, the court will apply the relevant foreign legal professional privilege law. Federal and state courts take different approaches to the choice-of-law analysis.

In federal courts, under Section 501 of the Federal Rules of Evidence, federal common law governs the attorney-client privilege to give courts the flexibility to develop rules governing legal professional privilege on a case-by-case basis. If the federal court finds that domestic law should apply, then the US concept of the attorney-client privilege protects correspondence with non-national qualified lawyers.

Most federal courts apply the 'touch base' approach when determining whether correspondence with non-national qualified lawyers is privileged. Under this fact-specific analysis, 'any communications touching base with the United States will be governed by the federal discovery rules', including the attorney-client privilege (*Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1169 (D.S.C. 1974)). The Southern District of New York recently applied the 'touch base' approach in a trademark infringement case, and found that even communication between a US client and a non-national agent of a non-national lawyer was privileged under US law (*Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D.N.Y. 23 September 2010)).

At the state court level, courts tend to follow one of two approaches when determining whether correspondence with non-national qualified lawyers is privileged. A minority of the states (including Nevada, Connecticut and Virginia) apply the 'territorial approach' under which courts apply the legal professional privilege laws of the forum state. On the other hand, most states (including California, Delaware, Florida, Illinois, Maryland, New York and Texas) apply the 'most significant relationship' test, under which courts apply the legal professional privilege laws of the jurisdiction that has the 'most significant relationship' with the communication, unless admission would be contrary to public policy. Accordingly, if the 'most significant relationship' with the communication is determined to be a foreign jurisdiction, and if such jurisdiction would not protect such communication (eg because the lawyer was an in-house counsel), the law of the foreign jurisdiction will govern.

A few states that apply the 'most significant relationship' test, including California, Delaware, Florida and Texas, have broadly defined 'lawyer' to include all licensed lawyers so that legal professional privilege extends to correspondence with non-national qualified lawyers. In these states, if the state court finds that its own jurisdiction has the 'most significant relationship' with the communication in question, it is clear that the attorney-client privilege applies, no matter the nationality of the licensed lawyer.

In other states, if the court determines that its own laws apply, either based upon the 'territorial approach' or the 'most significant relationship' test, the determination to protect correspondence with a non-national lawyer will depend on that individual state's laws and the results may vary.

How is legal professional privilege waived?

Unless care is taken, there are a number of situations where the lawyer-client privilege may be held not to apply or will be considered waived. Examples of how this may occur include:

- Communications include persons not in the structured client class
- Appropriate steps were not taken to ensure that the communications, both written and oral, are undertaken in confidence, and
- There are either intentional or unintentional waivers of the privilege (eg by unintentionally disclosing privileged materials in discovery or by voluntarily providing privileged information to the government during an investigation).

Legal professional privilege in the context of merger control

The attorney-client privilege and work product doctrine both apply in the context of merger control proceedings. In the event that the government demands documents from a party to a transaction, that party may redact or refuse to produce privileged documents. If a party chooses to rely on privilege as the basis for withholding or redacting documents, it must produce a 'privilege log', which describes the relevant documents in sufficient detail to demonstrate that a privilege applies (usually by identifying the document title, the name and position of its author, and a brief description of its content). If the government disagrees that a document described in a log is privileged, they may petition a court to order the production of that document.

Recent cases and/or other legal developments

In June 2014, the United States Court of Appeals for the District of Columbia Circuit ('DC Circuit'), in the case of *In re Kellogg Brown and Root*, 756 F.3d 754 (D.C. Cir. 2014), strengthened the application of the lawyer-client privilege in situations in which in-house counsel is leading a company's internal investigation. The trial court had held that the privilege did not apply when an investigation is being conducted to determine whether the company was complying with government regulations that require companies to maintain compliance programmes or respond to allegations of wrongdoing. The lower court concluded that in-house counsel did not have the same privilege protections as retained outside counsel and that was particularly so when the internal investigation involved

communications with non-lawyers who were working under the direction of the in-house lawyers. The DC Circuit reversed the decision and concluded that:

- A lawyer's status as in-house counsel 'does not dilute the privilege'
- The fact that the investigation was being conducted by non-lawyers does not vitiate the privilege as long as the non-lawyers were working under the direction of the legal department
- The privilege is not lost simply because employees being interviewed were not told that the purpose of the interview was to assist the company in obtaining legal advice, and
- Even if there is a business purpose for the interviews – such as assessing compliance with governmental regulations – the privilege will still apply if 'one of the significant purposes of the internal investigation was to provide legal advice'

In 2018, the DC Circuit also clarified the proper application of the so-called 'primary purpose test,' which provides that a communication between an attorney and client is privileged if its primary purpose is to seek or provide legal advice. Application of this test can become complicated when the client and attorney discuss both legal and business issues in the course of their communication. In *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 892 F.3d 1264 (D.C. Cir 2018), the DC Circuit explained that a communication with both legal and business purposes will be privileged so long as 'obtaining or providing legal advice was one of the significant purposes of the communications at issue.' *Id.* at 1268.

Application of legal professional privilege to former and prospective clients

The attorney-client privilege also protects communication with prospective clients and former clients. Under Rule 1.18, communication between a lawyer and a prospective client who does not retain the lawyer's services remains privileged. In these situations, lawyers should limit the information obtained during a preliminary interview to the information necessary to screen for conflicts. Under Rule 1.9, communication between a lawyer and a former client – arguably even one who is deceased – also remains privileged. The question of whether the legal professional privilege should survive a client's death is a debatable one. On the one hand, disclosure will not place the client in jeopardy; on the other hand, disclosure may call into question the former client's character.

Data privilege

Content to follow shortly.

Key contacts

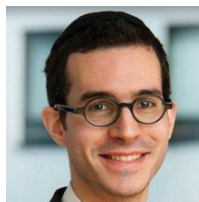


Jay Gary Finkelstein

Partner

jay.finkelstein@dlapiper.com

T: +1 703 773 4211



Michael A Marelus

Associate

michael.marelus@dlapiper.com

T: +1 212 335 4542

Disclaimer

This publication is intended as a general overview and discussion of the subjects dealt with. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication. If you would like further advice, please contact your usual DLA Piper contact.