

SPAIN

# 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).



# Spain

*Last modified 15 November 2021*

## Concept of legal professional privilege

Spanish general rules regarding professional conduct establish that attorneys are subject to duties of confidentiality and secrecy and, following that reasoning, documents and communications exchanged between lawyer and client are protected (Article 542.3 of the Judiciary Law, articles 21 et seq. of the General Regulation of the Legal Profession, the '**GRLP**').

Spanish regulations focus on the obligation to maintain professional secrecy, which guarantees the ability to discuss freely with a lawyer the issues regarding a legal case without the risk of interference by public authorities. Professional secrecy is a fundamental part of the right to defence as guaranteed by the Spanish Constitution in Article 24. And, in this context, article 23 GRLP confirms that communications between lawyers and their clients shall be kept confidential.

The Spanish GRLP was updated in July 2021. Insofar as legal professional privilege is concerned, the two most relevant changes are:

- lawyers can ask for the bar association's dean to be present in case there is a search in her/his office, and
- clients can expressly authorize their lawyers to waive their duty to secrecy.

It is important to note that Spanish regulations do not distinguish between in-house and external lawyers. Both are subject to the same rights and obligations and in-house lawyers are expressly recognised as members of the legal profession subject to the same legal regulations and principles that apply to the wider profession, including professional secrecy. However, as explained below, not all regulators in Spain are strictly following this approach.

## Legal professional privilege in the context of civil litigation

From a civil perspective, there is national case law that states that a lawyer, in application of professional secrecy, has the right not to stand as a witness in a trial and if a lawyer stands as a witness, they have the right to withhold confidential information belonging to their client.

Court rulings have held that information or evidence obtained as a result of a breach of legal professional privilege is invalid in Court and that lawyers are not obliged to provide information/documentation received from the client in preliminary proceedings such as pre-action disclosure.

## Pre-trial discovery proceedings in Spain

Spain has recently incorporated pre-trial discovery into sections 283-bis(a) to 283-bis (k) of the Spanish Law on Civil Procedure (hereinafter, the "**SLCP**"), in line with the EU Damages Directive.

Section 283-bis(b) of the SLCP has incorporated the Damages Directive's rules on access to confidential information. Evidence subject to legal privilege or professional secrecy is accordingly protected. Depending on the specific circumstances of each case, the Court may grant particular measures in order to protect the confidentiality of certain information (such as drafting a non-confidential version of a resolution redacting confidential information or restricting public access to hearings).

Section 283-bis(k) of the SLCP also sets out the consequences of non-compliance with obligations of confidentiality. The aggrieved party may request that the Court impose any of the following measures:

- Dismissal of the legal action or evidence in question
- Holding the person in breach liable for the damage caused by the disclosure; and
- Payment of costs.

Depending on the specific circumstances of each case, the Court may impose a fine between 6,000 and 1,000,000 Euros on the person in breach.

## Legal professional privilege in the context of criminal investigations

From a criminal perspective, professional secrecy between lawyer and defendant is also protected and cannot be violated by the parties, courts, public prosecutors or police/judicial authorities. Note, also, that the unlawful disclosure of information by lawyers is a punishable act.

In addition, lawyers must not use information entrusted to them by a client as a result of their professional activity where such use would be contrary to the client's best interests. This is expressly set out in Article 416.2 of the Spanish Criminal Procedure Act and supported by case law of the Supreme Court.

The lawyer's duty and right to professional secrecy includes information from the client, as well as the opposing party, colleagues and all facts and documents of which he has become aware or which he has received in the course of his professional duties.

The lawyer may not provide the court or his client with letters, communications or notes received from the lawyer of the other party, unless expressly authorised to do so by their lawyer.

Conversations held with clients, opposing parties or their lawyers, in person or by any telephone or electronic means, may not be recorded without the prior agreement of all those involved and, in any case, shall be covered by professional secrecy.

The case law of the Supreme Court as well as of the Constitutional Court (Tribunal Constitucional) states that the only valid interception of communications between lawyer and client during a criminal investigation is where there is some incriminating evidence against the defence lawyer.

Professional secrecy can be waived on an extraordinary basis when the lawyer exceeds their legal duty and willingly cooperates in criminal activities.

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

From a competition law perspective, the above considerations are also applicable.

However, the Spanish competition authority takes the view, following rulings from the European Court of Justice (e.g., Akzo judgment), that communications with in-house lawyers are not covered by legal professional privilege. There are queries as to whether this position is fully aligned with Spanish legislation, but case law has yet to fully clarify the issue.

## Legal Professional Privilege in the context of merger control procedures

As is the case for merger control procedures before the European Commission, the Spanish competition authority is increasing the volume of documentation requested for the assessment of transactions. This is related to the sophistication and complexity of the transactions and the assessment methods in recent years as well as the markets in which the transactions take place.

Notwithstanding the above, to date there is no particular case law in Spain dealing with legal professional privilege in the context of merger control; privileged information receives similar treatment in the context of both sanctioning and merger control procedures.

## Scope of legal professional privilege

### What is protected by legal professional privilege?

The general rule is that any spoken or written communications, documents or correspondence exchanged between a lawyer and their client, opposing parties and other lawyers within the context of a lawyer-client relationship must be kept confidential. Any breach of this duty could lead to the lawyer being held criminally liable and to sanctions being imposed by the Bar Association, as well as by any other potential authority related to the matter.

In the particular case of competition law, it is also understood that any internal document that merely reproduces advice provided for an external lawyer shall be covered by professional secrecy, as may be inferred from decisions issued by the Spanish Competition Authority. In this regard, it is important to highlight that when a dawn raid inspection is carried out, the raided company is required to explain and demonstrate to the authority the reasons that justify the consideration of this type of information as information protected by the professional secrecy (e.g., reproducing external legal advice). Once it is demonstrated that those documents are privileged, the officers of the Spanish authority should immediately return those documents to the raided company and exclude them from the scope of the investigation.

In this regard, the Supreme Court has recently confirmed the above. Namely, arguing that certain document is covered by the legal privilege will not suffice if no arguments for such coverage are provided to the officers of the CNMC (judgment issued on 21 September 2015).

### Are in-house counsel protected by legal professional privilege?

As noted above, Article 39 of the General Regulation of the Legal Profession (*Estatuto General de la Abogacía*) provides that in-house counsel benefit (in the same way external counsel do) from the general principles of freedom and independence. This legal provision does not distinguish between external and in-house counsel, which leads to the conclusion that both are subject to identical duties and rights in the framework of the performance of their legal services.

Nevertheless, in the specific case of *Spanish competition law*, the Spanish Competition Authority usually adopts the position during inspections that communications between internal counsel and company employees are not protected by professional secrecy as a result of the Akzo judgment mentioned above.

This approach has been challenged before the Spanish Courts and although the issue has not been fully clarified yet, case law states that there is no infringement of professional secrecy when internal communications with in-house lawyers seized during inspections are not used by the competition authority to support allegations of infringement of competition law.

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

Professional secrecy applies irrespective of the nationality of the lawyer. Therefore, non-national qualified lawyers have the same protection as national ones.

## Recent cases and/or other legal developments

From a criminal law perspective, even judges have been prosecuted for breaching professional secrecy between lawyer and defendant, for example by taping their private conversation without sufficient legal grounds. The Supreme Court recognises the right of a lawyer to refuse to testify against their client on the basis of information obtained as a result of their professional activity. More recent Supreme Court case law confirms that:

- The basis of the obligation is the trust and confidentiality of the client relationship.
- A breach of this duty implies damage to the client's rights of confidentiality and to effective legal protection;
- The obligation begins when a lawyer is instructed by a client. This is to ensure an adequate defence in the future process, which may require defendants to provide their lawyers with all available information required to guarantee an effective defence;
- Lawyers are also not required to report any incriminating or damaging information in accordance with art. 263 of the Spanish Criminal Procedure Act.

From the civil perspective, there are relevant precedents such as judgment number 6/2018, issued by the High Court of Valencia (*Audiencia Provincial*) on 16 January (appeal number 355/2017). In this case, a lawyer acted as a witness. In the hearing, the lawyer recognised that he was appointed as a lawyer by the plaintiff in criminal proceedings against the defendant and that an amicable settlement had been agreed between both parties (plaintiff and defendant). By means of this agreement a debt was recognised and the

criminal complaint filed by the plaintiff was withdrawn. The Court held that, these statements did not infringe the lawyer's obligations of professional secrecy.

A more recent precedent was issued by the High Court of *A Coruña* on 25 January 2021. The court pointed out that the right to professional secrecy is not a right, but an absolute obligation of confidentiality and it is a right of the client. So, to respect this right, the lawyer cannot be forced to testify. The only exception would be that the client exempts the lawyer from this duty for his own protection. Furthermore, the judge stated that any response given by the lawyer in those circumstances would be a violation of fundamental rights and should be inadmissible.

From an antitrust perspective, the Spanish Competition Authority had the opportunity to decide on the application of legal privilege to competition procedures in Spain in a decision issued in December 2020 (Case R/AJ/079/20 Albia). In particular, the Spanish Competition Authority obtained certain evidence related to potential infringements during a merger control procedure in the funerary services sector (Case C/1086/19 *Santa Lucía/Funespaña*). That evidence allowed the authority to open an investigation and conduct a dawn raid on Albia's premises, which was subsequently appealed by the company under investigation.

In that context, Albia filed an appeal and claimed, among other things, that the Spanish Competition Authority had breached legal privilege on the basis that European case-law (i.e., Akzo judgment) on this matter did not apply. From their perspective, the difference between legal privilege for in-house lawyers and external lawyers is not valid. This argument -together with the entire appeal- was rejected by the Spanish Competition Authority and it remains to be seen if the defendant appeals.

## Data privilege

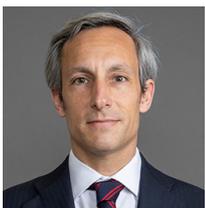
Spanish Data Protection Laws (including both EU General Data Protection Regulation 2016/679 "**GDPR**" and Spanish Fundamental Act 3 /2018 on the Protection of Personal Data and the Guarantee of Digital Rights "**NLOPD**") include some provisions regarding "legal and professional obligations of secrecy". Sometimes, professional secrecy is considered a safeguard of the rights and freedoms of the data subject, operating as a limit to the processing of sensitive personal data (e.g. Article 9.2.(i) of the GDPR). In other cases, professional secrecy operates in the opposite direction: processing may be lawful only if the data are processed by professionals under a secrecy obligation (e.g. Article 9.3 of the GDPR). In some cases, professional secrecy obligations may act as an exception to reporting obligations (e.g. Article 14.5 (d) of the GDPR).

The Data Protection Officer is made subject herself/himself to a duty of professional secrecy (Article 38.5 of the GDPR) when conducting her/his activities but this does not prevent the officer from investigating the data processing activities of a controller who objects on the basis of professional secrecy owed to company employees or representatives (Article 36.3 of the NLOPD). The same applies to the staff of the Spanish data protection supervisory authorities.

Article 90 of the GDPR allows Spanish authorities to issue new legal provisions harmonizing data protection laws and legal or professional secrecy duties. In addition to the points discussed above, Spain has made intense use of this delegation, clarifying that data protection and professional secrecy obligations are separate and compatible (Article 5 of the NLOPD) or requiring processing by external data processors to apply enhanced professional secrecy rules (Article 28.2 of the NLOPD), for example. Other harmonization rules that are specific to certain professions, (e.g. the medical profession), are also contained in the NLOPD.

Due to the relatively recent date of entry into force of both the GDPR and the NLOPD, case law on these matters still remains limited.

## Key contacts



### Joaquín Hervada

Partner

[joaquin.hervada@dlapiper.com](mailto:joaquin.hervada@dlapiper.com)

T: +34 91 788 7311

## Disclaimer

This publication is intended as a general overview and discussion of the subjects dealt with. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication. If you would like further advice, please contact your usual DLA Piper contact.