

DENMARK

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.

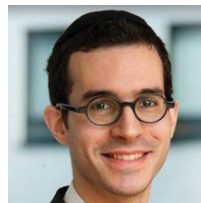


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Concept of legal professional privilege

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

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

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

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

Competition law infringements in Denmark are subject to criminal sanctions including fines and imprisonment. The Danish Competition and Consumer Authority ("DCCA") does not yet have the authority to impose administrative fines. Following the implementation of the ECN+ directive, such authority will be established under Danish law.

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

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

If there are reasonable grounds to suspect that a person or legal entity under investigation has infringed provisions of competition law which would be subject to criminal sanctions, any administrative coercive measures, e.g. dawn raids, must be conducted in accordance with the criminal procedural provisions set out in the Danish Administration of Justice Act (*Retsplejeloven*).

The SEIC constitutes the Danish fraud squad, whose power to conduct investigations and perform searches and seizures is regulated by the Administration of Justice Act. The SEIC has the power to issue a notice of fine, and, in its capacity as prosecuting authority, also conducts criminal proceedings before the courts.

In practice, the DCCA may conduct an administrative investigation if it suspects an infringement of the Danish Competition Act has taken place. The DCCA will in general refer a case to the SEIC as soon as it becomes reasonably clear that an infringement of the Competition Act has taken place.

In complex cases, the DCCA will often choose to conduct its own investigation and issue behavioural orders concerning any infringement,

e.g. cease-and-desist orders. Such orders are subject to appeal. If a party has appealed an order, SEIC will await the outcome of the appeal.

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

If a dispute arises during an inspection as to whether a document is covered by legal professional privilege, the DCCA will act in accordance with its dawn raid guidelines. Contested documents are placed and sealed in a briefcase for individual evaluation after the dawn raid has taken place. For electronic documents, the DCCA will make copies and store them on special hard drives for later review. The hard drives containing the copied data are sealed and placed in a locked safe in a specially secured investigation room at the DCCA. The entity under investigation or its representative (e.g. an external lawyer) is invited to witness when the seal on the copied hard drives is broken and to attend the subsequent search. During the search, the entity or its lawyers can specify which electronic documents it considers to be covered by legal professional privilege. These documents will be tagged and excluded from future searches. After completion of the search, the DCCA issues a report to the undertaking under investigation containing a list of documents tagged as potentially subject to privilege. The entity must explain the basis on which it claims privilege for such documents. If the entity and the DCCA are unable to agree on which documents are to be included in the case, the DCCA will issue a written decision on the matter. A party may apply to stay and appeal the DCCA's decision.

Legal professional privilege in the context of criminal investigations

SEIC's powers of inspection are set out in the Administration of Justice Act. SEIC is not bound by EU case law on legal professional privilege. Nevertheless, a party under investigation is entitled to request a lawyer and all correspondence between the client and its lawyer regarding the alleged infringement will be privileged and confidential. This protection applies from the time of the indictment; accordingly, any communications which are made up to the point of indictment are not protected, unless such communications would be covered by legal professional privilege under EU law.

Legal professional privilege in the context of civil litigation

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

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

Scope of legal professional privilege

What is protected by legal professional privilege?

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

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

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

Provided that documents are created in the lawyer's capacity as a lawyer they will fall under the scope of legal professional privilege. The

court may, however, in special cases order a lawyer to disclose certain evidence, unless the lawyer is acting as criminal defence counsel. The lawyer is considered to be acting as criminal defence counsel from the moment the lawyer and the client could reasonably have known that the client would be charged with a crime.

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

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

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

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

How is legal professional privilege waived?

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

Legal professional privilege in the context of merger control

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

Recent cases and/or other legal developments

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

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Disclaimer

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