

BELGIUM

Legal privilege global guide



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.



Belgium

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

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

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

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

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

Legal professional privilege in the context of civil litigation

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

Legal professional privilege in the context of criminal investigations

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

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

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

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

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

Scope of legal professional privilege

What is protected by legal professional privilege?

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

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

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

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

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

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

How is legal professional privilege waived?

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

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

/2020). Furthermore, the President of the Bar should be consulted and allow for such disclosure (in line with Article 6.1 of the Belgian Rules of Professional Conduct).

Legal professional privilege in the context of merger control

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

Recent cases and/or other legal developments

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

Belgian Court of Cassation, 19 October 2021

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

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

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

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

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

Data privilege

Content to follow shortly.

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