Legal privilege
global guide
Table of contents

About ................................................................. 5
Australia ............................................................. 5
Austria ................................................................. 9
Belgium ............................................................... 12
Brazil ................................................................. 15
Canada ............................................................... 17
China ................................................................. 22
Czech Republic .................................................... 24
Denmark ............................................................. 27
England and Wales ................................................. 29
European Union .................................................. 34
Finland ............................................................... 39
France ................................................................. 43
Germany ............................................................ 46
Greece ................................................................. 50
Hong Kong ........................................................... 53
Hungary .............................................................. 57
Italy ..................................................................... 60
Japan ................................................................. 63
Luxembourg ......................................................... 67
Morocco ............................................................. 70
Netherlands ......................................................... 73
New Zealand ....................................................... 77
Norway .............................................................. 81
Poland ............................................................... 84
Portugal ............................................................. 86
Romania ............................................................ 90
Russia ............................................................... 94
Scotland ............................................................ 97
Singapore .......................................................... 102
Slovak Republic .................................................... 106
South Africa ....................................................... 109
South Korea ....................................................... 111
Spain ............................................................... 115
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.

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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.

Confidential communications between a lawyer and his client, one or more lawyers acting for the client, or lawyers acting for the client and a third person (such as an expert witness) for the dominant purpose of providing legal advice or professional legal services 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. 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 applies in the context of criminal investigations and in the context of regulatory investigations by authorities such as the competition authority.

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.

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 his 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 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 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:

- The legal advice shaped the substance of the manual, and
- 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 recently 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.

**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 though 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.

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.

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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 (e.g., 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 (e.g., 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 his 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 his client must refuse to answer questions regarding information and matters subject to his 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 he is entrusted with in his 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 he is entrusted with in his 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. Generally speaking, the Austrian Competition Authority does not recognise legal professional privilege in the context of an investigation that is based on Art 101 (1) TFEU. This is especially true, if any suspicion (e.g. drafting of a cartel agreement) is directed against a lawyer or a chartered accountant.

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 his or her 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 his or her lawyer and is not limited to communications between a lawyer and his or her client after a criminal investigation has been initiated. Legal professional privilege protection begins when a client consults his or her 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. Another significant limitation to legal professional privilege is the fact that it only covers documents in the lawyer’s immediate possession (ie kept at the lawyer’s premises), while communications between the client and his or her lawyer found in the client’s possession are not protected.

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 his or her lawyer from the obligation to maintain confidentiality, this does not mean that the lawyer therefore automatically loses his or her 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, his or her 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.

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Concept of legal professional privilege

The obligation on lawyers to maintain professional secrecy is set out in Article 458 of the 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 (and electronic) correspondence, telephone and oral communications between a lawyer and its client, the consultation given, personal notes passed on to the lawyer by its client and notes of the 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 specifies 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 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 European Convention on Human Rights 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. Legal professional privilege therefore exists in Belgium.

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 as is typically found in 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 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). Some exceptions to the confidential nature of the correspondence between lawyers are laid down in Article 6.2 of the Belgian Rules of Professional Conduct, e.g., official letters exchanged between lawyers.

**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. 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 his 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 e-mails, correspondence, notes, advice, preparatory documents, etc.

**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 activity as 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 2010 read in conjunction with Article 8 of the ECHR (right to privacy), the Belgian Competition Authority could not seize documents containing legal advice provided by in-house counsel. The Court of Appeal held that legal professional privilege covered also internal requests for legal advice, correspondence relating to the legal advice, draft opinions and preparatory documents.

**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. It is generally accepted that a lawyer should or is entitled to set aside legal professional privilege if a higher value (overriding public interest grounds or state of necessity (Article 71 of the Belgian Criminal Code)) is at stake which can only be safeguarded through disclosure of the privileged information.

**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 recently confirmed the application of legal professional privilege in Belgium:

Brussels Court of Appeal, 5 March 2013

In a matter of competition law, the Brussels Court of Appeal decided that materials prepared by in-house lawyers at the request of their employers benefitted from the protection of professional secrecy and legal professional privilege (see Scope).

Belgian Constitutional Court, 24 September 2013, RW 2014-15, 1340

When an individual provides information to the police (whether or not on an anonymous basis), it is up to the public prosecutor’s office to assess what action should be taken and whether it is possible to gather evidence of potential criminal offences that may be revealed by the information received. The fact that the evidence is provided in breach of professional secrecy will not result in any subsequent investigation based on the information being unsound, nor will any evidence subsequently obtained necessarily be held to be inadmissible.

Belgian Constitutional Court, 26 September 2013, case n° 127/2013

The Constitutional Court stated that the purpose of professional secrecy is to protect clients’ fundamental right of privacy and trust in their lawyers (acting in their capacity as lawyers) when communicating confidential information. Confidential information is protected by Article 6 of the ECHR as in order to be effective the right of defence requires that a relationship of trust be created between clients and their lawyers. Such a relationship can only be maintained if clients have assurances in law that their lawyers will not disclose confidential information provided to them.

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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 himself is the subject of an investigation for having committed a crime, whether in collusion with his 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.

**Key contacts**

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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 his or her 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 his 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 lawyer's 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.

Key contacts
China

Last modified 15 March 2019

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
- The government may not conduct audio surveillance when a lawyer interviews a criminal suspect or defendant (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, although this is not specifically defined, and
- An order of the court (Article 67 and Article 72 of Civil Procedure Law which came into effect on 1 July 2017)

Again, 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. However, additional protection can be found in the revised Criminal Procedure Law (which came into effect on 26 October 2018). Article 48 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 has been seen as China taking a step forward 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 different from the concept of 'legal professional privilege' in common law jurisdictions. It also contains a number of exceptions that require disclosure of information to 'PRC judicial authorities' as described.
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 can also be 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 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.

This provision is sufficiently wide in scope that 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

No details for this country.

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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 his 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 him in connection with his 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 his 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 his 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 his 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 his 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 (i.e., 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.

Key contacts

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Concept of legal professional privilege

The Danish Administration of Justice Act and the Danish Penal Code set out provisions governing lawyer-client legal professional privilege obligating Danish lawyers to keep information confidential. The legislation applies to both civil and criminal litigation. The rules cover the relationship between a client and a lawyer, if the lawyer is qualified in Denmark, ie has obtained a formal practising certificate from the Ministry of Justice, which require that the criteria for this are fulfilled.

Legal professional privilege in the context of civil litigation

Legal professional privilege applies in the context of civil litigation.

Legal professional privilege in the context of criminal investigations

Legal professional privilege applies in connection with investigations if the investigation can lead to a criminal procedure.

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

Legal professional privilege applies in connection with investigations conducted by the Danish antitrust/competition authority if the investigation can lead to a criminal procedure. This is not the case for any investigation by the Danish antitrust/competition authority, but in our experience the majority of the investigations involve matters, which can lead to a criminal procedure.

Scope of legal professional privilege

What is protected by legal professional privilege?

Evidence cannot be demanded from lawyers if it involves matters communicated to them in the course of carrying out their profession against the will of the party that has a right to confidentiality (the client). This is in accordance with section 170 of the Danish Administration of Justice Act and applies in both civil and criminal cases. The Danish antitrust/competition authority is assumed to act in accordance with the legal professional privilege practice set out by the Court of Justice of the EU.

Are in-house counsel protected by legal professional privilege?

Communication between in-house counsel and officers, directors or employees of a company is not protected by the legal professional privilege in section 170 of the Danish Administration of Justice Act. The Danish antitrust/competition authority is assumed to act in accordance with the legal professional privilege practice set out by the Court of Justice of the EU, and according to practice under the Danish Competition Act communication between in-house counsel and officers, directors or employees of the company is not covered by the legal professional privilege. However, this has never been tested in court.
Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

There are no explicit legal provisions protecting communications between non-national qualified lawyers and Danish clients and there are to our knowledge no judgments concerning the question. However, there is the assumption that if the lawyer is established in the EU, legal professional privilege will apply.

How is legal professional privilege waived?

The court may order lawyers to give evidence when the evidence is deemed decisive for the outcome of the case, and the nature of the case and its importance to the party in question or society is considered to justify such evidence to be given. This does not apply to defence attorneys in criminal cases.

Furthermore, according to section 299 of the Danish Administration of Justice Act, a court may – upon request of a party – order a third party, including a lawyer, to present or surrender documents which are at his disposal and which are important to the case, unless this will result in the disclosure of matters on which he would otherwise be excluded or exempted from giving oral evidence.

Under the Danish Money Laundering Act, a lawyer who suspects a client of being involved in money laundering is obliged to report such activity to the Public Prosecutor for Serious Economic Crime.

In a search conducted by the police or the antitrust/competition authority, any written material from the lawyer is not subject to the search. This is in accordance with section 794, subsection 3 of the Danish Administration of Justice Act. The scope of the protection is limited to content from the lawyer. The client's own notes from a meeting or a conversation with a lawyer are not covered by the protection.

Recent cases and/or other legal developments

During the last year, the Danish antitrust/competition authority has rearmed on its IT forensic resources. The authority has updated both their forensic hard- and software as well as appointed new expert employees. However, securing compliance with the legal professional privilege is still a challenge in relation to the competition authorities' review of electronic information obtained on dawn raids. According to section 18 (4) of the Danish Competition Act, the antitrust/competition authority has 40 workdays to review electronic information obtained on a dawn raid. In reality, it is necessary for the client or the client's lawyer to be present during these 40 workdays in order to know and secure that the authority does not review information covered by the legal professional privilege.
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 his or her 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 his or her 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 his or her 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 his or her 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 he distinguishes clearly between advice which is legal and that which is commercial in nature, since the latter will not attract legal professional privilege. He must also take care when instructing external lawyers to ensure that he clearly identifies and effectively manages 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.

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**Footnote 1**: [2018] EWCA Civ 2006  
**Footnote 2**: [2018] EWHC 3179 (Comm)  
**Footnote 3**: [2018] EWCA Civ 2652
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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 him to ignore the commercial strategies pursued by his 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 his 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 him 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 his 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 his 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.

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 his 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. He is entitled to refuse to allow the European Commission's inspectors to take a cursory look where he believes a cursory look is impossible without revealing the content of the documents, and he 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 his 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 (e.g., 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 (e.g., 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 his 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 his 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 his 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.

**Key contacts**

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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 his/her 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 his 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 he or she has obtained:

- in handling a task related to legal proceedings
- in providing legal advice on the legal position of his or her 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 he or she has 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 counsel.
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 he or she has learned also when carrying out other tasks not related to those mentioned above. Nonetheless, the court may obligate him or her 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 he or she 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.

**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 his or her 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.

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**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.

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**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**

The Finnish provisions regarding production of evidence were reformed during 2014 and 2015. The amendments introduced, which entered into force in the beginning of 2016, have had a significant impact on the extent of legal professional privilege.

Most importantly, the prohibition to testify was extended in two senses. First, advocates and licensed legal counsel may no longer testify regarding information which has been obtained in connection with professional tasks that are not related to legal proceedings. However, the exception concerning ‘very important reasons’ was introduced in order to allow lifting an advocate’s or a licensed legal counsel’s prohibition to testify where exceptional circumstances exist. Second, the preparatory works of the amendments make it clear that, at least in tasks related to legal proceedings, the prohibition covers not only secrets and sensitive information of the client but also those of other parties.
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Concept of legal professional 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 as they have in England and Wales, the US and other common law jurisdictions. Legal advice provided by a lawyer to his / her 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.

Legal professional privilege in the context of civil litigation

In the context of litigation, the relevant rule is Article 66.5 of Law 71-130 which provides:

>'in all matters, whether it is advisory work or litigation, the legal opinions addressed by a lawyer to his client, or intended to be for his client's benefit, the communications exchanged between a lawyer and his client, between the lawyer and his colleagues, the meeting notes and more generally all the documents of the file are protected by professional secrecy'.

Pursuant to this rule, in the context of a civil litigation, documents protected by professional secrecy may not serve as evidence and their production cannot be compelled.

Legal professional privilege in the context of criminal investigations

In the context of criminal litigation, the same rule applies. Moreover, Article 432 of the 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.

Note that, in addition, when acting in a fiduciary capacity, participating on behalf of their client in any financial or real estate transaction or assisting their clients in the preparation or execution of specific transactions, French lawyers are required to disclose their suspicions of tax fraud or financial offences to the authorities (Tracfin) via their Bar President, when applicable.

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. The authority may not
seize materials that are covered by professional secrecy, at least to the extent that they affect the fundamental right of defence.

Scope of legal professional privilege

What is protected by legal professional privilege?

Pursuant to Article 2 of the Règlement Intérieur National (RIN) of the French Bar Council, French professional secrecy applies in all matters, whether advisory or contentious. Secrecy applies no matter when a document was created, and regardless of the medium, whether physical or electronic (paper, fax, email, etc).

Professional secrecy covers:

- legal opinions 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, and
- information required by statutory auditors

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.

Note that, in accordance with recent case law, the involvement of a lawyer in an electronic communication between non-lawyers (for instance when the lawyer is copied in on an email) is not, in itself, sufficient to make such exchange subject to professional secrecy.

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

As a matter of French law, in-house lawyers (juristes d'entreprise) are considered to be a separate profession and do not enjoy the same status as 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 within 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.

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

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 European Union).

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.

How is legal professional privilege waived?
A client can opt to use a document covered by professional secrecy, but the client cannot release the lawyer from their professional secrecy obligations. Professional secrecy may, however, be waived in the interest of the defence of the client or in the interest of the defence of the lawyer where he / she is personally facing judicial proceedings. In the latter circumstance, the production of protected documents must be essential to the lawyer’s defence.

**Legal professional privilege in the context of merger control**

Legal professional privilege in the context of merger control has not been clearly defined. There is no case law on this point so far, though it has been mentioned in the context of antitrust investigations by the French competition authority (Decision n°07-D-49 of 19 December 2007) and by several courts (eg see *Cour de Cassation* on 24 April 2013, *Société Medtronic France*, n° 12-80331 and Appeal Court of Paris, 8 November 2017, Whirlpool France, RG n°14/133844).

However, legal professional privilege cannot be disregarded within the context of merger control. Given the lack of jurisprudence, the general definition of legal privilege, as set out in Article 66.5 of Law 71-130 (see further above), should apply.

**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).

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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, he has 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 his 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 his 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 he is entrusted with in his 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 his 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 his or her 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 his 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 (e.g. 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.

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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 his client whatever information has been entrusted to him 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 his 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.

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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 his lawyer fully and frankly, and in complete confidence, safe in the knowledge that what he tells his lawyer will never be revealed to a third party without his 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 his 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 his 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 his 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 his 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 his 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 his 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 his client, but also covers the communications between a lawyer and his non-professional agent, a lawyer and a third party or the client and his 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 his 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, he holds other positions within the company (such as an executive or operational role). If he is consulted in his 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 his client to the same extent as the legal advice privilege exists between a Hong Kong lawyer and his 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.

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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 his 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 his client does not fall within the scope of protection (save for certain specific information, eg in the field of 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 his or her 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 his / her 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 he obtained in his 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.

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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 a criminal proceeding and provides that the public prosecutor cannot carry out inspections and/or searches of the defence lawyer's premises (unless the defence lawyer is himself 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 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 seized by the ICA.

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 his 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. It does not cover any written communications which illustrate the external lawyer's opinion although is not written by him.

**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 lawyer's ability to exercise his professional independence by taking into account the commercial strategies of his employer. Italian administrative case law has confirmed that legal professional privilege is limited to the communications between the defendant and his 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 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 his 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 CdS. 24 June 2010, No. 4016).

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'.

**Key contacts**
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 his fiduciary obligations to his 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 he may have learned of in the course of performing his 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 he has come to know in the course of his work. This obligation is imposed on him based on his status and the relationship of trust he forms with his 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.

**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 his 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 he retains or possesses in the course of his 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 his 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, he should take appropriate action within the enterprise or organisation, ie report the
issue to his superior. However, the in-house counsel is not required to disclose confidential information outside his 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, he 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.

**Key contacts**
Concept of legal professional privilege

The legal obligation on lawyers to maintain professional secrecy is set out in article 458 of the Criminal Code (Code penal).

The obligation of professional secrecy is also contained in the following: (i) the law of 10 August 2011 on the legal profession (loi sur la profession d’avocat) (the 2011 Law); (ii) 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 (iii) 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.

Violation of professional secrecy may be subject to a jail sentence of eight days to six months and a fine of €5,000.

The Criminal Code 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.

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.

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 he/she will have to determine for himself/herself whether the facts on which he/she is questioned are protected by professional secrecy and if so, should only disclose to the court the circumstances in which the information came to his/her 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 below for the scope of legal professional privilege.)

A lawyer who is (him/herself) the subject of criminal proceedings, may disclose information covered by professional secrecy only to the
extent strictly necessary for his/her defence.

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

Searches of law firms may only be carried out in the presence of the Head of the Bar or his/her representative, or if they have been duly called to attend.

The Head of the Bar or his/her representative may make observations regarding the preservation of professional secrecy to the investigative authorities and all acts of seizure or proceedings must record the presence of the Head of the Bar or his/her representative, or their having been called to attend, under the penalty of nullity.

It is generally felt that the powers of the Head of the Bar to (only) make observations are too limited so that other measures should be available under law, such as a temporary stay imposed by the Head of the Bar on the review or seizure of certain documents by the authorities, leaving it up to the courts to determine whether or not the documents under consideration are protected by professional secrecy. However, these measures have not been implemented in Luxembourg legislation.

Scope of legal professional privilege

What is protected by legal professional privilege?

Professional secrecy applies to all information pertaining to the client and his/her affairs brought to the attention of the lawyer by his/her client, or of which the lawyer has gained knowledge through the exercise of his/her 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 his client.

It covers all legal advice given to or intended for a client, all correspondence between the lawyer and his/her client as well as with other lawyers, notes of meetings and generally all information received by the lawyer in the exercise of his/her profession, the name of the client of the lawyer, the diary of the lawyer and the financial arrangements between the lawyer and his/her 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. 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 him/her by his/her client, the reverse is not necessarily true as nothing prevents the client from disclosing to third parties what he/she has disclosed to his/her lawyer (in other words, the client does not owe any obligations of confidentiality).

In recent cases, the court has:

- set aside the minutes of an investigation initiated by an individual who was handing over correspondence between his/her 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 his/her client.

Pursuant to the 2013 Regulation, a lawyer may disclose confidential information if:

- he/she determines that this disclosure is in the best interests of his client; and
- his/her client has authorized him/her 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 his/her 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.

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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 (i.e. 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 his 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 his client benefits from legal professional privilege in accordance with his national legislation, he will be entitled to refuse disclosure of such information to Moroccan authorities.

From the perspective of the client, we are of the opinion that he will not be able to beneficiate 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.

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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 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 confidentiality is not absolute. For example, under the law implementing the EU Anti-Money Laundering Directive (Wet ter voorkoming van wester en financiering van terrorisme), (legal) professionals providing specific services such as advising on mergers and acquisitions of undertakings, are obliged to report unusual transactions. To this extent, the professional may need to set aside the duty to protect the confidentiality of his 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 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 information that is provided to the lawyer for the purpose of obtaining legal advice, as well as all communications between lawyer and client.

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 his right of non-disclosure during the entire procedure (Article 218 of the Code of Criminal Procedure (Wetboek van strafvordering)). However, he 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 prior approval of the lawyer. However, documents which are not protected by legal professional privilege can be seized.

Legal professional privilege applies to a search for seizure as well, which means this search needs to respect legal professional privilege. 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. An exception applies if a lawyer personally is considered a suspect of a crime. Official reports based on privileged phone calls need to be destroyed and cannot be used in a criminal case(Article 126a(2) of the Code of Criminal Procedure).

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 his 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 a lawyer may not report a committed crime he becomes aware of in his 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. Based on this article, 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 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 (Algemene wet bestuursrecht).

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

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.

Documents that were not created for the purpose of seeking legal advice found at the premises of an undertaking are not covered by legal professional privilege solely on the basis that a copy of those documents was sent to a lawyer.

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 geheimhoudingsprievilege 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.

**Scope of legal professional privilege**

**What is protected by legal professional privilege?**

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 his professional capacity, fall outside the scope of legal professional privilege.

The lawyer will 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 communications with 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 his capacity as advocaat. Communications with and advice from an in-house counsel who is not admitted to the Bar, 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 judgement of the Oost Brabant District Court of 26 March 2014, ECLI:NL:RBOBR:2014:3420).

How is legal professional privilege waived?

Legal professional privilege can be waived by the client or by the lawyer (albeit, in principle, only with his 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

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.

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 attorneys who have been 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.

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Concept of legal professional privilege

New Zealand law recognises two main kinds of legal professional privilege. The two kinds are commonly known as ‘lawyer / client privilege’ and ‘litigation privilege’. 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 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

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. 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 his 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 he or she holds a current practising certificate and is acting in his 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 his 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

The New Zealand Law Commission is required to review the Evidence Act 2006 every five years. As a result of the first review, completed in February 2013, a number of changes were enacted by Parliament.

The Law Commission published an Issues Paper as part of its second review on 28 March 2018. The Law Commission is currently seeking submissions and will formulate recommendations based on those submissions to be presented to the government in 2019.

Recent case law of interest

Sheppard Industries Ltd v. Specialized Bicycle Components Inc [2011] NZCA 346, [2011] 3 NZLR 620 Sheppard concerned ‘settlement privilege’. The parties went to mediation in an attempt to settle proceedings that had been filed. The mediation agreement, on at least one reading, required written agreement for there to be settlement of the dispute. No written settlement agreement was entered into. The Court of Appeal found that it was not possible to contract out of the statutory exception to settlement privilege in respect of ‘evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue’. On that basis, the Court allowed evidence to be led to determine whether the parties had reached a binding oral settlement agreement at conclusion of the mediation, regardless of the fact that the mediation had been conducted on a confidential and ‘without prejudice’ basis.

R v Bain [2008] NZCA 585 In Bain, the defendant had been convicted of murdering members of his immediate family. The defendant signed a waiver of privilege for the sole purpose of an inquiry by the Ministry of Justice in relation to a petition by the defendant for exercise of the royal prerogative of mercy. This constituted a limited waiver. Privileged material was then adduced in evidence in open court (with the defendant's consent) and released into the public domain by way of publication of the judgment. During hearings before the Court of Appeal, counsel also referred to that material. Accordingly, the Court found that confidentiality was lost in relation to the (originally) privileged material as there had been consent as to its disclosure and, therefore, the privilege had been waived for the purpose of the defendant's retrial.

Gowing & Co Lawyers Ltd v Police [2013] NZHC 2177 Gowing concerned a letter prepared by the defendant in a criminal proceeding for delivery to the complainant which contained certain self-incriminating statements. The letter was given by the defendant to another person who refused to pass it on to the complainant as requested by the defendant. The letter was returned to the defendant, who then provided it to his legal adviser during a meeting. It was argued by the defendant that the letter attracted lawyer / client privilege as it was provided to the defendant's legal adviser during a ‘privileged meeting’. The court found that the letter did not attract the privilege for the following reasons:

- There was no intention that the letter remain confidential
- The letter was not created for the purpose of obtaining professional legal services, and
- Disclosure of the letter would not reveal legal advice provided to the defendant by his legal adviser

Smallbone v London [2015] NZCA 391 Smallbone was the plaintiff in a successful defamation action in the High Court. The trial was a credibility contest between Mr Smallbone and his ex wife Ms London. The judge entered judgment but before judgment could be sealed, he recalled the judgment on the basis that the defendants wanted to be heard on the damages award. The defendants made several applications, including for an order admitting the affidavit evidence of Witness Z, a woman who knew Mr Smallbone after his marriage to Ms London. Witness Z gave a materially similar account to Ms London of Mr Smallbone's behaviour. Witness Z also said that before trial,
Mr Smallbone had met with her and asked her to give evidence to the effect that he was not the sort of man who would do the things Ms London alleged and that he would pay her for her false testimony. Witness Z denied Witness Z’s allegations and said that he did ask her to make a statement but that she demanded money and refused to be involved when he did not agree to pay. The judge admitted Witness Z’s affidavit and then set aside the jury verdicts and ordered a retrial. The matter went to the Court of Appeal on a jurisdiction point but also included the ancillary matter of whether one of the defendants could claim litigation privilege in an affidavit of documents for communications with Witness Z. While it was not in dispute that litigation privilege applied to these communications, the argument was that the privilege should be disallowed on the ground that it was for a dishonest purpose or to enable Witness Z to commit perjury. The Court of Appeal held that to sustain an application for disallowing privilege on the basis that a communication was made for a dishonest purpose to enable a witness to commit perjury, an applicant must show a prima facie case of dishonesty and / or criminal purpose on behalf of the witness in relation to the privileged communications. The threshold is high. The Court declined to draw an inference of criminal purpose from mainly circumstantial evidence and the application for such an order was dismissed.

Beckham v R [2016] 1 NZLR 505

Beckham was an appeal against a decision of the Court of Appeal dismissing an appeal against conviction for serious drug offenses and money laundering. The issue was whether the appellant should have received a reduction in his sentence for breach of his rights under the New Zealand Bill of Rights Act 1990. As part of the appeal, Mr Beckham was given leave to raise new allegations of breaches of privilege, the focus being on phone calls he made to people other than his lawyer and which he claimed were subject to solicitor / client privilege and / or litigation privilege:

- In respect of three phone calls to his partner, Mr Beckham claimed solicitor / client privilege. The Supreme Court held that solicitor / client privilege could potentially apply where an accused person gives instructions to his or her lawyer through an intermediary, as Mr Beckham’s partner was in this case. However, Mr Beckham had to establish that the calls involved communications made in the course of and for the purpose of obtaining legal advice for Mr Beckham in relation to his case. It was not clear whether the discussions between Mr Beckham and his partner were communicated to his lawyer and it was at best, equivocal whether that was even the intention. Solicitor / client privilege did not therefore attach to the communications.

- In relation to litigation privilege, this was claimed by Mr Beckham in respect of certain phone calls between him and his partner, and him and his son, and where trial strategy or potential witnesses were discussed. Only small portions of the calls were the subject of litigation privilege which suggested that the dominant purpose of the calls between Mr Beckham and his partner and son were family and personal matters rather than preparation for the trial. Mr Beckham argued that it was not necessary to establish that the dominant purpose of each call was preparation for trial, but rather that the dominant purpose of the particular excerpt from the call for which the privilege claim was made was for the purpose of preparing for trial. The Supreme Court held that it was consistent with the intention of the legislature to apply the dominant purpose test with some rigour. While in some cases, a proper delineation can be made between different parts of a document (by severing material prepared for the purpose of trial from other material), it was harder to do this in relation to discursive and wide ranging telephone conversations where topics are intertwined. The Supreme Court ultimately held that the overall purpose of the communications was simply to keep in touch and to discuss normal domestic and business matters rather than preparation for trial. The Supreme Court also held that a requirement for confidentiality was consistent with litigation privilege. It was also consistent with the concept of waiver, which occurs when a person claiming privilege has voluntarily disclosed or consented to the production of privileged communications in circumstances which are inconsistent with a claim to confidentiality. The telephone calls for which litigation privilege had been claimed had not been made in circumstances where there was an expectation of confidentiality because Mr Beckham had admitted that he had made the calls from a monitored phone and that he knew the calls were being monitored. There was no necessary confidentiality in respect of the phone calls.

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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 his 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 his capacity as a lawyer, i.e., in connection with obtaining legal advice. 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 his or her 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 his 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.

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 (see footnote 1). So far no changes have been made although it was proposed to enhance the scope of privilege by statute specifying that the principle covers all information in connection with a lawyer’s assignment, including the lawyer’s advice.

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 his 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 6). 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 7).

Footnote 1: NOU 2015:3
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
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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, i.e., he is not admitted to the Bar, the professional secrecy rule does not apply to her/him).

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...
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 is such cases is waived.

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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. 145/2015, of 9 September.

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 he may have had knowledge of through the course of his professional activity, under the Civil Procedure Code.

See above 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 Code of Criminal Procedure. 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, codefendants, 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 a 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 that 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 nonnational 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 '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 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 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 his / her 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, 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 his / her 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 they are 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'.

www.dlapiperlegalprivilege.com/legalprivilege
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 misdemeanors). 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, it is relevant to highlight that 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 provides for a restriction on disclosure of evidence covered by legal professional privilege. This is also provided in Law no. 23/2018.

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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 him, 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 his 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(2) 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 learned in the course of performing his 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 defense 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 his client may not be subject to technical supervision, (see footnote 1) except for where there are indications that the lawyer himself 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 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 himself 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.

However, in accordance with specific legislation regarding, for example, money laundering (Article 7 of Law 656/2002 regarding the prevention and sanctioning of money laundering and the establishment of certain measures for the prevention and fight against the financing of terrorism), a lawyer may be required to disclose information about his client’s identity and transactions.

**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 Regulation regarding the organisation, functioning and procedure of the Romanian Competition Council.

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 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.

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Concept of legal professional privilege

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 his / her client. Such information may include:

- the fact of an advocate being contacted by a client
- the information obtained by an advocate from his / her client
- the evidence and documents collected by an advocate while preparing for a case
- 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 confidential agreement).

Information considered as 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 he receives from his 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 shall be 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 pretrial 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.

Scope of legal professional privilege

What is protected by legal professional privilege?

In addition to the above, correspondence between advocates is protected by advocate secrecy regulations. Special investigative activities can be performed in respect of advocates only under special rulings.

Advocate secrecy does not cover cases when an investigation has uncovered items used to commit a crime or goods prohibited or limited in Russia.

Advocate secrecy does not apply to lawyer-to-lawyer communications (to the extent the lawyers are not advocates). Correspondence between legal consultants can be protected by means of a confidentiality agreement as a commercial secret. However, upon the request of an authorised state body, this information must be provided. 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) he has to maintain the confidentiality of the commercially secret information which he obtained during the performance of his employment (including information received from clients)

Are communications with inhouse counsel protected by legal professional privilege?

Inhouse 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 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 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.

Does legal professional privilege apply to the correspondence of nonnational qualified lawyers?

Under Russian law, foreign qualified lawyers can advise on issues of such foreign law in the territory of the Russian Federation. Foreign advocates are prohibited from providing legal assistance in the territory of the Russian Federation on issues relating to state secrets of the Russian Federation. Only Russian-qualified advocates are protected by advocate secrecy.

If a foreign qualified lawyer is an employee under an employment agreement governed by the Russian Labour Code, that lawyer has to comply with Russian rules related to 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.

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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 self-incrimination states that no person is bound to release any document or information if the document or information would have a tendency to expose him 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 his 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 his or her 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 his or her client; this is construed to include actual lawyer / client communications (e.g. phone calls, facetoface discussions, letters, emails, faxes, etc) and evidence of such communications (e.g. 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 he is the ‘lawyer’, and one with external lawyers, in which he (alone or together with others) is 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 he distinguishes clearly between advice which is legal and that which is commercial in nature, since the latter will not attract legal professional privilege. He must also take care when instructing external lawyers to ensure that he clearly identifies and effectively manages 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.

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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 his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his 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 him and his ‘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 his employment showing that a crime or fraud has been committed since the commencement of his 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 his possession, custody or power
The party will rely on
Could adversely affect his 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 his 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 his 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 his 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. It remains unclear whether legal professional privilege curtails in any way a criminal investigator's power to require the production of and / or to search and seize documents. The general view is that 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.

**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 2007 publication, *CCS Guidelines on the Powers of Investigation*). 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 he has identified as potentially self-incriminating, also may not be used against him in criminal proceedings, other than proceedings under the Competition Act in respect of his failure to produce documents or wrongful destruction of documents. However, such documents are admissible in civil proceedings against him, whether or not those proceedings are brought under the Competition Act.

**Scope of legal professional privilege**

**What is protected by legal professional privilege?**
Legal professional 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 his 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 his 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 his right to invoke legal professional privilege if he 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 his 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 his 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.

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 his case
- Whether it can be said that there is a risk that an incomplete and misleading impression had been given

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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 his 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 his 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. 136/2001 Coll. 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 without delay, unless this is contrary to special legislation (eg banking, tax legislation).

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 he is released from the obligation of confidentiality by his 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 his/her 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 his 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, his obligation to maintain confidentiality stems from the general obligation of the employee to maintain confidentiality of any information which he obtained during the performance of his 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 he obtained during the performance of his employment, whereas the advocate is obliged to maintain confidentiality of all information he obtained in relation to the performance of his function as an advocate.

As regards in-house counsel, the obligation to maintain confidentiality will apply to a foreign in-house counsel, provided he is employed in the Slovak Republic and the Slovak labour law regulations apply to him.

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. 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 his professional activities and provide legal services as a sole practitioner under his 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 he is obliged to fulfil the duties and obligations arising for lawyers under this Act, under separate legal rules and the Slovak Bar’s internal rules (his duty to comply with the laws and legal rules applicable in his 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 his 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.

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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 his / her 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 his / her 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 him / her 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.

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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 are suggestions that current laws may be amended and, a group of members of the National Assembly has recently introduced two separate bills concerning attorney-client privilege. These bills suggest 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 its client, unless there is a special exception permitting disclosure or the client consents to its disclosure. Whether the proposed bills 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 clients' confidences must be protected. This concept is embodied in South Korea's Criminal Act, Criminal Procedure Act, Civil Procedure Act, Attorney-at-Law Act, and Korean Bar Association's Ethics Code for Lawyers.

The Foreign Legal Consultant Act has codified the rule of confidentiality as applied to communications with non-national qualified lawyers.

Correspondence between in-house counsel and their clients is not expressly denied protection by legal professional confidentiality.

Overall, there is an increasing demand that the scope of protection afforded by the principle of confidentiality should 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 of 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 such profession to disclose another's secret which has come to his/her knowledge in the course of practice of his/her 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.

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 his/her 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 his/her 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 him/her by the clients on the basis that they are confidential. Article 149 of the Criminal Procedure Act states that a lawyer may refuse to testify regarding clients' confidential information, where this was obtained in the course of performing his/her 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. Whilst 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 his/her duty of legal professional confidence.

**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 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 his/her own right.

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 its 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 that the application of legal professional confidentiality to in-house counsel should 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. 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 particularly 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 an attorney-at-law 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 he / she becomes aware in relation to his/her duties.' This rule shall not apply where disclosure of confidential matters is specifically prescribed otherwise by another law.

The law takes violation of the 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 he/she produced the legal memorandum, thereby waiving the right to refuse testimony, then such legal memorandum can be used as incriminating evidence.

The court emphasized that the inadmissibility of the legal memorandum was not by virtue of ‘attorney-client privilege,’ explaining that
attorney-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 attorney-client privilege in reaching its decision has invited some criticism from the Korean legal community.

In addition, 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 such investigative practice and the actions of the Prosecution.

In late 2018, one of the top tier law firms in Korea was raided by investigative authorities for allegedly attempting to influence the outcome of a politically high-profile case involving the former Supreme Court Chief Justice. The recent incident involves a case that is politically sensitive in Korea, and it remains to be seen whether the Korean courts will eventually be open to accepting and broadening the concept of legal professional privilege.

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Concept of legal professional privilege

Different general rules regarding professional confidentiality establish that all attorneys are subject to the duties of confidentiality and secrecy and, in the same way, documents and communications exchanged between lawyer and client are protected as well (Article 542.3 of the Judiciary Law, articles 32 and 42 of the General Regulation of the Legal Profession, the 'GRLP', (and Article 22 of the New General Regulation of the Legal Profession, now being processed in Parliament which, despite not having been implemented yet, contains extensive regulation on the professional privilege).

It is important to highlight that in the Spanish legal system there is no express regulation on 'privileged' documents or communications, but an obligation to keep professional secrecy, which consists in the guarantee to discuss freely with a lawyer the issues regarding a legal case with no fear to any interference by the public authorities. Summarizing, the professional secret is a fundamental part of the right to defense that is guaranteed by the Constitution in Article 24 (judgment of the National Court of 26 September 2011).

In Spain, all the lawyers practicing their professional activity have the same rights and obligations, regardless of being in-house lawyers or external ones. In-house lawyers have an express recognition as a form of individual practice of the legal profession regulated by the same legal regulations that rules such profession (articles 27.3 and 4 of the GRLP), including among these regulations the professional secrecy.

Legal professional privilege in the context of civil litigation

From the civil perspective, there is national case law that states that a lawyer, in application of professional secrecy in cases where he has been involved, has the right not to stand as a witness in a trial and if a lawyer stands as a witness, he has the right to withhold confidential information belonging to his client (see judgments issued by the High Court of Baleares (Audiencia Provincial) number 18/2014 on 22 January and number 174/2017 on 15 June).

Judgment number 23/2013 issued by the High Court of Madrid (Audiencia Provincial) on 21 December established that any information or evidence obtained as a result of a breach of legal professional privilege is not valid in Court proceedings, on the basis that evidence or information obtained in this way is devoid of effect.

The judgment issued by the High Court of Madrid (Audiencia Provincial) on 27 October 2011 (judgment number 289/2011) however declares that a lawyer is not obliged to provide the information / documentation received from the client, in the case of preliminary proceedings in order to allow the plaintiff to obtain information necessary to prepare the case to be filed before the court.

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 the criminal perspective, professional secrecy between lawyer and defendant cannot be violated either by the parties or by the courts, public prosecutors or the police authorities. Furthermore, according to Article 199 of the Spanish Criminal Code, the unlawful disclosure of information by lawyers is a punishable act.

In addition, the lawyer must not declare against his client regarding the information entrusted to him as a result of his professional activity. It is expressly provided in Article 416.2 of the Spanish Criminal Procedure Act and supported by the case law of the Supreme Court (issued on 24 November 2015).

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 (judgment of the Tribunal Constitucional number 183/1994, Judgment of the Supreme Court of 6 March 1995).

Professional secrecy can be waived on an extraordinary basis when the lawyer exceeds his legal duty and willingly cooperates in criminal activities (see the judgment of the Supreme Court of 28 November 2001, number 2026/2001). Legal professional privilege in the context of investigations by the competition authority.

**Legal Professional Privilege in the context of investigations by the competition authority**

From a competition law point of view, the above considerations are also applicable. Notwithstanding it, the Court of Justice (Akzo judgment) has stated that internal company communications with in-house lawyers in European Commission investigations are not covered by legal professional privilege (see Scope with regard to the inspections carried out by the Spanish competition authorities under Spanish law).

**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 his 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 recent case law issued by the Spanish Competition Authority (Comisión Nacional de los Mercados y la Competencia or ‘CNMC’). 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 Spanish Competition Authority the reasons
that justify the consideration of this type of information (ie reproducing external legal advice) as information protected by the professional secrecy (see the judgment of the Supreme Court of 27 April 2012). Once it is demonstrated that those documents are protected, the officers of the Spanish Competition 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 said above, Article 27.4 of the General Regulation of the Legal Profession (Estatuto General de la Abogacía) provides that in-house counsels benefit (in the same way external counsels do) from the general principles of freedom and independence. This legal provision do not distinguish between external and in-house counsels, 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 acts during the inspections as if internal counsel communication enjoys no professional secrecy on the grounds of the Akzo judgment abovementioned.

Such approach has been challenged before the Spanish Courts as the inspections carried out under Spanish regulations should not be affected by the Akzo judgment. The Spanish Supreme Court did not address directly this issue and simply stated (Judgment of 27 April 2012) that there had not been an infringement of the professional secrecy in those particular cases as the internal communications with in-house lawyers seized during the inspections had not been used by the competition authority to support the 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 the national ones.

Recent cases and/or other legal developments

From the criminal law perspective, the Spanish Supreme Court convicted not too long ago a judge that breached the professional secrecy between lawyer and defendant by taping their private conversation without the required legal grounds (judgment of the Supreme Court of 9 February 2012). In this regard, a judgement of 24 November 2015 issued by the Supreme Court also recognises the right of a lawyer to refuse to declare against his client regarding the information obtained as a result of his professional activity.

The most recent Supreme Court case law (Judgement No. 451/2018 of 10th October) stated the following:

- The basis of the obligation are the trust and confidentiality of the client relationship.
- The violation of this duty implies an injury of the client’s rights to the intimacy and to the effective legal protection.
- The obligation begins at the pre-trial moment, inasmuch as the future part of the eventual process has to be free to provide the lawyer who assists him with all the information in order to guarantee an effective defence.
- The lawyer is also exempted from the duty to denounce according to the art. 263 of the Spanish Criminal Procedure Act (without prejudice to the legal limitations in relation to the configuration of such professional secrecy).

From the civil perspective, there are relevant precedents such as the 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.

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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 (i.e., 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, i.e., ‘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 e.g. 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 his 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 A 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 his 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.

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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 his / her 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 he / she has 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 himself.

The legal professional privilege is imposed by statues 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 disclose:

- 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 his official appointment or any other official or semi-official capacity
- Any confidential document or fact which was entrusted or imparted by a party to him in his 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 he has 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:

- Document or fact which is confidential official information
- Confidential document or fact which has been acquired by or made known to him by virtue of his 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 he has 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 or such party or person to give such testimony or produce such evidence. This meant 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, registration, 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 he/she has obtained prior consent from the client or an authorization from the court to disclose such information. The violation of this regulation could be subject to punishment of:

- Suspension of penalty determination
- Prohibition from practising as a lawyer for a period of up to 3 years, or
- Removal of name from the lawyer register in accordance with Section 52 of Lawyer Act B.E. 2528 (1985)

Section 4 of the Lawyers Act B.E. 2528 ('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. 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 him or her in the course of his or her 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 THB1,000, 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 his or her knowledge or which he or she has 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 lawyer register.

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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 his 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 his 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 his 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 his client as per his 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.
Ukraine

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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 his professional obligations, including documents in electronic form.

The lawyer must not without the consent of the client disclose privileged information or use it in his own interest or in the interest of any third parties.

It is prohibited to demand from a lawyer (or his assistant or intern) that he 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 his own rights as a lawyer, eg if there is a disciplinary or criminal case brought against him.

Recent cases and/or other legal developments
No details for this country.

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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 him, 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. Gucci?, 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.

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