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](http://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 Criminal Code and indirectly covered by instruments of international law such as Article 6 and 8 of the European Convention on Human Rights ("ECHR") and the 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 their client, the consultation given, personal notes passed on to the lawyer by their 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 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 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 also covered 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.

Data privilege

Content to follow shortly.

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