FRANCE

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.

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France

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Concept of legal professional privilege

Under French law, professional secrecy is a general obligation, imposed on persons because of their state or profession, not to disclose any secret information they may have access to due to their function or mission (e.g. lawyers, judges, doctors, journalists etc.). This obligation is sanctioned both under criminal law (art. 226-13 of the French Criminal Code) and by disciplinary measures that may apply to these different professionals.

Definition of legal privilege under French law

The concept of legal professional privilege has no exact equivalent under French law. However, legal advice provided by lawyers to their clients as well as their communications are protected by the lawyer's professional secrecy (secret professionnel de l'avocat), as provided by Article 66-5 of Law No 71-1130 of 31 December 1971:

“in all matters, whether it is advisory work or litigation, the legal opinions addressed by a lawyer to their client, or intended to be for their client's benefit, the communications exchanged between a lawyer and their client, between lawyers (with the exception of communications identified as 'official'), the meeting notes and more generally all the documents of the case are protected by lawyer's professional secrecy”.

Furthermore, Article 2 of the National Rules of Procedure (Règlement Intérieur National, RIN) of the French Bar Council provides:

“The lawyer is the necessary trusted advisor of the client.

The lawyer professional secrecy is of public order. It is general, absolute and unlimited in time.

Subject to the strict requirements of his own defence before any court and to the cases of declaration or disclosure provided for or authorized by law, the lawyer shall not, in any matter, make any disclosure contrary to lawyer's professional secrecy.

French lawyer's professional secrecy covers all matters, whether advisory or contentious and regardless of the medium, material or immaterial (paper, fax, electronic means etc.):

· legal opinions addressed by lawyers to their clients or intended for their clients;

· correspondence between lawyers and their clients, and between lawyers – except correspondence marked 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;
Legal professional privilege in the context of civil litigation

Pursuant to the lawyer's professional secrecy, all documents and communications exchanged between a lawyer and his/her client are, as a principle, protected by secrecy and cannot be communicated to a third party, may not serve as evidence and their production cannot be compelled by a court.

In application of this principle, a lawyer cannot disclose the content of communications sent to a client or addressed to him/her by a client. The French Court of cassation (Cour de cassation) has for example ruled that a lawyer cannot in any case disclose the content of a letter addressed to him/her by the client even with the client's authorization (Court of Cassation, 6 April 2004, n° 00-19.245).

However, the client not being bound by professional secrecy, he/she can use exchanges or documents covered by professional secrecy. The French Court of Cassation has for example ruled that a lawyer's client can communicate a copy of a letter he/she has sent to his/her lawyer in the interest of his/her defence (Court of Cassation, 26 March 2008, n° 06-88.674).

Legal professional privilege in the context of criminal investigations

In the context of criminal litigation, the same rule applies. Moreover, Article 432 of the French 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 for the strict requirements of the lawyer's own defence.

Note that, in addition, when (i) acting in a fiduciary capacity, participating on behalf of their client in any financial or real estate transaction or (ii) assisting their clients in the preparation or execution of specific transactions or (iii) providing, directly or through any intermediary, advice on tax matters, French lawyers are required to disclose their suspicions of tax fraud or financial offences to the authorities (Tracfin) via their Bar President (Articles 561-2 and following of the French Monetary and Financial Code, CMF).

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.

Scope of legal professional privilege

What is protected by legal professional privilege?

As stated before, lawyer's professional secrecy applies to all documents and communications exchanged between a lawyer and his/her client regardless of the medium, whether physical or electronic (paper, fax, email, etc).

To ensure lawyer's professional secrecy applies, it should be stated clearly that the document has been drafted by or is intended for a lawyer: “Confidentiel – Communication avocat/client”.

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

Under French law, in-house counsels (juristes d'entreprise) are considered to be a separate profession and are not lawyers. Therefore, they do not benefit from the same status as lawyers members of the Bar (avocats). This position is approved by the European Court (Court of Justice of the European Union, 14 September 2010, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission, Case C550/07 P).
As a result, French authorities can make use of internal legal advice made by in-house counsels as they are not protected by the lawyer's professional secrecy. The French Court of Cassation has for example ruled that communications between in-house counsels will not be protected by the lawyer's professional secrecy (Court of Cassation, 3 November 2016, n° 15-20.495).

In-house counsels are nonetheless subject to a general professional secrecy obligations regarding information they may obtain due to their mission within the company that can be characterized as “business secrets”. Therefore, such as other professionals bound by secrecy (either because of their profession or mission), in-house counsels are prohibited from voluntarily sharing secret information with non-authorized third parties. A breach of this obligation is a criminal offence and is sanctioned under Article 226-13 of the French Criminal Code. Disciplinary measures may also be imposed to the in-house counsels by their company.

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

Communications between French lawyers and foreign lawyers will be subject to lawyer's professional secrecy only if certain precautions are taken (Article 3 of the RIN).

For communication between EU lawyers, such precautions shall consist for the sender to clearly express his/her wish for the communication to remain confidential or without prejudice prior to communicating the first documents. If the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he/she should inform the sender accordingly without delay (Articles 3.3 of the RIN and 5.3 of the Code of Conduct for Lawyers in the European Union). Then, the lawyers' communications should be marked as "confidential" or "without prejudice".

For communication with non-EU lawyers, such precaution shall consist for the sender to make sure that, before exchanging confidential information, the country where the foreign fellow lawyer practices has rules that ensure the confidentiality of the correspondence. If not, the lawyer shall enter into a confidential agreement covering any, or specified types of, communication with the non-EU lawyer or ask his/her client if he/she accepts the risk of exchanging non-confidential information (Article 3.4 of the RIN).

**How is legal professional privilege waived?**

As mentioned before, under French law, the lawyer's professional secrecy is of public order. As the lawyer's obligation of professional secrecy is general and absolute, a client cannot release him/her from this obligation.

However, a client can use a document covered by professional secrecy and communicate a copy of a document sent to or received from his/her lawyer in the interest of his/her defence.

**Lawyer's professional secrecy in the context of seizure by certain administrative authorities**

When an administrative authority such as the French Market Authority (Autorité des Marchés Financiers, AMF) or the French Competition Authority (Autorité de la Concurrence, ADLC) proceeds to a documents request or a seizure of documents, notably within a company, the rules applicable to the lawyer's professional secrecy must be applied so that the protected documents and communications cannot be seized by the authority.

**Lawyer's professional secrecy in the context of a documents request by the AMF**

Pursuant to Article L-621-10 of the CMF, the AMF can request any document, regardless of its format, for the purposes of an investigation or an audit. With regard to lawyer's professional secrecy, the AMF has created a protocol that explains how the audited person may exclude certain emails from the general documents communication requested by the authority.

Indeed, to be excluded from a documents request by the AMF, an email has to meet all the following conditions: (i) be sent or received by a lawyer of the company (the lawyer cannot be solely in copy), (ii) be sent or received by a person inside the lawyer's client company, and (iii) a person outside the company shall not have been the sender, the recipient or in copy of the email. However, the AMF retains the possibility of carrying out verifications on all emails to ensure the privileged nature of its emails.

Regarding these documents requests, the French Court of Cassation approved this position by ruling that consultations addressed by a lawyer to his/her client or intended for his/her client and correspondence exchanged between the client and his/her lawyer are covered by professional secrecy (Court of Cassation, 4 November 2020, n° 19-17.911).

**Lawyer's professional secrecy in the context of visits and seizures of documents by the ADLC**
Pursuant to Article 450-4 of the French Code of commerce, agents of the ADLC may proceed to documents seizure after the authorization by an order of a judge (juge des libertés et de la détention, JLD).

As already explained before, all documents and communications exchanged between a lawyer and his client are protected by secrecy and cannot be communicated to a third party. The French Court of Cassation ruled that, in specific matters of documents seized by the ADLC, the protection covers all communications exchanged between a lawyer and his/her client and that is related to the exercise of the rights of defence. This requirement induces a control of the content of the email and not simply the control of the recipients or senders. However, the court also held that the meaning of the right of defence is general and not specific to the case disputed before the court (Court of Cassation, 20 January 2021, n° 19-84.292).

**Lawyer’s professional secrecy in the context of internal investigations**

Since the practice of internal investigation is recent in France, French law does not provide for any specific rules as regard to the protection of the lawyer’s professional secrecy in the context of such investigations, and there is almost no case law on the subject so far. Nevertheless, some guidelines provide clarifications on the subject including but not limited to the following:

> Since the internal investigation is a defence strategy of the lawyer, all exchanges between the lawyer and his client related to the internal investigation are protected under the lawyer’s professional secrecy (Guide of the French Bar, the French lawyer and the internal investigations, June 2020).

**Lawyer’s professional secrecy in an international internal investigation**

If the internal investigation is multi-jurisdictional, the national notion of lawyer’s professional secrecy might not be enforced before courts of another country. It is then crucial for the lawyer in charge of the investigation to make sure of the rules applicable before every jurisdiction in order to control the scope of the applicable lawyer’s professional secrecy.

**Lawyer’s professional secrecy in an internal investigation led by in-house counsels**

It should be noted that when the company carries out the internal investigation itself, via its in-house counsels, without having recourse to lawyers admitted to practice at the bar, the content of the internal investigation will not be protected by the lawyer’s professional secrecy. An exception may arise in the context of an investigation led by the ADLC: the Paris Court of Appeal has ruled that exchanges between in-house counsels could be protected by lawyer’s professional secrecy when these exchanges take up a defence strategy put in place by the lawyer of the company (Paris Court of Appeal, 8 November 2017, n° 14/13384). Please note that, at this stage, the abovementioned decision remains isolated.

**Waiver of the lawyer’s professional secrecy in the French equivalent of a deferred prosecution agreement (Convention judiciaire d’intérêt public, CJIP)**

As already mentioned, under French law, the lawyer’s professional secrecy is of public order. As the lawyer’s obligation of professional secrecy is general and absolute, a client cannot release him/her from this obligation.

Regarding the possibility for a client to waive the lawyer’s professional secrecy, the French Anti-corruption Agency (Agence Française Anticorruption, AFA) and the Financial Prosecutor (Procureur National Financier, PRF) recall that lawyer’s professional secrecy is not imposed on the client, who is free to hand over the documents covered by such secrecy (PRF and AFA, Guidelines on the implementation of the CJIP, 26 June 2019). However, these guidelines are only recommendations from these authorities and are not legally binding.

**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).
Data 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 like they have in England and Wales, the US and other common law jurisdictions. Legal advice provided by a lawyer to their 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.

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

Professional secrecy applies to any information disclosed by client to their lawyer during an internal investigation. Even though the client may subsequently freely disclose the lawyer conclusions to third parties, such conclusions are covered when they relate to information communicated by the client to their attorney.

However, professional secrecy will not apply to information communicated by third parties to an attorney during an internal investigation. In this context, an attorney has to inform said third parties before any communication that their exchanges will not be covered by professional secrecy of the attorney and thus may be disclosed in all or part.

French professional secrecy applies in the context of criminal investigations. Moreover, Article 432 of the French Code of Criminal Procedure expressly forbids the use of correspondence exchanged between the defendants and their attorney(s) as evidence. However, if an attorney 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 for the strict requirements of the attorney’s own defense.

Please note that the French law No. 2021-1729 of December 22, 2021 “for confidence in the judicial institution” has created exceptions to the French attorneys professional secrecy. Article 3 of that law provides that legal privilege is not opposable to the police and judicial investigations measures relating to offences of tax fraud, corruption and the financing of terrorism as well as the laundering of these offences. However, in such cases, the competent Bar Head (Bâtonnier), its representative or the person at whose premises the search of investigation measures take place may object to the seizure of a document and require that this objection be examined by the Judge of Liberty and Custody (juge de la détention et des libertés). According to Articles 18 and 19 of Law No 78-17 on information technology, data files and freedom, professional secrecy can be opposed to a request from the French Supervisory Authority (Commission Nationale de l'Informatique et des Libertés (CNIL)) to provide information or documents that are covered by such professional secrecy.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

Professional secrecy applies from the beginning of the exchange between an attorney and the client.

Pursuant to Article 2 of the Règlement Intérieur National (RIN) of the French Bar Council, French professional secrecy applies in all matters, whether it be legal advice or litigation. Secrecy applies no matter when a document was created and regardless of the support, whether physical or electronic (eg paper, fax, email).

Professional secrecy covers, notably:

- legal opinions addressed or meant to be 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
- information required by statutory auditors
c) Are communications to / by companies and in-house counsel protected by privilege?

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

d) Are there any specific requirements of a privileged incident response engagement letter?

In practice, 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.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, according to Article 2.2 of the National Rules of Procedure (Règlement Intérieur National) (RIN) of the French Bar Council, professional secrecy applies to interview notes and more generally to each element of the file, information and confidence received by the attorney who is a member of the Bar (avocat) in the performance of their position.

Regarding experts, unlike attorneys who are members of the Bar (avocats), such third parties are not subject to professional secrecy. They may, however, be subject to professional secrecy obligations regarding information that can be characterized as “business secrets” received in the framework of their position.

Furthermore, the client, not being bound by professional secrecy, can use exchanges or documents covered by professional secrecy. Therefore, any document, such as the final report, employee interviews or expert reports may be communicated by the client and will thus no longer be protected by professional secrecy.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No, the location of the documents does not affect the application of professional secrecy.

c) How are seized documents put into evidence in a criminal / civil procedure?

Documents covered by professional secrecy cannot be seized during a criminal procedure, unless such seizure is expressly authorized by a judge (for instance, when the documents concerned reveal the participation from an attorney to a criminal activity).

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Response to the first question regarding the waiver:

A client can opt to use a document covered by professional secrecy, but the client cannot release the attorney from their professional
secrecy obligations. Professional secrecy may, however, be waived in the interest of the defense of the client or in the interest of the defense of the attorney where they are personally facing judicial proceedings.

In the latter circumstance, the production of protected documents must be essential to the attorney's defense.

Response to the second question:

The client should make sure to inform its employees (if any) of the confidential nature of the document. The concerned file(s) on the client's computer (if any) should indicate that the information contained in it is covered by professional secrecy.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

A company cannot be required to disclose the content of an internal investigation in civil litigation if this investigation is protected by professional secrecy.

A company may, however, choose to disclose the content of an internal investigation that is protected by professional secrecy. In this case, the disclosed content of the internal investigation will no longer be protected by professional secrecy.

In addition, it must be noted that where information covered by professional secrecy (in the specific case, medical secrecy) might be disclosed during a public hearing, the CNIL has already granted a request for a closed hearing (Deliberation of the CNIL No SAN-2020-015 of 7 December 2020).

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

The sharing of the content of an internal investigation that is protected by professional secrecy to third parties or affected individuals means the company waives professional secrecy in regards to the disclosed content of the investigation. Thus, the disclosed content of the internal investigation will no longer be protected by professional secrecy but the remaining information that was not disclosed remains covered by professional secrecy.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

To the best of our knowledge, there has not been any published case of civil litigation in regards to GDPR in France as of the date of this report.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/ cross-border scenario?

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 EU).

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.

From a data protection standpoint, to the best of our knowledge, there has not been any rules and/or cases in France that deal specifically with privilege in a multi-state/cross-border scenario.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Communications between French lawyers and foreign lawyers will be subject to lawyer's professional secrecy only if certain precautions are taken (Article 3 of the RIN), as applicable provisions in other jurisdictions regarding lawyer's professional secrecy may not be enforced before French courts.

As already mentioned, for communication between EU lawyers, the precautions must include the sender clearly expressing their wish for the communication to remain confidential or without prejudice before communicating the first documents. If the prospective recipient of
the communications is unable to ensure their status as confidential or without prejudice they should inform the sender accordingly without delay (Articles 3.3 of the RIN and 5.3 of the Code of Conduct for Lawyers in the EU). Then, the lawyers’ communications should be marked as “confidential” or “without prejudice.”

For communication with non-EU lawyers, the precaution must include the sender making sure that, before exchanging confidential information, the country where the foreign fellow lawyer practices has rules that ensure the confidentiality of the correspondence. If not, the lawyer must enter into a confidential agreement covering any, or specified types of, communication with the non-EU lawyer or ask their client if they accept the risk of exchanging non-confidential information (Article 3.4 of the RIN).

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

The French notion of lawyer’s professional secrecy might not be enforced before courts of another country. It is then crucial for a lawyer to make sure of the rules applicable in every jurisdiction to control the scope of each national lawyer’s professional secrecy.

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