

LUXEMBOURG

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

Communications between lawyers and clients are in principle protected by professional secrecy. Article 35 of the law of 10 August 2011 on the legal profession (*loi sur la profession d'avocat*) (the **2011 Law**) sets out the rules on professional secrecy.

The obligation of professional secrecy is also contained in the following: (i) the internal regulation of 9 January 2013 of the Luxembourg Bar (*Règlement intérieur de l'Ordre des Avocats du Barreau de Luxembourg*) (the **2013 Regulation**) and (ii) the internal regulation of 22 April 2005 of the *Diekirch Bar* (the **2005 Regulation**).

The professional secrecy of the lawyer is a matter of public order. It is general, absolute and unlimited in time, except as provided otherwise by law.

Article 458 of the Criminal Code (*Code pénal*) provides that violation of professional secrecy may be subject to a jail sentence of eight days to six months and a fine of €500 to €5,000. The same provision provides for two exceptions to the obligation of professional secrecy:

- when one is called to testify in court; and
- when one is required by law to disclose certain information.

Also, under the law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended, the disclosure in good faith of any relevant information to the Luxembourg competent authorities does not constitute a breach of the duty to maintain professional secrecy and does not result in liability of any kind for the lawyer making the disclosure.

In addition to criminal sanctions, the lawyer may face (i) disciplinary sanctions, from the bar, ranging from a warning to a ban on practising the profession (ii) as well as being held contractually liable by the injured client.

Legal professional privilege in the context of civil litigation

The judge is authorized to order the production of documents in both civil and commercial litigation (article 280 of the *Nouveau code de procédure civile*).

However, a judge may not order any lawyers participating in proceedings to produce documents, as this would be contrary to the right of defence and the right to a fair trial. In the absence of any specific or implied exception, the issue arises as to whether a judge could order a lawyer who had been instructed previously by a client but who was not currently retained by that client, to produce certain documents (such orders have been made in respect of banking institutions who were holding client documents).

A lawyer may be called as a witness by the court (as permitted by the Criminal Code), in which case they will have to determine whether the facts on which they are questioned are protected by professional secrecy and if so, should only disclose to the court the circumstances in which the information came to their knowledge, so as to allow the court to determine whether professional secrecy applies.

Legal professional privilege in the context of criminal investigations

Legal professional privilege also applies in the context of criminal proceedings (see [Scope of legal professional privilege](#)).

A lawyer who is subject to criminal proceedings, may disclose information covered by professional secrecy only to the extent strictly necessary for her/his defence.

Searches of law firms may only be carried out in the presence of the Head of the Bar or their representative, or if they have been duly called to attend.

The Head of the Bar or their representative may make observations regarding the preservation of professional secrecy to the investigative authorities and, in order not to be invalidated, all acts of seizure must record the presence of the Head of the Bar or their representative, or their having been called to attend.

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?

Professional secrecy applies to all information pertaining to the client and their affairs brought to the attention of the lawyer by their client, or of which the lawyer has gained knowledge through the exercise of their profession, whatever the source of the information. It applies also to all documents and information emanating from the lawyer advising, representing in court or assisting their client.

It covers all legal advice given to or intended for a client, all correspondence between the lawyer and their client as well as with other lawyers, notes of meetings and generally all information received by the lawyer in the exercise of their profession, the name of the client of the lawyer, the diary of the lawyer and the financial arrangements between the lawyer and their client.

Correspondence and discussions between lawyers are protected by professional secrecy, unless the correspondence:

- is marked as "official" and does not contain any information confidential by nature;
- comprises a formal and unconditional agreement between parties; or
- is not confidential by nature (letter sending a brief or asking for a document or a procedural act).

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

In the absence of any specific legislation recognizing legal professional privilege for in-house counsel and in view of the fact that the latter are bound by an employment contract with their employers, it may be expected that the advisory activity of in-house counsel is not protected by professional secrecy.

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

Lawyers should exercise caution when communicating with lawyers who are not subject to the rules of the Luxembourg Bar, as the rules governing legal professional privilege may vary from one country to another. At European level, the recommendations in article 5.3 of the CCBE Code of Conduct for European Lawyers should preferably be followed.

How is legal privilege waived?

Although the law requires a lawyer to keep confidential all matters entrusted to them by their client, the reverse is not necessarily true as nothing prevents the client from disclosing to third parties what they have disclosed to their lawyer (in other words, the client does not owe any obligations of confidentiality).

In some cases, the court has:

- set aside the minutes of an investigation initiated by an individual who was handing over correspondence between their lawyer and another lawyer; and

- denied the application of a lawyer to file a complaint against another lawyer on the basis of an alleged criminal offense committed by the latter which threatened their client.

Pursuant to the 2013 Regulation, a lawyer may disclose confidential information if:

- she/he determines that this disclosure is in the best interests of the client; and
- her/his client has authorized them to do so after having been duly informed of the nature of the information to be disclosed and the proposed recipients of the information.

There may also be situations where a 'state of necessity' or other principles take precedence over professional secrecy thereby releasing a lawyer from their obligations of legal professional privilege. An explicit reference to the 'state of necessity' was mentioned in a previous version of the 2013 Regulation (and may still be found in the 2005 Regulation) but it is generally considered that this principle remains applicable despite its omission from the 2013 Regulation.

Recent cases and/or other legal developments

No details for this country.

Data privilege

Content to follow shortly.

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Disclaimer

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