This information is intended as a general overview and discussion of the subjects dealt with. This publication is intended as a first point of reference and should not be relied on as a substitute for professional advice. Specialist legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.
Does legal privilege exist?

There are no statutory provisions establishing legal privilege in the EU. In the absence of this, EU legal privilege was recognised as a fundamental right in 1982 by the European Court of Justice in AM & S v European Commission (C-155/79).

Documents protected by EU legal privilege are protected from inspection by the European Commission, notably in the exercise of its powers of investigation in the enforcement of EU competition law.

What is protected by legal privilege?

Any person should be able, without constraints, to consult a lawyer, whose profession entails the giving of independent legal advice to all those in need of it. In order for the communication to be protected by EU legal privilege, the communication must have been made for the purposes and in the interests of the client’s rights of defence.

- EU legal privilege covers all written communications between an independent lawyer and his/her client after the initiation of a European Commission administrative procedure and which are related to the procedure.
- Pre-existing communications which have a relationship with the subject matter of the investigation by the European Commission are also protected.
- EU legal privilege is not restricted to the actual communication between an independent lawyer and his/her client. Internal notes which reproduce the advice given by an independent lawyer to his/her client are also protected by EU legal privilege (Hilti Aktiengesellschaft v Commission T-3/98).
- Furthermore, EU legal privilege protection extends to documents prepared for the purpose of seeking legal advice in the exercise of one’s rights of defence. For example, working documents and summaries prepared as a means of gathering information for an independent lawyer will be protected by EU legal privilege. Such preparatory documents will be privileged even if they were not exchanged with a lawyer or created for the purpose of being sent physically to a lawyer. The only requirement is that the documents were created exclusively for the purpose of seeking legal advice from an independent lawyer in the exercise of one’s rights of defence.

Is in-house counsel protected by legal privilege?

Communication between a company and its in-house counsel is not protected by EU legal privilege. EU legal privilege applies only to correspondence with an independent lawyer not bound to the client by a relationship of employment.

This was recently confirmed by the Court of Justice in Akzo Nobel v European Commission (C-550/07). Communications with in-house counsel are not protected by legal privilege irrespective of in-house counsel’s status under national law. The Court of Justice held that an in-house counsel’s relationship as an employee of the company by its very nature does not allow him to ignore the commercial strategies pursued by his employer.

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

No. EU legal privilege applies only to correspondence with independent lawyers registered with a bar of one of the countries of the EEA.

What are the main differences between national legal privilege and EU legal privilege?

The protection of EU legal privilege may differ substantially from legal privilege protection in other jurisdictions. Companies need to be aware of these differences and understand the risks they are exposed to in their jurisdictions of operation. It is therefore of utmost importance to have correct internal procedures dealing with legal privilege and to appreciate the differences between the various legal privilege regimes.

There are commonalities but also significant discrepancies between the scope of legal privilege under the national and EU laws. The scope of EU legal privilege is narrower than legal privilege under some national legislations, for instance:

- EU legal privilege does not protect legal advice emanating from in-house counsel. This is in contrast with legal privilege protection in Belgium, Greece, the Netherlands, Norway, Portugal, England and Wales and others.
- EU legal privilege protects only correspondence made for the purposes and in the interests of the client’s rights of defence. Under the laws of England and Wales, the protection of legal privilege covers a wider range of legal advice.
EU legal privilege protects communication with EEA-qualified lawyers only. In England and Wales the protection covers communication with any lawyer.

Other remarks

What to do when legal privilege is disputed during a dawn raid

The European Commission has the power to conduct dawn raids to examine and copy books and other records as part of its investigation into anti-competitive practices. In the course of a dawn raid, if a document is protected by EU legal privilege, the undertaking should give the European Commission’s inspectors a cursory look at the headings of the document to demonstrate that the document is indeed protected by EU legal privilege.

An undertaking claiming EU legal privilege is entitled to refuse to allow the European Commission’s inspectors to take even a cursory look at one or more specific documents which the undertaking claims to be covered by EU legal privilege. This is provided that the undertaking considers that such a cursory look is impossible without revealing the content of the documents and that the undertaking gives the European Commission’s inspectors appropriate reasons for its view.

Where the protection of EU legal privilege is disputed during a dawn raid by the inspectors of the European Commission’s DG COMP, the following procedures are to be followed:

- the disputed document is placed in a sealed envelope;
- the European Commission’s inspectors may remove the sealed envelope from the premises;
- if the matter cannot be resolved with the European Commission, the undertaking may ask the Hearing Officer to examine the claims of legal privilege. In order to do so, the Hearing Officer may inspect the document. The Hearing Officer will communicate his preliminary view and take appropriate steps to propose a mutually acceptable decision;
- where no resolution is reached, the Hearing Officer will formulate a reasoned recommendation and deliver it to the European Commission; and
- The European Commission will then examine the matter further. It may adopt a decision rejecting the claim. The European Commission will not look at the document before the deadline for appealing the decision to the Court of Justice has passed, or, if appealed, before the proceedings before the Court of Justice are closed.

An undertaking should exercise caution when making claims of EU legal privilege, as unwarranted and deceitful claims are prohibited and may be punishable by a fine.

Exchange of information within the European Competition Network

The competition authorities of the European Competition Network have the power to exchange and use information collected for the purpose of applying competition law. National competition authorities may use information exchanged within the European Competition Network in order to enforce their national competition law when it is applied in parallel with EU law and does not lead to a different outcome.

This has implications on the treatment of legal privilege. A national competition authority is able to obtain a document from an authority in another Member State which is subject to more relaxed legal privilege rules. A national competition authority is therefore able to obtain and use documents even if they were collected under rules which are less protective than its own.

Indeed, as an example, the UK Office of Fair Trading’s Guidelines governing powers of investigation states that it may use documents emanating from in-house counsel if it has received those documents from a national competition authority of another Member State.

Disclosure of documents and private antitrust damages claims

A related and important matter to consider is the disclosure of documents to third parties, notably private damages claimants. The competition authorities and the courts are increasingly encouraging the private enforcement of competition law on the one hand. On the other hand, the European Commission is seeking to protect certain categories of documents from disclosure in order to maintain its very successful leniency programme. Indeed, the European Commission is planning to introduce legislation enabling class-action damages claims for competition law infringements, as well as legislation harmonising the rules on private litigants’ access to case files.
The push for private enforcement of competition law further exposes undertakings to the possibility that their documents may be obtained by third parties and be used against them in civil damages claims for competition law infringements.

The Transparency Regulation (Regulation 1049/2001) grants citizens the right to access documents of the European Parliament, Council and European Commission. Private claimants are using these provisions in an attempt to gain access to the European Commission’s competition files.

Under the Transparency Regulation the right to access files may be restricted where disclosure would undermine the protection of public interest or the protection of commercial interests of a natural or legal person. It may also be restricted to protect court proceedings and legal advice or to protect the purpose of inspections, investigations and audits. Access to internal documents may also be restricted where disclosure would undermine the institution’s decision-making process.

The European Commission and the European Courts have so far restricted the use of the Transparency Regulation for accessing the European Commission’s files of competition proceedings on the basis that doing so would undermine the European Commission’s leniency programme. If access to leniency documents were given, undertakings would be reluctant to come forward and expose wrongdoings in fear of their statements being used against them in a civil court.

However, with the recent emphasis on, and encouragement of, private competition law enforcement, courts are increasingly willing to aid private litigants. In a recent judgment, the General Court held that a private damages claimant should be granted access to the European Commission’s statement of contents of the administrative file relating to a cartel (CDC Hydrogene Peroxide v Commission T-437/08).

The Transparency Regulation is not the only avenue open to private claimants seeking access to the case files of competition proceedings. Private claimants may seek to obtain documents, especially leniency applications, held by national competition authorities. The Court of Justice recently held in Pfeiderer that the EU competition rules must be interpreted as not precluding a person who has been adversely affected by an infringement of EU competition law, and is seeking to obtain damages, from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. The Court of Justice left it to the courts of Member States to determine, on the basis of their national law, the conditions under which such access must be permitted or refused (Pfeiderer v Commission C-360/09). The exposure companies face is further increased through the exchange of information within the European Competition Network.

In the first application of the Pfeiderer judgment by a national court, the Local Court of Bonn in Germany ruled on 30 January 2012 against disclosing leniency applications of cartel participants. The Local Court affirmed the German Federal Cartel Office’s view that leniency applications are subject to particularly strict confidentiality and that private damages claimants should not be granted access to them. It remains to be seen how courts in other jurisdictions will decide on such matters.

A peculiar situation arises where a document which is not protected by EU legal privilege is obtained by the European Commission or other national competition authority, and is relied on by a private litigant in damages proceedings in a jurisdiction with wider legal privilege protection. This question is as of yet unanswered.

The law on access to documents in competition proceedings, and especially leniency applications, is uncertain at this stage. The European Commission is planning to introduce a Directive towards the end of 2012 to clarify and harmonise the law. Companies ought to remain vigilant and understand the complexities and risks of these matters.
Does legal privilege exist?
Partly.
Legal Privilege exists in the context of European Competition Law but not within the legislation of the Austrian Cartel Act. Therefore, as long as the Federal Competition Authority does not act for the European Commission or for another member state, there is no guarantee that the “privileged” communication is protected.

What is protected by legal privilege?
Legal Privilege protects the communications between the attorney and its client (if and when the client agrees to such protection). Legal privilege also grants the right to refuse to testify in court regarding facts related with attorney/client counselling.
Legal Privilege does not cover communications from the attorney to the client when they are found in the client’s possession.

Is in-house counsel protected by legal privilege?
The attorney-client privilege is applicable only with respect to independent attorneys registered with the bar (Rechtsanwälte) and extends to personnel assisting these independent attorneys as well.
The attorney-client privilege is not applicable to in-house counsels as they cannot be or remain registered with the Austrian bar. To be able to register or remain registered with the bar, attorneys need to be independent and not under control of the client. These requirements are not met by in-house counsels that are normally integrated in the organization of their client (legal department). In-house counsels usually have various functions, which extend beyond the services normally provided by an attorney, sometimes including management functions.

What are the main differences between national legal privilege and EU legal privilege?
In addition to the reply to the first question, an exception to the attorney client privilege is applied in cases of money-laundering (when there is a suspicion that a certain client is connected with money-laundering activities its attorney is obliged to report such activities to the Austrian Federal Office of Criminal investigation). Such exception is not applicable regarding facts perceived in the preparation of court proceedings.

Other remarks
There are no explicit legal provisions privileging communications between in-house counsels and officers, directors or employees of the company. However, Austrian labour law establishes a general duty of loyalty of the employees towards the employer. This means that all employees of a company (including in-house counsels) are obliged to protect the employer’s business interests. It includes the obligation not to disclose relevant information concerning the enterprise towards third persons. Under Art 15 DSG, Austrian Data Protection Act, data, which have been accessible during and by virtue of one’s employment, have to be treated as confidential as far as there is no legal reason for the transmission of these data. Communications between in-house counsels on the one hand and officers, directors or employees of the company on the other are subject to this general duty of secrecy if this is in the employer’s interest.
These secrecy obligations, however, are not applicable if the employee is called as witness in proceedings which are criminal, administrative or civil. Furthermore, this obligation of secrecy normally only lasts for the duration of the respective employment contract. At a later stage, the employee is only committed to secrecy if a respective secrecy agreement has been entered into.
Does legal privilege exist?

Belgium has no separate and independent right to Legal Privilege. However, legal advice is protected from seizure through the following concepts:

**Professional secrecy** – is a general obligation not to disclose secrets, imposed on all persons that, due to their professional status, have access to such secrets. It is an obligation of public order and deontology, sanctioned by criminal law (art. 458 Criminal Code) and by disciplinary measures.

**Confidentiality** – is a corollary of professional secrecy, giving the person bound by it the right to refuse to give evidence on matters covered by professional secrecy or to withhold from seizure any document containing information covered by professional secrecy.

Thus, no separate right exists that grants protection to legal advice. It is, however, the necessary consequence of the obligation imposed on lawyers not to disclose information obtained due to their professional capacity.

What is protected by legal privilege?

Since confidentiality is a corollary of the secrecy obligation, its rights are connected to the lawyer and not to the legal advice. It is a right *in personam*. This means that only information communicated to and in possession of the lawyer is protected and that advice or information communicated by the lawyer to his client does not fall within the protected scope. However, in criminal cases, protection has a wider reach, which is linked to the rights of defence of the accused: in this context, also communications by the lawyers to the accused are protected from seizure. Since Belgium does not impose criminal sanctions on violations of competition law, this is not relevant from a competition law perspective.

Art. 458 Criminal Code formulates the secrecy obligation in general terms. This means that any secret is caught by it. The obligation is, however, restricted by allowing lawyers to reveal a secret when a law requires them to do so or when called before court to testify. This does not imply that he can be compelled to do so if he believes that it is his duty not to disclose a secret. Furthermore, exceptions to the obligation can be provided for by law (eg. money laundering).

In contrast, Belgian lawyers’ deontology imposes an absolute secrecy obligation. However, at all time, a lawyer may reveal a secret in order to defend himself against an unjustified accusation.

In principle, correspondence between lawyers is protected. However, where it is expressly stated not to be confidential, when it cannot by its nature be confidential, or when the correspondence discloses a concluded agreement between the parties, it cannot enjoy confidentiality.

Is in-house counsel protected by legal privilege?

Yes; the profession of in-house counsel is regulated in Belgium by the law of March 1, 2000, creating the Institut des Juristes d’entreprise/Instituut voor Bedrijfsjuristen (hereinafter referred to as the “Institut/Instituut”).

These in-house counsels are the only ones entitled to bear the title of “Juriste d’entreprise/Bedrijfsjurist”. In order to become a Juriste d’entreprise/Bedrijfsjurist, the candidate must, amongst others, be registered with the Institut/Instituut. The Institut/Instituut is an autonomous public institution enjoying legal capacity (*personnalité juridique/rechtspersoonlijkheid*) and created by the abovementioned law.

As required by law, the Institut/Instituut issues ethical rules, sets up a disciplinary regime to be approved by Royal decree and exercises effective disciplinary power through specific bodies, namely the *commission de discipline/tuchtcommissie* and the *commission d’appel/beroepscommissie*, both chaired by magistrates appointed by the King. The *Juristes d’entreprise/Bedrijfsjuristen* must abide by these rules and they are sanctioned in case of infringement.

Article 5 of the law of March 1, 2000, as commented by the ethical rules issued by the Institute, provides that all correspondence between a client and a Juriste d’entreprise/Bedrijfsjurist containing or seeking legal opinion is confidential. Therefore, if a manager asks
his/her Juriste d’entreprise/Bedrijfsjurist a legal opinion, both the correspondence seeking and containing the legal opinion will be confidential.

As a difference compared to the Advocat/Advocaat, the legal privilege of the Juriste d’entreprise is limited to his/her legal opinion and the document(s) seeking it.

Article 5 of the law of March 1, 2000, does not expressly refer to article 458 of the Criminal Code. Yet, although the matter remains controversial, article 458 of Criminal Code also applies, according to eminent authors to the Juriste d’entreprise/Bedrijfsjurist where he/she gives a legal opinion so that any infringement to his/her duty not to reveal what is confidential will give rise to criminal sanctions in the same way as for external lawyers.

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

Regarding lawyers: No; since confidentiality is linked to the capacity of a lawyer, it can only be granted to lawyers that fall within the field of application of Belgian law: a lawyer is recognised as such due to subjection to a Belgian Bar. This makes art. 458 Criminal Code and its accompanying right of confidentiality applicable. A foreign lawyer, who is not subject to art. 458 Criminal Code, thus does not enjoy the accompanying right of confidentiality.

Regarding in-house counsel: No; in order to enjoy protection, legal advice needs to be given by in-house counsel recognised as such by the Institut/Instituut.

What are the main differences between national legal privilege and EU legal privilege?

European confidentiality protection is, contrary to the Belgian equivalent, not granted to legal advice emanating from in-house counsel.

European confidentiality protection is attached to the actual communication. This means that also documentation in possession of undertakings can enjoy protection.

European confidentiality can only be enjoyed when correspondence relates to a client’s right of defence. This means that only communication relating to a procedure enforcing art. 101-102 TFEU can be granted protection. Also communication predating the initiation of such procedure that comes to fall within such context, is granted protection.

Correspondence between a lawyer and a third party, not being a client of his, is not protected by European legal privilege.

Other remarks

Article 5 of Law of March 1, 2000, creating the Institut des Juristes d’entreprise, states:

“Opinions given by in-house counsel to the benefit of their employers and within the framework of their activity as legal counsel are confidential.”

This implies that legal advice emanating from in-house counsel enjoys a functional protection that is to be judged upon in every single situation. Thus, correspondence with other in-house counsel or with external lawyers can be granted confidentiality, but will not automatically enjoy such protection.

Interestingly, a distinction is to be noticed in the philosophy of the two different forms of protection: while in-house counsel enjoys an actual legal privilege protection, this stands in contrast with protection granted to lawyers: not the advice in itself is protected; rather, the professional secrecy of the lawyer is maintained. No functional approach is thus taken towards this protection.

In addition, stagiers (legal trainees) are covered in the same way as lawyers are.

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Does legal privilege exist?

Generally, attorney-client privilege is regulated in Bulgarian legislation by article 33 of the new Law on Advocacy (in force from July 1, 2004), which contains the legal regime of the attorneys. No competition-law-specific regulation with respect to legal privilege (by way of legislative or case-law authority) exists in Bulgaria.

What is protected by legal privilege?

Legal Privilege states that the attorney’s files, documentation, electronic documents, computer equipment and other information carriers, as well as the client-attorney correspondence (irrespective of the manner it is maintained, including electronically), are inviolable. They cannot be reviewed, copied, examined or seized and cannot be used as evidence either.

The attorneys may not be summoned to testify (in court) or otherwise interrogated (by investigating authorities) regarding their conversation and correspondence exchanged with the client or another counsel, regarding client’s matters or other facts and circumstances that the attorney became acquainted with while representing and assisting the client.

Any oral attorney-client communications/conversations may not be intercepted and recorded. Provided that any recordings have been made, they may not be used as evidence and should be destroyed immediately.

Is the in-house counsel protected by legal privilege?

EU case-law provides that “communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, are expressly excluded from protection under legal professional privilege.” (Joined Cases T-125/03 and T-253/03, Akzo Nobel Chemicals and Akcros Chemicals v Commission of the European Commission, CFI, September 17, 2007). Those views were recently upheld by the ECJ in its Judgement of 14 September 2010 in Case C-550/07P, Akzo Nobel Chemicals Ltd and Ackros Chemicals Ltd v European Commission, at para 43 et seq.

This tenet has not yet been tried in Bulgarian courts and, thus, no clear resolution at national level exists in this respect. However, it can be reasonably expected that the Bulgarian competition authority and courts will bring this principle to bear to such domestic situations as well.

Pursuant to the Law on Advocacy attorneys are not entitled to be bound to their clients by a relationship of employment. Bulgarian law has no specific legal provision or Court ruling in respect of in-house counsel privilege. In fact, to the extent that the in-house counsel is in an employment relationship with the company (i.e. has been retained on the basis of an employment agreement), it is considered to be a regular employee of a company (and not an “independent” lawyer with its inherent rights). Open remains the question of legal privilege over the advice of counsel who effectively works in-house full-time but on the basis of the so-called “civil law” agreement (services agreement), which happens in practice.

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

The Bulgarian Law on Advocacy implements Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtain. Article 6 of the Directive reads that “irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all activities he pursues in its territory.”

The Law on Advocacy provides that a citizen of an EU Member State who qualified as an attorney-at-law in another EU Member State (other than Bulgaria) in accordance with the home Member State’s legislation, may practise in Bulgaria under the professional title obtained in his/her home Member State. Such attorneys from other EU Member States enjoy the same rights as Bulgarian attorneys, including legal privilege.
What are the main differences between national legal privilege and EU legal privilege?

The EU Privilege extends to attorneys who are admitted to the bar in one of the EU Member States. According to the settled case-law of the European Courts (Case C-155/79, AM & S Europe Limited v Commission of the European Communities, May 18, 1982; Joined Cases T-125/03 and T-253/03, Akzo Nobel Chemicals and Akcros Chemicals v Commission of the European Commission, CFI, September 17, 2007, Case C-550/07P, Azko Nobel Chemicals Ltd and Ackros Chemicals Ltd v European Commission), legal privilege sticks to written communications between lawyer and client made for the purposes and in the interests of the client’s rights of defense and emanating from independent lawyers (that is to say, lawyers who are not bound to the client by a relationship of employment are subject to the EU Privilege protection). Such written communications include both (i) all written communications exchanged between the attorney and the client in relation to the subject-matter of the pending proceedings, as well as (ii) internal notes circulated within the client’s organization if they are confined to merely reporting the content of the outside counsel’s advice.

The Bulgarian Law on Advocacy provides that not only written communications are subject to client-attorney privilege protection, but any attorney’s files, documentation, electronic documents, computer equipment and other information carriers, correspondence between client and attorney (irrespective of the manner it is maintained, including electronically), as well as verbal client-attorney communication. No domestic legislative or case-law authority exists as to whether the written communications (including correspondence) need to be exchanged specifically for the purposes of excising the client’s right of defence in already pending proceedings in order to benefit from legal privilege. Neither exists authority on the application of legal privilege to internal notes merely reporting the content of the external advice.

Other remarks

The information and correspondence emanating from in-house counsel is not especially protected against scrutiny by authorities in the course of pending proceedings. More specifically, from a competition law perspective, undertakings may not call on protection of business secret with respect of such information/correspondence if they are subject to investigation or have been requested to provide information.

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Does legal privilege exist?
Yes.

What is protected by legal privilege?
All persons that are admitted to the Cyprus Bar are considered to be advocates and are, consequently, regulated by the Advocates’ Law (Cap. 2) and the Advocates’ Code of Conduct Regulations of 2002 (“the Regulations”).

The Regulations provide that, as a general rule, the advocate – client privilege (“Legal Professional Privilege” or “LPP”) applies to the dealings and communications of all advocates with their clients. Legal Professional Privilege is both a fundamental right and a duty of the advocate not to disclose any confidential information which has arisen from communications with his client, whether in the context of legal proceedings or at a discovery process. Communications between an advocate and a third person are also considered privileged so long as these take place predominantly in the context of pending or anticipated judicial proceedings/litigation.

If an advocate practices in a firm or partnership, the rules of confidentiality and legal professional privilege extend and apply to all members of the firm or partnership as well. Confidential information arising from another advocate is therefore also regarded as privileged.

Legal Professional Privilege applies only in relation to an advocate’s legal communications with his client and does not extend to any additional role the advocate may take up, e.g. as a trustee, agent, representative etc of his client.

Is in-house counsel protected by legal privilege?
Yes provided that he/she is admitted to the Cyprus Bar.

Does legal privilege apply to the correspondence of non-national qualified lawyers?
The Regulations also apply to foreign advocates allowed or granted a license to practice law by the Cyprus Bar.

Other remarks
The Regulations apply also to trainee lawyers.

The duty to maintain professional secrecy does not have any time limitation. If the client appears as a witness in court he may refuse to answer any question which may tend to lead to a disclosure of information covered by professional privilege.

If a client makes a complaint against an advocate or if the advocate is facing criminal or disciplinary charges then the advocate is entitled to disclose any confidential information with regard to the accusations.

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Does legal privilege exist?
Yes.

What is protected by legal privilege?
Only external counsel, i.e. member of the Czech Bar Association, is subject to the Czech Advocacy Act, which provides for the right and obligation of an attorney not to divulge any information obtained in the course of providing legal services.

Besides these provisions, there is no express regulation of “privileged” documents or communications.

This is applicable to any spoken or written communications, documents or correspondence exchanged between an attorney and his client. Any breach of this duty could lead to sanctions being imposed by the Bar Association and under certain circumstances to the attorney being held criminally liable.

Is in-house counsel protected by legal privilege?
As to in-house counsel, no generally applicable legislation exists which would classify the communication between the counsel and his or her employer as privileged. In a limited number of cases, such communication may be subject to a special duty to maintain confidentiality (typically, in-house counsel at state organizations or regulated businesses may be subject to non-disclosure requirements).

Does legal privilege apply to the correspondence of non-national qualified lawyers?
Legal Privilege is applicable also to non-national qualified lawyers which are members of the Czech Bar Association.

What are the main differences between national legal privilege and EU legal privilege?
We believe that the accepted concept of the legal privilege in the Czech Republic is similar to what is applicable in other EU jurisdictions.

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(typically, in-house counsel at state organizations or regulated businesses may be subject to non-disclosure requirements).
Does legal privilege exist?
Yes. However there are no explicit provisions on legal privilege under the Danish Competition Act.

What is protected by legal privilege?
Communication (at least with respect to confidential information) in any form between a qualified attorney and his client is generally subject to the attorney-client privilege (Legal Privilege).

The Danish Administration of Justice Act and the Danish Penal Code set out provisions governing attorney-client privilege. The rules apply to all Danish attorneys, whether in-house, self-employed or otherwise engaged, provided that the attorney is qualified as such in Denmark, i.e. has obtained a formal practicing certificate from the Ministry of Justice on the basis of having fulfilled the requirements for this.

The main legal rule on attorneys’ duty to give oral evidence in legal proceedings is section 170 of the Danish Administration of Justice Act according to which evidence cannot be demanded from attorneys regarding matters communicated to them in the course of carrying on their profession, if the party who has a right to confidentiality does not agree with that. The court may, however, order attorneys (apart from defence counsel in criminal cases) to give evidence, when the evidence is deemed decisive for the outcome of the case, and the nature of the case and its importance to the party in question or society is considered to justify such evidence being given.

Further, according to section 299 of the Danish Administration of Justice Act a court may – at the request of a party – order a third party, including an attorney, to produce or surrender documents which are at his disposal and which are important to the case, unless this will result in the disclosure of matters, on which he would otherwise be excluded or exempted from giving oral evidence.

Is in-house counsel protected by legal privilege?
There are no explicit legal provisions privileging communications between in-house counsels and officers, directors or employees of the company and there is no case law regarding the question. It is therefore unclear, whether in-house counsel is protected by the legal privilege as contained in section 170 of the Danish Administration of Justice Act.

However, please note that practice under the Danish Competition Act, communication between in-house councils and officers, directors or employees of the company is not covered by the Legal Privilege.

Does legal privilege apply to the correspondence of non-national qualified lawyers?
There are no explicit legal provisions privileging communications between non-national qualified lawyers and Danish Clients and there is to our knowledge no judgments concerning the question. However, there is the assumption that if the attorney is established in the EU, the legal privilege will apply.

Other remarks
Under the Danish Money Laundering Act an attorney, who suspects a client to be involved in money-laundering, is obliged to report such activities to the Public Prosecutor for Serious Economic Crime.

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Does legal privilege exist?
Yes, the law of England and Wales recognises two main types of legal professional privilege:
- legal advice privilege
- litigation privilege.

Other types of privilege which are occasionally asserted are joint privilege and common interest privilege.

Legal professional privilege is a substantive legal right (not a procedural rule). It enables a person to refuse to disclose certain documents in a wide range of situations. However, it only applies to protect documents which are confidential. If documents which would otherwise be privileged contain information which is already in the public domain or which has been shared with third parties, privilege will be lost.

The privilege belongs to the client, not the lawyer and does not depend upon the document being in the lawyer’s custody. Privileged documents can (and frequently are) held by the client.

Privilege is waived if the relevant material is placed before a court. It is also lost if the material in the document loses confidentiality or if the document came into being for the purpose of furthering a criminal or fraudulent scheme. A lawyer has a duty to protect his client’s privilege and cannot waive it without his client’s express authority.

What is protected by legal privilege?

Litigation Privilege
Litigation privilege affords a wider protection than legal advice privilege since, where it applies, it can protect communications with third parties, as well as those between a lawyer and his client. It applies where adversarial proceedings are reasonably in prospect (for instance, where negotiations over a contractual issue are breaking down or one party sends or receives a formal letter before action). Conferences by regulatory authorities, requests for staff to give witness evidence, third party disclosure orders and other investigative processes will not normally be considered adversarial, although regulatory proceedings in which judicial powers are being exercised are likely to be considered adversarial for these purposes. A good approach to determining whether proceedings are in prospect is to consider whether there is a legal issue to be determined as between the parties to the relevant process.

If adversarial proceedings are reasonably in prospect, a “dominant purpose” test will apply to protect as privileged all confidential documents prepared for the dominant purpose of giving or obtaining legal advice with regard to that litigation or aiding the conduct of that litigation. Determining the dominant purpose can be problematic.

Litigation privilege has no retrospective effect. Documents created before adversarial proceedings are reasonably in prospect will not attract litigation privilege (although they may attract legal advice privilege).

Legal Advice Privilege
If no adversarial proceedings are in contemplation, privilege will only attach to documents which constitute confidential communications between a lawyer and his client made for the purpose of giving or obtaining legal advice and documents which evidence such communications. Each part of this test requires further explanation:

Communications must actually transfer information between a lawyer and his client. A document which stands in its own right or is not addressed and delivered to a lawyer specifically for his advice may not constitute a communication. A statement prepared by an employee at the request of his manager to record his recollection of events is unlikely to benefit from legal advice privilege – even if the employee believes that the document will be passed to lawyers for advice – since it is not a communication with a lawyer.

Lawyer: includes all members of the legal profession: solicitors, in-house lawyers, barristers and foreign lawyers. Where appropriate provisions for supervision are in operation, it can also include legal executives, paralegals and trainee solicitors. Care must be taken when communicating with an in-house lawyer to place the communication within the correct lawyer/client relationship. An in-house lawyer may need to maintain
two such relationships; one with the business, in which he is the “lawyer” and one with external lawyers, in which he (alone or together with others) is the “client”.

Client: Not every employee in a company will be the client for the purpose of attracting privilege. The “client” will only comprise those few individuals who are actually charged with obtaining legal advice and who directly communicate with the lawyer, whether external or in-house. This might be an ad hoc committee or group formed to respond to a specific issue or incident. Or it might be members of senior management. Often, however, those with direct knowledge of the facts or matters in issue will not fall within the concept of “client” and particular care will therefore need to be exercised when interviewing or obtaining information such employees.

Documents made for the purpose of giving or obtaining legal advice: privilege only attaches to legal advice, which includes advice as to what should prudently and sensibly be done in the particular situation (including how best to present facts in light of legal advice given). There must first be a relevant legal context – an important practical distinction for in-house lawyers to bear in mind, since privilege will not attach to advice they provide which is purely commercial or strategic.

Difficulties arise when determining the status of copy documents and documents which are only privileged in part. Further difficulties can arise if privilege has been impliedly or expressly waived. These issues are beyond the scope of this brief summary. Expert legal advice should be taken.

Is in-house counsel protected by legal privilege?

Yes, except in the context of a competition investigation by the European Commission.

An in-house lawyer must, however, take particular care to ensure that he distinguishes clearly between advice which is legal and that which is commercial in nature, since the latter will not attract legal professional privilege. He must also take care when instructing external lawyers to ensure that he clearly identifies and effectively manages the relevant lawyer/client relationships.

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

Yes, where the question of disclosure is governed by the law of England and Wales. Legal professional privilege applies to advice given by all members of the legal profession. It is not necessary for the lawyer to be qualified in England and Wales.

Where the question of disclosure is governed by European law (such as in the context of a competition investigation within the UK by the European Commission), only the advice of a lawyer qualified within the European Economic Area is privileged.

What are the main differences between national legal privilege and EU legal privilege?

The law of England and Wales pertaining to legal professional privilege differs from European law in that:

- legal advice provided by in-house lawyers enjoys the same privilege as legal advice provided by external lawyers;
- the protection of privilege extends to legal advice provided by any lawyer, not just to advice provided by a lawyer qualified to practice within the European Economic Area;
- protection is afforded to a much wider range of legal advice. Under European law, only correspondence made for the purpose and in the interest of the client’s right of defence is protected;
- when litigation is reasonably in prospect, communications with third parties can fall within the protection of privilege, depending upon the dominant purpose of those communications.

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Does legal privilege exist?

The Legal Privilege is explicitly enacted in the Bar Association Act. Few specifying provisions have been included in the Taxation Act, Money Laundering and Terrorist Financing Prevention Act and Code of Criminal Procedure. The non-adherence of the confidentiality obligation (part of the Legal Privilege) has been sanctioned in the Penal Code with fines of up to 500 daily rates (rate depends on the daily earnings of the convicted person).

The Legal Privilege in Estonia consists of the following rights and obligations (the Legal Privilege):

- All the information mediums related to the attorney providing Legal Services (for definition see 1.2 Scope) enjoy immunity;
- Right to refuse from answering questions in criminal proceedings as a witness regarding the information received in the course of providing the Legal Services;
- Right to refuse from providing information to the Tax and Customs Board, when such information has been received in the course of the providing Legal Services;
- Attorney’s right to be guided only by the laws, regulations and decisions of the Bar Association, professional ethics, good moral and conscience;
- Attorney may not be detained, searched or arrested based on the circumstances arising from his/her professional activity;
- The law office cannot be searched based on the circumstances arising from its professional activity;
- Obligation to maintain in secrecy the information received during the provision of Legal Services;
- Obligation to maintain in secrecy the fact of addressing the attorney for Legal Services;
- Obligation to maintain in secrecy the amount of the legal fee paid for Legal Services.

What is protected by legal privilege?

Scope

The scope of Legal Privilege under Estonian law is considerably wide covering the correspondence between the client and the attorney (the member of the Bar Association) in the course of the court proceedings, pre-trial procedure or any other legal procedure, legal counselling and executing any other legal act in the interests of the client (the Legal Services). This means that the Legal Privilege applies to all the information revealed in the correspondence between the client and the attorney related to provision of Legal Services and not only to the correspondence related to the right of defence in the courts. All rights and obligations under the Legal Privilege are valid without term. The immunity of the information mediums related to provision of Legal Services also apply to the information mediums in the possession of the client.

Covered Persons

The Legal Privilege is not only the privilege of the attorneys, but it also covers the employees of the law offices and Bar Association and public officials, who have acquired information covered by Legal Privilege in the course of his/her professional activity. Furthermore, the clients of the attorneys are covered as well regarding the immunity of the information mediums. Lawyers, who are not members of the Bar Association (including in-house counsels), enjoy no Legal Privileges.

Restrictions

a) Money laundering

Legal Privilege is not an absolute privilege and there exist few exceptions. For example, the Money Laundering and Terrorist Financing Prevention Act stipulates that attorneys and other legal service providers (also lawyers not being members of the Bar Association) are obliged to inform Financial Intelligence Unit of any information regarding the money laundering or terrorist financing or any suspicion thereon they have acquired
while acting as a client’s representative in financial or real estate transactions, at the sale or purchase of the real estate or the company or while administering client’s money, securities or other property, opening or administering bank or security accounts, acquiring funds for establishing, operating or managing the company or similar entity or while providing instructions or executing the transaction regarding the establishment, operation or management of the company or any other similar entity.

The attorneys (but not other lawyers) have been released from the informing obligation, when they have received information regarding the possible money laundering or terrorist financing, while representing the client in civil, criminal, administrative or challenge proceedings, including the pre- and post-trial activities (i.e. determining the clients position). Extending the exception only to the attorneys creates lots of problems, as the law also allows other persons with sufficient capabilities to represent the client/accused person in the court proceedings. For example, the investigatory bodies may demand information on money laundering from the non-attorney criminal defence counsel during the proceedings and the latter has no legal ground to refuse. When the counsel refuses to provide information on money laundering or terrorist financing, he/she may be sentenced to prison for up to one year.

b) In criminal proceedings

As a rule, the attorney and the law office cannot be searched based on the circumstances relating to their professional activity. However, the pre-trial judge may approve searching of the attorney or law office, when there exists dominant public interest and the procedural guarantees (i.e. the attorney must always be present, when the law office is being searched) shall be adhered. It is also important to emphasise that the personnel of the investigative body may only review and take away the information mediums specifically related to the grounds of the search and no wide scale search and removing of “random” information mediums is allowed. With the prior approval, the investigative bodies may also apply surveillance on the correspondence between the attorney and the client. Therefore, the immunity of the information mediums and obligation of confidentiality related to the attorney providing Legal Services can be limited in the criminal proceedings with the approval of the court.

However, the approval to apply surveillance, to review and take away the information does not automatically mean that these information mediums can be used as evidence in the criminal procedure. After the personnel of the investigative body has acquired the information mediums about or from attorney, law office or client (by searching or surveillance) and presented them to the judge hearing the matter, the judge shall review the presented information mediums and shall decide whether the relevant information mediums enjoy Legal Privilege or not (Supreme Court decision 3-1-1-22-10). When the judge decides that the relevant information mediums are related to the attorney providing Legal Services, the judge will refuse to accept these mediums as evidence.

c) In competition supervisory proceedings

The Competition Act stipulates that the Competition Board is entitled to inspect the premises of the entrepreneur, including enterprise, area, building, room and transport vehicle without the prior notice or special permit, to establish the breach or possible breach of the Competition Act. The person inspecting the entrepreneur has the right to control the documents relating to the business activity and to make copies and to control the information, databases and electronic information mediums recorded in the computers at the premises or belonging to the entrepreneur. The Competition Act includes no references to the information mediums covered with Legal Privilege. On the contrary, Competition Act stipulates that the Competition Board has the right to issue a precept, when the entrepreneur has failed to present the documents requested by the Competition Board. When the precept has not been complied with the Competition Board may issue fine of up to 6400 EUR. Although, given procedure may be in violation with the Legal Privilege principle, this should be considered as current practice. It should be noted however, that it is not in compliance with the standpoint expressed
by European Court of Justice in the milestone case Akzo Nobel Chemicals Ltd vs European Commission (please see below).

**d) On confidentiality obligation**

Although as a rule, the attorney and other obliged persons, are bound by the obligation without term to keep all the information received in the course of providing Legal Services confidential, there are few exceptions to that rule. Firstly, the client or its legal successor may release obliged person from the confidentiality obligation. Secondly, the obliged person may file to the chair of the administrative court or to the administrative judge so appointed by the chair a reasoned written application for releasing him/her from the confidentiality obligation in order to prevent the first degree crime. However, the judge may refuse to grant approval.

**Is in-house counsel protected by legal privilege?**

No; the principle of Legal Privilege applies only to the persons stipulated above (Covered Persons). Lawyers not being members of the Bar Association are not included.

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

The Bar Association Act stipulates that the attorney, who has the full legal right to act as attorney in another European Union member state and is not the member of Estonian Bar Association must comply, when acting in Estonia, with all the professional and professional ethics requirements set for attorneys being members of the Bar Association. The rights and obligations under Legal Privilege serve as integral part of the professional requirements set for the members of the Bar Association and are therefore applicable also to the European Union member state attorneys.

**What are the main differences between national legal privilege and EU legal privilege?**

The legal practice of the right of defence in competition supervisory proceedings in Estonia is not in compliance with the standpoint expressed by ECJ in Orkem vs Commission and Akzo Chemicals Ltd vs Commission. The ECJ has repeatedly stated that the competition authorities must acknowledge the legal privilege and cannot demand the obliged person to present the information mediums evidencing its guilt. In practice the Competition Board shall collect and review all the information mediums located at the premises of the entrepreneur. Although, most likely the judge in misdemeanour and criminal proceedings shall declare such information mediums to be covered with Legal Privilege and shall not accept them as evidence, it is still not in accordance with the standpoint expressed by ECJ in Akzo Chemicals Ltd vs Commission. ECJ stated that the exercise of the right of defence is impaired even, when the information mediums shall not be used as evidence, however, the supervisory body has gained through reviewing the information mediums direct or indirect information about the possible sources of evidence. Investigatory bodies in Estonia shall have reviewed the information mediums by the time they submit them to the judge.

Also in criminal proceedings the current legal practice stands with investigatory bodies collecting all the information mediums (from the client, attorney or from the law office), which are related to the purpose of the search despite some information mediums being covered with Legal Privilege. Whether the information medium is covered with legal privilege is determined by the judge hearing the matter, but the investigatory body shall review the documents beforehand. This is not in compliance with the right of defence as fundamental right established by ECJ, however, this practice has been confirmed by the decision of the Supreme Court. Such approach could be in direct violation with art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which releases accused person from the obligation to convict himself and art 8, which protects the secrecy of the correspondence.

The range of information mediums protected by Legal Privilege is wider than in EU (please see above);

The immunity under EU Legal Privilege means that the documents covered with Legal Privilege cannot be reviewed prior to final determination by the court, whether the documents are covered by the Legal Privilege
and enjoy immunity or not. Under Estonian Legal Privilege, the entitled persons review the documents and then submit the documents to the judge for determination, whether the documents are covered with Legal Privilege or not.

**Other remarks**

When the client (entrepreneur) has refused to submit documents to the Competition Board and the Competition Board has imposed a fine on the entrepreneur, the latter is entitled to file a claim to the administrative court to challenge the fine. In the administrative proceedings the administrative court is subjected to the same rules as the civil court in the matters of acceptable evidence. The civil court may not accept and may not collect evidence, which have been collected or have been requested to be collected in violation with the fundamental rights. According to ECJ the right of defence is a fundamental right. It remains unclear, what should the administrative court do next; whether it should state, based on the forbidden evidence argument, that the fine cannot be imposed as these documents cannot be used as evidence in administrative proceedings or should it disregard the claim and state that the right of the Competition Board is a special right, which initially prevails the Legal Privilege, and that the entrepreneur should hand over the documents knowing that these documents cannot be used as evidence in administrative, misdemeanour or criminal proceedings.

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Does legal privilege exist?

Yes, the concept corresponds with the practice of the EU. Legal Privilege is presented in the Act on Advocates section 5c, which states that an advocate or his assistant shall not, without due permission, disclose the secrets of an individual, family or business or professional secrets which have come to his knowledge in the course of his professional activities. The obligation to follow this confidentiality is expressed in subsection 2: Breach of the obligation of confidentiality provided for under paragraph 1 above shall be punishable in accordance with chapter 38, section 1 or 2, of the Penal Code, unless the law otherwise provides for more severe punishment for the act.

A similar provision is found in the Code of Judicial Procedure chapter 15, section 17: An attorney, a counsel or an assistant thereof may not without permission disclose a private or family secret entrusted to him or her by a client, nor similar confidential information received by him or her in the course of his or her duties.

According to the Code of Judicial Procedure chapter 17, section 23(1)(4), an attorney or a counsel is not allowed to testify in respect of what the client has entrusted to him or her for the pursuit of the case. The testimony can be allowed with the client’s consent. According to subsection 3, other persons can, except for the counsel of the defendant, be ordered to testify in the case if the public prosecutor has brought a charge for an offence punishable by imprisonment of six years or more.

What is protected by legal privilege?

In Finland, the Legal Privilege of an attorney is not bound to his membership with the Finnish Bar Association, but to his status as a legal advisor. According to the provisions mentioned above, Legal Privilege covers advocates, attorneys, counsels and their assistants. The coverage has also been interpreted to cover a wider circle of people: legal aid counsels have been equated with attorneys, and the expression “an advocate and his assistant” covers the whole staff of the lawyer’s office. It has been commonly acknowledged that the secrecy obligation which can be derived from the attorney’s profession also includes the staff of his office; the fulfillment of an assignment requires often the assistance of other lawyers and legal staff.

The question on Legal Privilege often arises in relation to legal proceedings, where the possibility to use different documents as evidence is put to a test. The scope of the documents which are covered by this confidentiality is not explicitly mentioned at the level of law in Finland, but the principle expressed in the EU case law has been considered to be valid also at the national level. The correspondence between a legal advisor and a client is considered to be confidential if the material is relevant to the client’s right of defence and the legal advisor is independent, i.e. not an employee to the client. Legal Privilege covers the entire correspondence between an independent lawyer and a client in relation to a specific case, i.e. all the material after an authority has begun the proceedings, but also all the material prior to the case, if a direct relation to the case can be presented. The documents’ relevance to the case must also be stressed: not all material that the client considers as secret is protected by Legal Privilege, e.g. documents containing business or trade secrets.

There are exceptions to the main rule of Legal Privilege. Firstly, the confidentiality can be passed if the client, whose interests are protected, gives an express consent. Secondly, the Penal Code chapter 15 section 10 expresses a duty to disclose serious threats against an individual or the society. The duty also covers lawyers, except for cases where there exists a confidentiality based on an assignment. Thirdly, a state of necessity, e.g. a lawyer’s need to defend himself against accusations, entitles an infringement of Legal Privilege. A fourth exception applies only to advocates, who shall give essential information on the completion of his professional duties to the organs of the Finnish Bar Association in cases of disciplinary measures. Other exceptional situations can be justified by law, e.g. money laundering regulation.
Is in-house counsel protected by legal privilege?

According to the relevant EU case-law, an in-house counsel is not protected by Legal Privilege, and this is also the standpoint in Finland. Legal Privilege is based on the attorney’s independence in relation to the client; an in-house lawyer cannot be considered to be separate from his employer. It is more difficult for an in-house lawyer to solve eventual conflicts objectively, and he is often bound to the employer’s strategies, business principles and goals.

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

Legal Privilege is not bound to the nationality of the legal advisor.

What are the main differences between national legal privilege and EU legal privilege?

In Finland the scope of persons covered by Legal Privilege is more extensive than the advocate in person, see above. The EU Court of Justice has in its case law defined Legal Privilege mainly in relation to the role of advocates.

Other remarks

The prohibition to testify is expressed in the aforementioned section 23, chapter 17 of the Code of Judicial Procedure. The purpose of the prohibition is to protect the confidentiality in the client-attorney relationship. The prohibition means that although the Code imposes a common duty to testify, the role of legal advisor repeals this obligation and imposes an opposing obligation not to testify about matters related to the case. The Finnish Supreme Court has stated in its ruling 2003:119 that the lawyers’ secrecy obligation is more wide-ranging than the prohibition to testify and that a legal advisor can be obliged to testify about issues that otherwise would be covered by confidentiality.

In the field of criminal law, the Finnish Supreme Court has stated that Legal Privilege covers only information relevant to an assignment. In the case 2003:117, a legal advisor was obliged to disclose information which he had found out about his client while discussing another case. He had not taken the second assignment, and the information was not covered by the first assignment’s Legal Privilege.

In the field of competition law, the new Finnish Competition Act entered into force as of 1 November 2011. In the preparatory work of the Act, a separate section has been created to express Legal Privilege. The section refers to investigations performed by the FCA, during which the entrepreneur is not obliged to supply the FCA with documents which contain privileged correspondence between a legal advisor and a client. According to the preparatory work, the section is of informative nature, because the principle of the protection of independent legal advice is already considered as the state of law.

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**FRANCE**

**Does legal privilege exist?**

France does not grant a separate and independent right to Legal Privilege. However, legal advice is protected through professional secrecy.

**Professional secrecy** is a general obligation not to disclose secrets, imposed on all persons that, due to their professional status, have access to such secrets. It is an obligation of public order and deontology, sanctioned by criminal law (art. 226-13 Criminal Code) and by disciplinary measures.

French Bar Association provides the principles of the professional rules of conduct (cf. Article 2 of the “Règlement intérieur national” referred to herein after as the “RIN”).

**What is protected by legal privilege?**

In effect a lawyer shall not disclose the information that he acquired while representing a client or even the information he passed onto a client when advising him. The professional secrecy of the lawyer is an obligation of public order. It is general, absolute and unlimited.

More precisely, pursuant to Article 2 of the RIN, French legal privilege is applicable in all matters, both in case of consulting or litigation, whatever the support, either material or immaterial (paper, fax, email, etc.):

- legal opinions addressed by the lawyer to its clients;
- correspondences between the lawyer and its clients, and between lawyers except those identified as official;
- meeting notes, and, in general, all the elements of the files, all information and confidences made to the lawyer at the occasion of its profession;
- clients’ names and the lawyer’s diary;
- fees payments;
- information required by the statutory auditor.

The violation of such conduct would represent a professional misconduct according to the professional rules established by the French Bar and the French Criminal Code.

However, this hard and fast rule applies within the following restrictions:

- the lawyer assisting the civil part, who does not have to respect the secret of the instruction, is allowed, in order to support its demand of stay of execution, to produce elements belonging to a criminal procedure where they are necessary for the defence of its client;
- the legal privilege could not be opposed at the occasion of investigations of alleged criminal offences involving the lawyer; (the Cour de Cassation authorised the copying of the law firm’s complete hard drive (14/11/2001, 01-85965)).
- the legal privilege could be disclosed for the purpose of the lawyer’s own defence.

Pursuant to Article 3 of the RIN, all correspondences between lawyers are confidential (including letters, faxes, emails …).

**Is in-house counsel protected by legal privilege?**

Contrary to common law which provides that in-house lawyers (juristes d’entreprise) enjoy the same status as private practitioners (avocats), French law still considers these two professions as totally separate.

Under French law, in-house counsel is obliged to respect professional secrecy regarding the information qualified as «business secrets» they receive within the framework of their position with the company. Professional secrecy also applies to legal opinions they render to their «client», i.e. the company. A breach of this obligation is deemed a criminal offense (Article 226-13 of the French criminal Code).

Because only lawyers are subject to the Code of Conduct of the French Bar, the legal privilege principles are not extended to communications between in-house counsel and employees, officers or directors of a company that aim at obtaining legal opinions on subjects related to their work.

In fact, a French investigation on Competition law issues can use internal company memos produced by the in-house lawyers against the company. Furthermore in-house
lawyers (unlike external lawyers) are obliged to testify if called or to provide evidences regarding the company they work for.

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

No, as there is no rule specifying the status of the correspondences exchanged between French and foreign lawyers.

In such a case, it is thus recommended that they determine whether they will respect confidentiality or not prior to any negotiation.

In addition, the Code of professional ethics of European lawyers specifies that correspondences between EU lawyers would be considered as confidential at the sole condition that it is mentioned on it “without prejudice”.

**Other remarks**

Legal advice of major importance shall then be provided by external legal counsel in order to assure the full extent of the legal privilege principles and lawyers professional secrecy.

The French OFT’s agents seize the whole hard drive and the whole e-mail box even if they contain documents covered by the legal privilege. The Court of Appeal of Paris recently ordered an IT expert to determine if the whole copy of the hard drive is the only applicable solution guaranteeing the investigation’s efficiency (02/11/2010). Could the OFT’s agents find a less intrusive way to guarantee the effectiveness of legal privilege and the affairs’ confidentiality?

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Does legal privilege exist?

In Germany, communication between the attorney and the client is protected by several seizure prohibitions based on the following principles:

**Effective right of defence** – is protected by Article 6(3) of the European Convention on Human Rights as well as Article 2 (1) in connection with Article 20 (3) of the German Constitution (Grundgesetz – GG). It protects correspondence and private notes from being seized if they relate to the client’s defence, regardless whether they are in the attorney’s or the client’s possession.

**Right to refuse testimony** – is the right of certain persons to refuse testimony. According to section 53 (1) no. 2 of the Code of Criminal Procedure (Strafprozessordnung – StPO), a counsel has the right to refuse testimony as to matters he is entrusted with in his capacity as defence counsel, same applies to attorneys according to section 53 (1) no. 3 StPO. In connection to this, section 97 (1) no. 1 stop provides that correspondence between the defendant and the persons entitled to refuse testimony shall not be seized. According to section 97 (2) StPO this prohibition does, generally, only apply if the person in question is in the possession of the respective documents.

**What is protected by legal privilege?**

As regards the effective right to defence and the seizure prohibition based on the right to refuse testimony, the correspondence which shall not be seized must relate to the client’s defence (“defence correspondence”).

I. The prerequisites are the following: Investigation proceedings must be initiated, the suspected person (i.e. the client) must be aware of those proceedings and the correspondence must be prepared and/or exchanged within the scope of an existing mandate with regard to the respective proceedings. Otherwise, the correspondence will not be considered as defence correspondence. As regards correspondence which has been prepared and/or exchanged before the initiation of the respective proceedings, there is, under German law, no seizure prohibition even if the correspondence has a relationship to the subject-matter of the procedure. Despite some scholars arguing in favour of a seizure-prohibition expansion, relevant court practice, so far, has not shown relevant new tendencies.

II. Correspondence relating to legal advice, e.g. a legal opinion, is protected from being seized if its purpose is the client’s defence, only. Memos shall not be seized if they are made in relation to the respective accusation and within an existing mandate. In case there is no existing and specific mandate that relates to the client’s defence, seizure of such correspondence is, according to the regional court of Bonn, not prohibited even if it contains comments or legal opinions on potential summary proceedings. Thus, general advice by external lawyers in the possession of the client is, potentially, subject to seizure.

III. As regards the seizure prohibition based on the right to refuse testimony, section 97 (2) StPO provides that the person who is entitled to refuse testimony must be in the possession of the correspondence in question. According to the legal practice, section 148 StPO has to be taken into account if the entitled person is the defence counsel. It provides that the suspected person is permitted to correspond with his defence counsel. In view of this provision, seizure of correspondence is, in deviation from section 97 (2) StPO, even prohibited if the respective correspondence is in the client’s possession, as long as it concerns the client’s defence. It is also prohibited to seize documents which are in the possession of the client and recognisably prepared by the client for the purpose of defence. Advice by external lawyers, however, just as other documents, is protected if it is in the possession of the lawyer, only.

IV. The seizure prohibition does not apply if the attorney is suspected of having participated in the infringement.
Is in-house counsel protected by legal privilege?
In case in-house counsel is in possession of the documents/correspondence in question, the abovementioned seizure prohibitions only apply if the in-house counsel actually acts as an attorney, i.e. if correspondence is concerned which the attorney has prepared for attorney-related services for third parties. In so far as the in-house counsel acts for the undertaking he is employed by, he does not act as an attorney within the meaning of section 53 StPO. An attorney within the meaning of section 53 StPO must have the position of an organ of justice which is independent and not bound to the client. Thus, in order to enjoy the legal privilege, the in-house counsel must be entitled to act independently from the undertaking without being bound to instructions. For practical reasons this means that the in-house lawyer is treated comparably as under EU law.

Does legal privilege apply to the correspondence of non-domestic qualified lawyers?
Legal Privilege applies to lawyers being enrolled in the bar. As a result of this enrolment the lawyer is subject to the professional ethical obligations, e.g. confidentiality.
According to section 4 of the Federal Attorney Regulation (Bundesrechtsanwaltsordnung – BRAO) the enrolment requires the applicant to be qualified to exercise the function of a judge according to the German Judiciary Act (Deutsches Richtergesetz – DRiG) or to fulfil the incorporation requirements of the Law on the activity of European lawyers in Germany (Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland – EuRAG) or to have passed the qualification test as to this law. Additionally, at least attorneys from other EU-member states and also Switzerland are covered by the legal privilege of sections 53 and 97 StPO, provided that all other criteria are met. Other foreign lawyers, generally, do not qualify for Legal Privilege.

What are the main differences between national legal privilege and EU legal privilege?
German Legal Privilege is narrower than EU Legal Privilege as “normal” legal correspondence with no specific relationship to an existing defence mandate is not subject to privilege.

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Does legal privilege exist?

Legal Privilege is recognized and protected by Greek legislation. Mainly the Attorneys Code of Conduct, the law regulating the legal profession, and also the Code of Civil Procedure, the Code of Criminal Procedure and the Criminal Code, are the sources that contain specific provisions, granting protection from disclosure of privileged communication between attorney and client.

What is protected by legal privilege?

All data (verbal, written, electronic etc.) obtained in the course of legal practice is treated by the law as privileged – unless such data is in the public record – even after the termination of the attorney client relationship, and cannot be used even for the purposes of judicial proceedings.

Greek law (L. 3691/2008) provides an important exception from legal privilege in case of “Money Laundering”. Attorneys while acting as a client’s representative in financial or real estate transactions, or while administering client’s money, opening or administering bank or security accounts, acquiring funds for establishing, operating or managing the company or similar entity, if they acquire information regarding money laundering or terrorist financing, they are obliged to inform the Authorities. The same obligation applies to counselling a client while being aware that his purposes and activities would violate anti-money laundering rules. Attorneys are forbidden to notify a client of any investigation being conducted against him. The violation of these two main obligations attracts both disciplinary and criminal sanctions against the attorney. However, attorneys are not obliged to inform the Authorities of any information received regarding money laundering and terrorist financing, while representing the client in civil, criminal or administrative proceedings, including the pre- and post-trial activities. The law has not been tested in practice and remains to be seen how the Courts will interpret such strict provisions.

Is in-house counsel protected by legal privilege?

Until today there is no specific legislation on the matter. The Attorneys Code of Conduct does not distinguish between in-house counsel and independent attorneys. They are all subject to the local Bar and fall under the same ethical and disciplinary rules.

Due to the fact that in everyday practice in-house counsel are “not bound to the client by a relationship of employment”, it is accepted that they are also protected by legal privilege. It should be noted that in Greece attorneys are not considered to be “employees”. Even as in-house counsel they remain legal professionals providing legal services against “remuneration” even if such remuneration is monthly and of a fixes amount.
However, in case where “exclusive employment” exists and in-house counsels in the exercise of their duties participate in administrative decisions or exercise administrative duties, they are not covered by the legal privilege, when their particular function does not constitute provision of legal services (ECJ 155/1979/18.05.1982). Generally speaking each case is being decided ad hoc and the practice tends to award privilege rather than to deny it.

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

The Attorneys Code of Conduct does not differentiate between Greek and EU nationals (who can practice law in Greece under permit of the local Bar association, P.D. 130/23.05.2000) as to the application of Legal Privilege. Third country nationals cannot qualify as lawyers in Greece with the exception of Greek expatriates following special permit by the Ministry of Justice and respective Bar Association.

Given that standard EU jurisprudence shall be respected, communications, other than correspondence, between a Greek (or EU) in-house legal counsel and lawyers outside EU (third countries) are not covered by legal privilege.

Similarly to EU practice, in case of doubt a copy of the relevant document should be placed in a separate envelope, which may not be used by the investigators until the resolution of the dispute as to its status.

**What are the main differences between national legal privilege and EU legal privilege?**

The EU Legal Privilege applies only to written communications between attorneys and clients for the purpose of exercising the clients’ rights of defense. The EU Legal Privilege may extend to internal written communications (preparatory documents) written by in-house counsel as long as they are prepared exclusively for the purpose of seeking advice from an independent attorney in the exercise of the right of defense.

Under Greek legislation qualified attorneys providing legal service as in-house legal counsel are also protected by Legal Privilege.

**Other remarks**

According to the Attorney Code of Conduct attorneys can not be called as witnesses regarding a case they were involved with, unless they have permission by the BoD of the local Bar Association.

Under the provisions of the Code of Civil Procedure attorneys can reveal before a Court confidential or privileged information received from their clients only if they have the clients’ permission to do so.

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Does legal privilege exist?

Hungary has no separate and independent right to Legal Privilege. However, legal advice is protected from seizure through the following concepts:

**Professional secrecy** – is a general obligation on attorneys not to disclose secrets without the consent of their client. It is an obligation sanctioned by disciplinary measures.

**Confidentiality** – is a corollary of professional secrecy, giving the person bound by it the right to refuse to give evidence on matters covered by professional secrecy or to withholding from seizure any document containing information covered by professional secrecy.

Thus, no separate right exists that grants protection to legal advice. It is, however, the necessary consequence of the obligation imposed on lawyers not to disclose information obtained due to their professional capacity.

What is protected by legal privilege?

Since confidentiality is a corollary of the secrecy obligation, its rights are connected to the lawyer and not to the legal advice. It is a right *in personam*. This means that only information communicated to and in possession of the lawyer is protected and that advice or information communicated by the lawyer to his client does not fall within the protected scope (save for certain specific information e.g. in the field of competition law). However, in criminal cases, protection has a wider reach, which is linked to the rights of defence of the accused: the attorney cannot be heard in respect of any confidential information – not even in the case if the attorney got consent from its client to disclose the confidentiality obligation.

Is in-house counsel protected by legal privilege?

No explicit provisions of the decree regulating the operation of in-house counsels in an employment relationship grant Legal Privilege to the information possessed by in-house counsels and the lack of protection is explicitly provided for in competition matters.

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

Regarding lawyers: No; since confidentiality is linked to the capacity of a lawyer, it can only be granted to lawyers that fall within the field of application of Hungarian law: a lawyer is recognised as such due to subjection to the Hungarian Bar.

Regarding in-house counsel: No; since no protection is granted to national in-house counsels either.

What are the main differences between national legal privilege and EU legal privilege?

European confidentiality protection is, like the Hungarian equivalent, not granted to legal advice emanating from in-house counsel.

European confidentiality protection is attached to the actual communication. This means that also documentation in possession of undertakings can enjoy protection.

European confidentiality can only be enjoyed when correspondence relates to a client’s right of defence. This means that only communication relating to a procedure enforcing art. 101-102 TFEU can be granted protection. Also communication predating the initiation of such procedure that comes to fall within such context, is granted protection.

Correspondence between a lawyer and a third party, not being a client of his, is not protected.

Other remarks

Legal trainees are covered in the same way as attorneys are.

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Does legal privilege exist?
Yes.
Legal Professional Privilege is a rule of evidence providing for a privilege that can be asserted by a client – and must be asserted by a lawyer (unless otherwise instructed by his client [who ‘owns’ the privilege]) – whereby disclosure of certain confidential communications, whether written or oral, can lawfully be refused if the communication comes within one or other limb of the Legal Professional Privilege rule.

What is protected by legal privilege?
Legal Professional Privilege covers two types of confidential communication, and thus has two limbs. The two types of privilege are known as “legal advice privilege” and “litigation privilege.”

Legal Advice Privilege covers confidential communications between client and professional legal adviser, made either to establish-, or in the course of, a professional legal relationship, for the purpose of seeking or giving legal advice. (Note that no litigation or any prospect of litigation is required for legal advice privilege to apply.)

Litigation Privilege covers confidential communications between
(a) a client and a professional legal adviser; or
(b) a client and a third party other than a legal adviser; or
(c) a lawyer and a third party other than the client,
the dominant purpose of which is preparation for reasonably apprehended or pending litigation.

Claims to privilege are most usually made in the context of court proceedings, when either refusing to give oral evidence of a privileged communication, or refusing to produce a privileged communication comprising of a document, by way of discovery. When a privilege claim is accepted, the oral evidence cannot be required, or, as the case may be, the document need not be produced. The final arbiter of whether any claim to privilege over any communication is properly and validly made is the court dealing with the proceedings in which the claim is made.

Is in-house counsel protected by legal privilege?
The rule of legal professional privilege extends to communications to and from professionally qualified and practicing lawyers (not academics, for example), and so extends in the normal case to such communications involving solicitors in private practice, such solicitors’ employees acting on their behalf, barristers and employed (“in-house”) lawyers (be they solicitors or barristers).

The only exception to privilege extending to cover confidential communications between in-house lawyers and their employer clients is that provided for in the specific context dealt with by the European Court of Justice in the Akzo Nobel decision (cartel investigations carried out by the European Commission).

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

What are the main differences between national legal privilege and EU legal privilege?
I am not aware of any other main differences, but further or other differences may exist.

Other remarks
It is important to be precise in applying the ingredients of the legal professional privilege rule. For example, in all cases, it is necessary that the communication at issue be confidential. Also, in the advice privilege limb, it is necessary that the communication concern the giving or seeking of legal advice (not other types of advice, and not something falling short of legal advice – often distinguished as ‘legal assistance’). The latter is particularly important in the in-house context, where
communications can easily become entangled with other, non-legal, matters. In the litigation privilege limb, it is important to observe that the dominant (or preferably the sole) purpose of the confidential communication must be preparation for reasonably apprehended or pending litigation (beware, therefore, of mixed or other purposes).
Does legal privilege exist?
The Legal Privilege does not exist in the Italian framework. According to the Italian Code of Conduct, communications between lawyers are protected. However, please note that this breaching is a violation of an ethical rule.

What is protected by legal privilege?
All documents can be seized under Italian rules. The only exceptions to the above is provided by article 103 of the Italian Procedural Criminal Code (“IPCC”) which strictly relates to the defense counsel formally appointed in a criminal proceeding and provides for that the public prosecutor cannot carry out inspections and/or searches in the defense counsel’s premises (unless the defense counsel himself is indicted). Under this provision, at the lawyer’s premises the public prosecutor cannot seize any documents which concern the defence’s strategy, the defence’s investigations and any correspondence between the lawyer and his client (defendant); also wiretapping the conversations between the lawyer and his client is forbidden. In case the public prosecutor violates this provision, the results of his investigations cannot be used during the criminal trial.

Is in-house counsel protected by legal privilege?
The in-house counsel category does not exist. They are levelled to the other employees.
1) Lawyers to go in house have to resign from the bar.
2) In house legal council are not necessarily lawyers (and even if it happens more seldom they may not even have a degree in law).

Does legal privilege apply to the correspondence of non-national qualified lawyers?
No.

What are the main differences between national legal privilege and EU legal privilege?
There are no main differences.

Other remarks
Even if (see e.g. C.d.S. No. 4016 of June 24 2010) principles of the case law established by the European Court should be applied also to domestic cases, the Italian Competition Authority is used to seizing documents also covered by the legal privilege according to EU principles.

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Does legal privilege exist?

In Latvia Legal Privilege legal framework applies to the professional activities of the Sworn Attorneys who are members of the Latvian Sworn Attorneys Collegium (hereinafter referred to as “Sworn Attorneys”). The Latvian Advocacy Law states that Sworn Attorneys shall be independent in their professional activities and it is prohibited to request any explanations on information obtained in providing of the legal assistance even if the legal relations with the client have been terminated. The same provision is included in the Code of Ethics of the Sworn Attorneys (hereinafter referred to as “Code of Ethics”) and the Criminal Procedure Law concerning the criminal proceedings.

The afore noted laws cover the requirements related to the protection of the confidentiality of the Sworn Attorney provided by:

- Basic Principles on the Role of Lawyers adopted by the United Nation in 14 December 1990,

The Law on the Prevention of Laundering the Proceeds from Criminal Activity (Money Laundering) and of Terrorist Financing (hereinafter referred to as “Law on Prevention of Money Laundering and of Terrorist Financing”) that implements Directives 2005/60/EC and 2006/70/EC of the European Parliament and of the Council limits the scope of confidentiality of the Sworn Attorneys in providing of the legal assistance by imposing an obligation to inform a competent state authority on each suspicious and unusual transaction if such is identified.

Confidentiality of the legal assistance provided by the lawyers that are not members of the Latvian Sworn Attorneys Collegium (hereinafter referred to as “lawyers”) may be protected by the provision of the Commercial Law on regulation of a “trade secret”. However this option applies only to the legal relations with business entities (companies) and only to the extent that such business entity (company) has determined. Upon the request of the competent government authority according to the Law on Prevention of Money Laundering and Terrorist Financing and the Criminal Law the information under the status of “trade secret” shall be disclosed.

What is protected by legal privilege?

Article 67 of the Latvian Advocacy Law prohibits the Sworn Attorneys from disclosing any secret of the client not only while providing the legal assistance, but also after termination of the legal relations. Moreover, the Sworn Attorneys are obliged to ensure compliance with such requirement not only in their activities, but in the work of their employees as well.

The similar provision is included in Article 1.3 of the Code of Ethics stating that the Sworn Attorneys cannot disclose the information obtained while providing legal assistance even if the legal relations with the client are terminated. In addition Article 2.1 of the Code of Ethics states that the Sworn Attorneys are prohibited to perform such operations that may damage the interests of the client.

According to Article 6 of the Latvian Advocacy Law and Article 122 of the Criminal Procedure Law the government authorities are prohibited from performance of the following actions in the criminal proceedings where the Sworn Attorneys defend the client:

- request information and explanations from the Sworn Attorneys including interrogation as witnesses on the information obtained in providing legal assistance;
- control any correspondence and any document, which the Sworn Attorneys have received or drafted upon providing the legal assistance, examine or seize, as well as to search in order to find and seize such correspondence and documents;
control the information systems and means of communication, including electronic, used by the Sworn Attorneys in providing the legal assistance, delete information from information systems and interfere with operation thereof.

It follows that the effective laws and regulations are generally determined to protect confidentiality of the legal assistance of the Sworn Attorneys in Latvia. However, the Sworn Attorneys are obliged to notify the government authorities on particular cases that may be detrimental to public interests such as:

- any suspicious and unusual transaction (according to Article 3 of the Law on Prevention of Money Laundering and Terrorist Financing), and
- if there is verified information on preparation or commitment of a crime.

As it was noted in response above, in certain cases the lawyers who are not members of the Latvian Sworn Attorneys Collegium may rely on the provision of the Commercial Law containing regulation of “trade secret”.

Thus, according to Article 19 of the Commercial Law a business entity (company) may assign status of “trade secret” to information of economic, technical or scientific nature, which is recorded in writing or by other means or is not recorded and complies with the following features:

- information is related to the company;
- information is not available to the third persons;
- information possesses actual or potential financial or non-financial value;
- the company has performed appropriate measures to prevent disclosure of such information.

If the above noted requirements apply to the information obtained in providing legal assistance such information might be considered to be “trade secret”. The business entity (company) is entitled to claim reimbursement of damages in case of disclosure of the “trade secret”.

However, the status of “trade secret” does not release the lawyer from the obligation to notify government authorities upon identification of the case any suspicious and unusual transaction according to the Law on the Prevention Money Laundering and Terrorist Financing and preparation of the crime complying with the requirements of the Criminal Law. Upon the request of the competent government authority the information under the status of “trade secret” shall be disclosed according to the aforesaid law.

Is in-house counsel protected by legal privilege?

Presently there is no specific legal framework for activities of an in-house counsel in Latvia.

The in-house counsel may provide the legal assistance as a Sworn Attorney upon a cooperation agreement with a company. In this case his professional activities fall within general protection of the Legal Privilege provided in Latvian Advocacy Law, Law on Criminal Procedure and the Code of Ethics in the scope described in responses to the question 1.2 above.

According to the Advocacy Law the Sworn Attorney relying on the protection of the Legal Privilege shall provide a legal assistance independently and cannot enter in the employment relations with the client. This complies with the opinion of ECJ in case C-550/07P, Akzo Nobel Chemicals, Akcros Chemicals Ltd vs European Commission (hereinafter referred to as Akzo case), and case 155/79, AM&S vs European Commission (hereinafter referred to as AM&S case), providing that the correspondence between the client and the Attorney is privileged if:

- the correspondence relates to the clients’ right to defense;
- relates to the written correspondence between the client and the Attorneys whose relations are not bound by the employment agreement.

Another option for a Sworn Attorney to operate as in-house counsel is to terminate the professional activity in the status of a Sworn Attorney and to provide the legal assistance as a lawyer upon an employment contract. If the in-house counsel is operation as a lawyer the confidentiality of the legal assistance could cover
the regulation on the “trade secret” according to the Commercial Law. The information under the status of “trade secret” shall be disclosed upon the request of the competent state authority in compliance with the Law on the Prevention Money Laundering and Terrorist Financing, Criminal Procedure Law and Criminal Law.

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

An Attorney from another EU Member State may provide a legal assistance in Latvia only after registration with the Latvian Council of Sworn Advocates and upon receipt of a permit to perform professional activity. Afterwards the Attorney may participate in criminal court proceedings only in cooperation with the Latvian Sworn Attorney. If the Latvian Council of Sworn Advocates recognizes professional qualification of the Attorney from another EU Member State as correspondent to practice independently (upon passing an examination on the knowledge of Latvian language and Latvian legislation), such Attorney has the same rights and obligations as the Latvian Sworn Attorneys. Thus, the legal framework on Legal Privilege applies only to the Attorneys from another EU Member State who have obtained the aforesaid recognition of the Latvian Council of Sworn Advocates.

Other foreign non-national qualified lawyers may rely on the provisions of the Commercial Law that regulates the “trade secret”.

What are the main differences between national legal privilege and EU legal privilege?

The national regulation of the Legal Privilege generally complies with the regulation of the Legal Privilege of EU according to the following:

(1) The Latvian Advocacy Law, Criminal Procedure Law and the Code of Ethics cover the requirements related to the protection of the confidentiality of the Sworn Attorney provided by:

- Basic Principles on the Role of Lawyers adopted by the United Nation in 14 December 1990,


(2) The criteria of application of the Legal Privilege provided in ECJ AM&S and Akzo cases (the application of the Legal Privilege to the correspondence that relates to the clients’ right to defense and is between the client and the Attorneys
whose relations are not bound by the employment agreement) is reflected in the Latvian Advocacy Law, Criminal Procedure Law and the Code of Ethics.

(3) The requirement to notify the competent governmental authorities on unusual and suspicious transactions provided in Directives 2005/60/EC and 2006/70/EC are implemented in the Law on Prevention of Money Laundering and Terrorist Financing;

(4) The practice of the government authorities and the provisions of the Law on Prevention of Money Laundering and Terrorist Financing complies with the ECJ judgment in case C-305/05 of 26 June 2007 providing that the obligation of information and cooperation with the competent government authorities do not infringe the right to a fair trade.

Legal framework of the Legal Privilege in Latvia applies to professional activities of the Sworn Attorneys who are members of the Latvian Sworn Attorneys Collegium and EU Attorneys whose professional qualification is recognized by the Latvian Council of Sworn Attorneys and does not cover confidentiality of legal assistance by lawyers who do not belong to the Latvian Sworn Attorneys Collegium.

Other remarks

The regulations of the Legal Privilege on professional activities of the Sworn Attorneys apply to the professional activity of the Assistants of the Sworn Attorneys as well.

The confidentiality could be limited by an obligation to notify competent authorities according to the Criminal Law and Law on Prevention of Money Laundering and Terrorism Financing in cases explained below.

According to Article 315 of the Criminal Law the Sworn Attorney is obliged to notify government authorities on preparation of a crime in case if there is true information precluding any doubts that the crime could be committed. The Criminal Law establishes criminal liability for failure to notify on preparation of a crime, and such liability may involve imprisonment for up to 4 years or detention, forced labour, or a fine in the amount of 60 minimum monthly salaries (one minimum monthly salary in Latvia is 200 LVL that is approximately 284.46 EUR). The duty of the Sworn Attorney is to discourage the client from committing such crime.

The obligation of the Sworn Attorney to inform the government authorities on any suspicious and unusual transaction (provided by the Law on the Prevention of Money Laundering and Terrorist Financing) mainly applies to the transactions dealing with immovable property and finances. This obligation does not cover the cases when the Sworn Attorney defend or represent a client in relation to such transaction in out-of-court criminal proceeding, court proceedings or when they provide legal advice on initiation of the court proceedings or evading thereof. The Law on the Prevention of Money Laundering and Terrorist Financing prohibits from informing the client about such notification of the government authority on suspicious and unusual transaction. This prohibition is aimed at preventing elimination of evidence. However, it may possibly jeopardize possibilities of the Sworn Attorney to discourage the client from entering into such transaction.

In addition the Latvian Advocacy Law provides that the unlawful operation of the Sworn Attorney that facilitates the commitment of the crime is not considered to be a legal assistance. Therefore the Legal Privilege protection is not applicable in this case.

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Does legal privilege exist?

In Lithuania, a legal privilege is understood as a duty of an advocate to preserve a professional secret as well as a set of general rules of substantive law (legal prohibitions), which ensure that such duty can be effectively fulfilled. The definition of the advocate’s professional secret is broadly defined and covers any information that is obtained by the advocate when conducting his or her professional activities; cases when information shall not be deemed to be professional secret can be provided for by the law (e.g. money laundering prevention).

What is protected by legal privilege?

The laws of Lithuania set the following legal prohibitions pertinent to the protection of advocate’s professional secret:

- it shall be prohibited to summon an advocate as a witness or to give explanations as to the circumstances which came to his knowledge in the pursuit of his professional activities;
- it shall be prohibited to examine, inspect or take the advocate’s practice documents or files containing information related to his professional activities, examine postal items, wiretap telephone conversations, control any other information transmitted over telecommunications networks and other communications or actions, except for the cases when the advocate is suspected or accused of a criminal act (the latter exception covers only the documents related to the allegations or charges made against the advocate);
- it shall be prohibited to familiarise, overtly or covertly, with the information comprising the advocate’s professional secret and use it as evidence.

The law specifies that the advocate’s professional secret shall encompass the fact of consulting the advocate, the terms of the contract with the client, the information and data provided by the client, the nature of consultation and the information collected by the advocate by order of the client. While there is a general position that the definition of the professional secret covers communication to as well as from the client, there has been no jurisprudence confirming this position. It also does not answer the question whether it covers the information and data exchanged between advocates. Therefore, currently the laws of Lithuania and jurisprudence do not provide a comprehensive concept of professional secret.

The legal prohibitions mentioned above only apply in respect to and the duty to preserve the professional secret is only imposed upon regulated legal professional who is authorized to pursue its professional activities under the professional title of “advokatas” (in English: “advocate”), i.e. member of the Lithuanian Bar. Therefore, no other person is protected by the legal privilege in Lithuania.

Is in-house counsel protected by legal privilege?

No. Only advocates, who are being members of the Lithuanian Bar, are protected by the legal privilege. Other legal professionals, including in-house counsels, are not covered by the laws of legal privilege in Lithuania. In practice, however, there are cases when an advocate is being exclusively engaged by a company for the provision of legal services exclusively to that company (without becoming its employee). Though it poses a question of the independence of such advocate, under current laws of Lithuania, such advocate would be covered by the laws of legal privilege. Please also note that employees (e.g. in-house counsels), who provide legal services to their employers, are subject to a general obligation of confidentiality in their capacity as employees.

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

No. Only advocates, who are being members of the Lithuanian Bar, are protected by the legal privilege under the current laws of Lithuania. The possibility to claim such protection by EU legal professionals, who are practicing in Lithuania, remains unclear.
What are the main differences between national legal privilege and EU legal privilege?

The main difference is that the European Union legal privilege can only be enjoyed when correspondence relates to a client’s right of defence, while no such distinction exists under the laws of Lithuania.

It is also not entirely clear whether Lithuanian legal privilege covers client’s internal communications made for the purposes of seeking legal advice or reporting such within the client’s organization in the same way as European Union legal privilege does.

Other remarks

In Lithuania, advocate’s assistant (future advocate) is covered in the same way as advocate is. However, the capacity of the advocate’s assistant is limited (e.g. he/she is not allowed to act at the appeal stage of any court proceeding; he/she is not allowed to act as a representative of a defendant in criminal case, etc.).
Does legal privilege exist?

Yes.

The term “Legal Privilege” is not defined in Maltese law. There is a general obligation not to disclose secrets, imposed on all persons who, due to their professional status, become the depositary of any secret confided in them. A breach of professional secrecy is a crime that is punishable by heavy penalties (art.257 of the Criminal Code). This obligation is elaborated upon in the Professional Secrecy Act. Lawyers are specifically mentioned. Apart from this, a lawyer has an ethical duty to keep the affairs of clients confidential.

The corollary of this is confidentiality. A number of professions, and lawyers in particular, may not be compelled to disclose information on matters covered by professional secrecy.

Particular instances or effects of legal privilege are stated in various provisions of law.

This “privilege of silence” referable to lawyers, “inviolable” within its scope, is also recognised by caselaw (Grech vs Mifsud, Civ.Ct 1st Hall, 1916)

What is protected by legal privilege?

(a) The obligation of professional secrecy imposed by art 257 of the Criminal Code, and its corollary of confidentiality, are wide.

The definition of “secret” in the Professional Secrecy Act is framed widely and includes anything that is described as secret by the person giving it, or that should be considered as secret in view of circumstances, including the profession of the person receiving the information, that is in the possession of the professional person.

(b) There are limits.

The wording of art 257 of the Criminal Code and the Professional Secrecy Act refer to information given to the professional, and in his possession.

(c) There are exceptions.

In exceptional cases, a person normally bound by professional secrecy may be compelled by an express provision of law to disclose the secret information. (art 257 of the Criminal Code and the Professional Secrecy Act) Such cases include the obligation of the professional person to report knowledge or suspicion of money laundering or of funding of terrorism to the regulatory authority, or to provide information to it.

(d) There are fewer exceptions in the case of lawyers.

Even in the exceptional cases, the lawyer may not divulge information that is received or obtained in the course of ascertaining the legal position of his client. (Prevention of Money Laundering Act, Prevention of Money Laundering and Funding of Terrorism regulations)

(e) It is expressly stated in the Code of Organisation and Civil Procedure, the Criminal Code that in civil and criminal proceedings, the lawyer cannot be compelled to divulge information that he has received from the client in professional confidence. There are other specific statutory references to the duty of professional secrecy and the protection of confidentiality of communications between a lawyer and his client.

Is in-house counsel protected by legal privilege?

Yes. In dealing with legal privilege the law does not distinguish between independent and in-house counsel. In view also of the strong culture of legal professional secrecy, it is thought that the same obligation of professional secrecy, and the same confidentiality, must apply also to in-house counsel. The code of ethics applicable to the legal profession, in dealing with professional secrecy, does not distinguish between lawyers in private practice, and lawyers in employment.
Does legal privilege apply to the correspondence of non-national qualified lawyers?

The formulation of the general duty of professional secrecy in art. 257 of the Civil Code, as elaborated on in the Professional Secrecy Act, (and its corollary of confidentiality) is wide enough to include non-national qualified lawyers.

However, it is thought that the enhanced confidentiality referred to above in item (d) would not apply to non-national qualified lawyers, because the legal provisions dealing with this enhanced confidentiality appear to refer to lawyers holding a warrant to appear before the Maltese courts.

What are the main differences between national legal privilege and EU legal privilege?

National legal privilege is not limited to communications that are made for the purpose of the client’s rights of defence, unless there is a specific statutory provision that requires disclosure to a public authority, in which case, the legal privilege will be thus limited.

National legal privilege does not extend to documents that are prepared by the client for the purpose of obtaining legal advice but that are not communicated to the lawyer.

Other remarks

Although the concept of legal privilege is long-standing and very strong, there are various scenarios that are not specifically dealt with by statute, nor clarified by case-law.

It is not clear whether or to what extent communication by the lawyer to his client is protected. There is a strong view that such communication is also protected as confidential since it would appear to be a necessary aspect of the confidentiality that the law is protecting.

It is thought that national legal privilege will not normally extend to a communication by a client to a lawyer that is in the possession of the client, except in criminal proceedings if the communication is in connection with the giving of advice by the lawyer.

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Does legal privilege exist?

Yes. The Netherlands Competition Authority (Nederlandse Mededingingsautoriteit or NMa) exercises supervisory and investigative powers under the Competition Act (Mededingingswet or Mw) and the General Administrative Law Act (Algemene wet bestuursrecht or Awb). Section 5:20 of the General Administrative Law Act stipulates that everyone must extend cooperation to a supervisory authority. Paragraph 2 of this section subsequently grants a right of non-disclosure to, for example, attorneys. Insofar as supervisory powers concern third parties, attorneys have the right to refuse to cooperate. Section 51 of the Competition Act supplements this attorney-client privilege by stating that the NMa may not request to inspect “documents relating to the application of competition rules exchanged between an undertaking and an advocate admitted to the Bar”.

What is protected by legal privilege?

Section 51 of the Competition Act is based on the AM&S judgment rendered by the European Court of Justice (“ECJ”), which held that it follows from the principle of confidentiality between an attorney and an undertaking that correspondence and advice from an attorney to his client belong to the category of protected documents insofar as these concern the subject of a verification investigation. Hardcopy or digital information exchanged between an undertaking and a client fall under legal privilege. In practice, legal privilege applies to almost all attorney-client correspondence. For the purposes of interpreting this privilege, the NMa follows the AKZO case law and on some points its interpretation goes a bit further to the advantage of undertakings:

This correspondence includes:

- Internal documents prepared for the sole purpose of seeking legal advice from an attorney;
- Any advice given by the attorney himself;
- Internal reports and summaries of an attorney’s advice.

Is in-house counsel protected by legal privilege?

Under section 5:20 of the General Administrative Law Act, in-house counsels who are admitted to the Dutch bar as “salaried lawyers”, also referred to as “Cohen lawyers”, may also invoke their attorney-client privilege in respect of supervisory authorities. Documents exchanged between an undertaking and a Cohen lawyer are also protected by legal privilege, provided that it is clear from the documents that the in-house counsel acted in his capacity as an attorney. Legal privilege does not apply to communications with in-house counsels who are not also attorneys. The broader protection applies only to the application of national powers. The only situation in which legal privilege does not apply is when the NMa assists officials of the European Commission (“Commission”) with verifications (the searching of premises) conducted by these officials. In line with the Akzo judgment, Cohen lawyers do not enjoy attorney-client privilege in the event of such dawn raids and undertakings cannot invoke legal privilege.

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

Yes. Section 51 of the Competition Act does make a distinction based on where the attorney in question is based. Correspondence with attorneys based outside the EU is also protected under Dutch legal privilege. This constitutes an expansion of an attorney’s duty of confidentiality, also under disciplinary and criminal law. In this respect, the Dutch legal privilege provision explicitly deviates from ECJ case law.

What are the main differences between national legal privilege and EU legal privilege?

Contrary to national legal privilege, in-house counsels do not enjoy legal privilege at a European level. This means that national competition law offers more extensive protection of the confidentiality of correspondence between an attorney and his clients, because the correspondence of in-house counsels is also protected.

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European legal privilege limits its protection to attorneys who are based in a Member State. Dutch legal privilege does not make a distinction based on where an attorney is based.

The NMa’s manner of protecting legal privilege differs from that of the Commission. If a legal privilege claim is dismissed, the Commission issues a decision. An administrative law proceeding then follows. After this proceeding has been finalised, the Commission will be afforded the opportunity to inspect these documents. In the case of the NMa, a “Legal Privilege Officer” examines the documents and determines whether they fall under legal privilege. This officer notifies the undertakings of his opinion. Following this, a judicial review can be conducted in the form of civil law interim relief proceedings.

**Other remarks**

As soon as the supervisory officials have a reasonable suspicion that a certain undertaking or an association of undertakings has committed an offence, the obligation to extend cooperation within the meaning of section 5:30 of the General Administrative Law Act will no longer apply in the sense that there will no longer be an obligation to give a statement regarding the matter. This right to remain silent applies from the moment a situation involves a “criminal charge” within the meaning of article 6 of the European Convention on Human Rights and article 14(3) of the International Covenant on Civil and Political Rights. This right to remain silent under criminal law applies to both verbal and written statements given by an undertaking or a association of undertakings. Employees of an undertaking who are required to give a statement upon the NMa’s demand may invoke the undertaking’s right to remain silent. Anyone who has dealings with the NMa may be assisted by an attorney. This applies to both consulting an attorney prior to a hearing, and the right to have an attorney present during a hearing.

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Does legal privilege exist?
Yes, based on a long-term practice and sections 119, 204 and 205 of the Criminal Procedure Act as well as section 22-5 of the Civil Procedure Act.

What is protected by legal privilege?
The attorney-client privilege applies to both qualified attorneys and junior lawyers, as well as those persons who assist the attorney in his or her work. In order to be considered privileged, the information must be given to the attorney in his capacity as an attorney, *i.e.* in connection with obtaining legal advice. The attorney-client privilege does not apply to information an attorney receives when acting in another capacity, for instance as a member of a company’s Board of Directors. Further, the privilege does not apply to legal documents that are in the hands of a third party.

Is in-house counsel protected by legal privilege?
Yes, the attorney-client privilege also applies to in-house attorneys, although there are some caveats, *cf.* below.

Does legal privilege apply to the correspondence of non-national qualified lawyers?
Attorney-client information is regarded as privileged regardless of the attorney’s nationality. In a case where an in-house counsel of an US-corporation had prepared certain strategy documents in connection with a dispute, it was held that sections containing legal considerations and assessments of litigation risk were to be considered as privileged information, *cf.* decision by the Appeals Selection Committee of the Supreme Court 22 December 2000.

What are the main differences between national legal privilege and EU legal privilege?
Under Norwegian national law, in-house counsels are protected by legal privilege as described above. Under EEA/EU-law, however, information given to in-house counsels are not protected by legal privilege. The result of this is, for instance, that if a dawn-raid is undertaken by the EFTA Surveillance Authority (ESA), which falls within the scope of EEA/EU-law, the in-house counsel at the company in question cannot invoke legal privilege.
Lawyers need to be aware of this difference, and have to be certain of what kind of decision and which regulatory agency he or she is facing.

Other remarks

If an attorney is sued by a client for alleged malpractice, the attorney is free to disclose privileged information to the extent that this disclosure is necessary for his or her defense. However, information received under a specific confidentiality agreement cannot be divulged.

There has been a debate between the National Authority for Investigation at Prosecution of Economic and Environmental Crime (Økokrim) and the Norwegian Bar Association on the legal privilege of attorney-client information. Økokrim has been arguing that the privilege is an obstacle to their work against white collar crime, and has been asking for new regulations which involve limiting the attorney-client privilege. The Norwegian Bar Association is clear on the importance of trust and confidentiality in the attorney-client relationship and that the attorney-client privilege is a fundamental part of this.

Over the last few years, there have been a few cases regarding the legal privilege of attorney-client information. In December 2010 the Supreme Court concluded that information about money transfers as part of the attorney’s legal practice, and client identity in a specific attorney assignment, is privileged information. In a subsequent High Court case in 2011, the Supreme Court’s 2010 precedent was re-confirmed.

In these cases it was emphasized that if the scope of legal privilege is an obstacle against white collar crime, it is a task for the legislative authority to make the necessary amendments.

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Photo credit: Terje Rakke, Nordic Life, Innovation Norway
**Does legal privilege exist?**

There are two groups of lawyers i.e. advocates and attorneys-at-law which are specified under Polish law. Difference between profession of advocates and attorney-at-law are insignificant. The discrepancy is that solely advocates are entitled to appear before the court in criminal cases acting on behalf of accused party. Both professions are bound by Polish law, internal regulation of the bar etc. (hereinafter jointly “attorneys”).

The concept of legal privilege does not exit under the Polish law. However, attorneys are obliged to keep confidential all information which they became aware of in the course of providing legal services. In accordance with Polish law, attorneys are bound by the professional secrecy of attorneys, which means that they should keep all information concerning legal service confidential.

**What is protected by legal privilege?**

The scope of the protection of the client is narrower under Polish law than the concept of EU legal privilege. The professional secrecy of attorneys concerns the knowledge and documentation possessed by the particular attorney rather than specific documentation marked with confidentiality clause. Exceptionally, professional secrecy is excluded if the obtained information refers to money laundering and terrorist activities regulated under a separate statute.

**Is in-house counsel protected by legal privilege?**

There is no separate law concerning in-house lawyers. Therefore, the above-mentioned comments apply to in-house lawyers provided that in-house lawyers are qualified attorneys. (If the in-house lawyer is not an attorney i.e. he is not admitted to the bar, the professional secrecy rule does not apply to him.)

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

Generally, the above-mentioned rules will be applicable to non-national qualified lawyers (which obtained professional title in the member state of European Union or third country) in the event that qualified lawyers will provide service in the territory of Poland. The Polish law specifies the scope and limitation of the legal service provided by foreign qualified lawyers in the territory of Poland. However, general rules applicable to the attorneys will be applicable to foreign qualified lawyers, including the professional secrecy rule.

**What are the main differences between national legal privilege and EU legal privilege?**

We have determined the following main discrepancies:

1. European legal privilege covers communication between the client and the lawyer, including correspondence and written legal opinion. On the other hand, Polish professional secrecy of attorneys is related to the particular lawyer which is obliged to keep all information obtained from the client confidential. As a result it does not protect from disclosing documents which may contain relevant information related to providing legal services, for example during the criminal investigation concerning the search on the client’s premises, dawn raid etc.

2. European legal privilege is not granted to in-house lawyers. In Poland the same scope of the professional secrecy rule is applicable regardless of the fact whether the attorney is in-house lawyer or not.

**Other remarks**

Legal trainees for attorneys who are admitted to the bar for traineeship programme are bound by the professional secrecy rule respectively.

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Does legal privilege exist?

Legal Privilege in Portugal is provided by the Portuguese Bar Association Statutes enacted by Law nº. 15/2005 of January 26 (“Statutes”), which regulates the rights, conduct and code of ethics of Portuguese Lawyers.

Article 87 of the above mentioned Statutes determines that Lawyers can not disclose any secret information, data or relevant facts obtained due to their professional status.

Furthermore, § 2 of this provision states that this professional secrecy duty is always applicable, regardless if the lawyer does or does not represent the client on and out of court, if he/she receives a fee or practices pro bono. Also, if incorporated in a law firm, this duty is extended to every lawyer of the firm.

Therefore, any breach of professional secrecy can give rise to disciplinary, civil and criminal liability of the infringer, subject to different penalties:

- **Disciplinary liability** – the penalties range from the mere admonishment to the disbarment of the infringer;
- **Civil liability** – this conduct falls under the category of tort and may determine a compensation for damages;
- **Criminal liability** – Article 195 of the Portuguese Criminal Code establishes that whoever discloses someone else’s secrets, without their consent, having acknowledged it due to their profession or office is punished with a penalty up to 1 year of imprisonment or a fine up to 240 days.

What is protected by legal privilege?

i. Legal privilege covers a broad spectrum of information and documents. In fact, article 87 of the Statutes determines that every fact and/or supporting document (in any format) disclosed to a lawyer by a client, its associated parties, co-defendants, counterparties and others are of confidential nature, unless its disclosure is expressly authorized by the concerned party and, in most cases, by the Bar Association. In addition, Portuguese Lawyers have the right/obligation to withhold from seizure any document containing information covered by professional secrecy.

ii. Legal privilege does not include:
- notorious facts;
- facts known by the public;
- facts previously proven in court;
- facts described in public documents/deeds;
- facts alleged in the client’s benefit and on his defence.

iii. Legal privilege is extended to lawyer’s staff, co-counsels, trainees, substitutes, successors and also third party experts.

iv. It should be noted that Legal privilege is not an absolute right in Portugal, and the concept is still disputed among judges and Lawyers. It flows from Article 135 of the Portuguese Criminal Procedural Code that criminal courts can order the disclosure of certain facts and or documents subject to Legal privilege, whenever the same are deemed essential to provide evidence in trial and there are no other alternative evidences. However, such court decisions can only be adopted when the interest at stake is deemed higher than Legal privilege. In these cases, Lawyers can appeal from the court decision and refer the matter to the Bar Association. To the extent that Article 135 of the Portuguese Criminal Procedural Code may be inconsistent with Article 87 of the Statutes, Lawyers can only abide by the Court decision if duly authorized by the Bar Association, and even in such cases they still can object to disclose the confidential information to which they have access.

v. Lawyers can formally request the Bar Association to authorize the disclosure of confidential information whenever such disclosure is deemed necessary to safeguard their own legitimate interests, rights and dignity or of their clients and representatives.

Is in-house counsel protected by legal privilege?

Yes. Pursuant to Article 68 of the Statutes, and opinion No. 14/PP/2008-G of the General Council of the Portuguese Bar Association, in-house counsels have
the same rights and are bound by the same duties as independent Lawyers, notably on what concerns Legal privilege and professional secrecy duties.

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

Yes. The Portuguese Bar Association allows for the registration of certain foreign accredited Lawyers to enable their practice in Portugal, whether on a permanent or occasional basis. Hence, foreign Lawyers are subject to the same guidelines and code of conduct as Portuguese Lawyers, namely on what concerns Legal privilege and professional secrecy as provided by Article 24 of the Bar Regulation No. 232/2007 for the registration of Lawyers and Trainees.

Regarding communications exchanged between Lawyers, the same are covered by Legal privilege. However, it should be clearly stated to the recipients that the information is strictly confidential, in which case it can neither be disclosed nor serve as evidence in court (Article 108, §1 and 2 of the Statutes).

**What are the main differences between national legal privilege and EU legal privilege?**

- European confidentiality protection is, contrary to the Portuguese equivalent, not granted to legal advice emanating from in-house counsel. This is particularly noticeable in matters of Competition Law. Contrary to the European trend and as recently confirmed in the ECJ Judgment on Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission case, whereby it was reaffirmed that in-house counsels are not protected by legal privilege and that they may be subject to antitrust investigations and that their communications and documents may be seized and serve as evidence in court, this is not the Portuguese courts’ understanding. In fact, Lisbon’s Commercial Court passed a judgment in 2009 stating that the National Competition Authority (Autoridade da Concorrência) can neither seize nor present as evidence in court in-house counsels’ communications or documents as these are, in fact, protected by legal privilege.

- European confidentiality can only be enjoyed when correspondence relates to a client’s right of defence. This means that only communication relating to a procedure enforcing art. 101-102 TFEU can be granted protection. Also communication predating the initiation of such procedure that comes to fall within such context is granted protection. In Portugal there is no such limitation and all confidential information, as described above, is protected from seizure.

**Other remarks**

The recently enacted Money Laundry Regulation provides for certain duties of lawyers when accepting new clients, notably to complete details concerning the clients identity, ultimate ownership in case of legal persons and origins of values/moneys. Whenever a lawyer has strong suspicions concerning the origin or legitimacy of his client and values/moneys involved, such Lawyer has the duty to report it to the Portuguese Bar Association who, on its turn and if it the issue is deemed potentially unlawful, has the duty to report it to the Public Prosecutors. However, Portuguese Lawyers have been limiting this duty to confidential information not pertaining directly to their clients but to third parties involved, and the general understanding and interpretation of Article 87 of the Statutes has been prevailing. Thus, to the best of our knowledge, nothing was yet reported.

In addition to the above, and as a complementary information, it should be noted that lawyers can be prosecuted in case they assist their clients in perpetrating any unlawful actions.

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NATIONAL LEGAL PRIVILEGE

Does Legal Privilege exist?

Yes.

Prior to the amendment of the Competition Law No. 21/1996 ("Competition Law") by Government Emergency Ordinance 75/2010, entered into force on 5 August 2010, one could only rely on general provisions in the legislation which regulated a corollary notion - professional secrecy (confidentiality), as follows:

(i) the Law on the profession of lawyer;
(ii) the Regulations of the profession of lawyer;
(iii) the Law on the profession of in-house counsel (Romanian, “Consilier Juridic”);
(iv) the Regulations of the profession of in-house counsel;
(v) the Criminal Code.

For instance, according to the Law on the profession of lawyer, the lawyer is obliged to keep the professional secrecy with regard to any aspect of the matter which was confided to him/her, except for the cases expressly provided by the law (e.g. Law no. 656/2002 on Money Laundering provides that under certain circumstances, if they have the suspicion that a coming operation is made in order to launder money or to finance terrorism, lawyers have the obligation to inform the National Office for Preventing and Combating Money Laundering).

Therefore, although our national legislation did not expressly regulate a client’s right to legal privilege, it did regulate an obligation for the lawyer/in-house counsel to keep the professional secrecy with regard to any aspect of the matter which was confided to them.

Following the amendment of the Competition Law by Government Emergency Ordinance 75/2010, entered into force on 5 August 2010, legal privilege is now expressly regulated. The legal framework is represented by Art. 36 paragraphs (8) through (11) of the Competition Law.

What is the scope of Legal Privilege?

Legal privilege covers the following type of correspondence:

- Communications between the investigated undertaking or association of undertakings and its lawyer exchanged for the exclusive purpose of exercising the undertaking’s right of defense, respectively before or after the opening of the administrative procedure based on the Competition Law, subject to such communication being related to the object of the procedure. They cannot be seized or used as evidence during the procedures exercised by the Competition Council.

- The preparatory documents drafted by the investigated undertaking or association of undertakings for the exclusive purpose of exercising the right of defense. They cannot be seized or used as evidence.

As per the procedure, to the extent the undertaking does not prove the privileged nature of the communication, the competition inspectors will seal the document in two copies and take it with them, together with the rest of the documents gathered during the dawn raid.

The president of the Competition Council will then urgently decide, on the basis of the evidence and arguments put forth by the investigated undertaking, whether the document will be deemed privileged or not. Should the president of the Competition Council decide to reject the privileged nature of the communication, the undertaking can challenge this decision before the Court of Appeal within 15 days of it being communicated to it.

The Court of Appeal’s decision can further be challenged before the High Court of Cassation and Justice, within 5 days of communication.
De-sealing can only take place after the expiry of the time period in which the decision of the president of the Competition Council can be challenged, or, if challenged, after the court decision becomes final and irrevocable.

**Is the in-house counsel protected by Legal Privilege?**

No.

As opposed to lawyers, in-house counsels are not considered to be practicing a liberal profession. The aforementioned legal provisions appear not to cover the situation of in-house lawyers. Nevertheless, in-house counsels are also obliged to keep the professional secrecy.

**Does Legal Privilege apply to non-national qualified lawyers counselling/correspondence?**

Yes, the Competition Law makes no distinction between national lawyers and non-national lawyers.

**Other Remarks**

*Mutatis mutandis*, all the considerations made with respect to lawyers, shall also apply for trainee lawyers (Romanian, “Avocați Stagiari”).

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Does legal privilege exist?

In Slovakia, the right to Legal Privilege is not explicitly stipulated in the laws of the Slovak Republic. In general, right to legal protection is stipulated in Article 47 of the Slovak Constitution (Act No. 460/1992 Coll.).

The Act No. 586/2003 Coll. on Advocates, as amended, stipulates that the advocate shall not reveal any information relating to the client’s representation and shall treat such information as strictly confidential. It should be noted that a violation of professional privilege is not a criminal offence and is considered as being professional misconduct accordingly leading to possible disciplinary sanctions. A duty of confidentiality of the advocates applies to all matters related to the performance of his/her function unless otherwise stipulated by the relevant legal regulations.

According to the Act No. 300/2005 Coll. Criminal Code, as amended, it is a criminal offence if someone breaches the secret provided in closed letter or other documents transferred via post, electronic communications or computers. It is also a criminal offence to breach the secret of document or other written document, audio record, record of image or other record, computer data or other document maintained in privacy in a way that it will be disclosed or accessed by third person or otherwise used causing so serious damages on a person’s rights.

According to the Act No. 513/1991 Coll. Commercial Code, as amended, trade secrets are protected; in particular, everyone is entitled for trade secrets protection, and should one interfere into it, the person suffering trade secrets protection does have legal means for the protection of his trade secrets.

As regards the execution of inspections in by the Slovak Competition Authority, pursuant to Act No. 136/2001 Coll. on Protection of Competition, as amended, the Authority is entitled to request from natural and legal persons information and documents concerning an undertaking, as well as other information and documents necessary to the Authority’s activities. These persons are required to provide such information and documents to the Office without delay, unless this is contrary to special legislation (e.g. banking, tax legislation).

What is protected by legal privilege?

The express privilege of confidentiality is provided by the Slovak law only in respect to the attorney-client relationship. This covers the right of the client for the protection of the information the client provided to the advocate in course of legal representation and the obligation of the advocate to maintain confidentiality on the obtained information. This obligation of the advocate does not apply in cases where the legal regulations impose on him/her to prevent a criminal offence.

An advocate cannot be compelled to produce documents in court proceedings. The advocate can produce such materials only in case when he/she is released from the obligation of confidentiality by his/her client or a client’s successor. In course of civil proceedings, the Act No. 99/1963 Coll. on Civil Proceedings, as amended, guarantees during evidence in civil proceedings the obligation to maintain confidentiality.

In course of a criminal proceeding any secret information, trade secret, bank, tax, insurance or telecommunications secret shall be protected. The data which is subject to such secret can be only provided before the criminal proceedings or in the preparatory proceeding on request of a prosecutor or the judge. In this respect, also communications between the advocates and clients shall be protected from seizure out of an investigation.

Is in-house counsel protected by legal privilege?

Since the in-house counsel is deemed to be an employee, his obligation to maintain confidentiality stems from the general obligation of the employee to maintain confidentiality on information which he obtained during the performance of his/her employment. The obligations set for the advocates do not apply to in-house counsels.

Thus, contrary to the advocate, the in-house counsel is obliged to maintain confidentiality on information which he obtained during the performance of his/her employment whereas the advocate is obliged to maintain confidentiality on all information he obtained in relation to the performance of his function of an advocate.
Does legal privilege apply to the correspondence of non-national qualified lawyers?

The obligation to maintain confidentiality stipulated in the Act No. 586/2003 Coll. on Advocates, as amended, shall also apply to the so-called registered European lawyer (European lawyer is a national of any EU Member State or a national of any other signatory of the EEA Treaty, who is authorised to pursue his professional activities and provide legal services as a sole practitioner under his home professional title). A registered European lawyer may provide legal services in the Slovak Republic under the terms and conditions laid down in this Act and he/she is obliged to fulfill the duties and obligations arising for lawyers under this Act, under separate legal rules and the Slovak Bar’s internal rules (his/her duty to comply with the laws and legal rules applicable in his home Member State shall not be affected).

As regards the in-house counsel, the obligation to maintain confidentiality will apply to a foreign in-house counsel provided he/she will be employed in Slovak Republic and Slovak labour law regulations will apply to him/her.

What are the main differences between national legal privilege and EU legal privilege?

In Slovakia the legal privilege is not expressly recognised in the Slovak regulations. There is unfortunately no case law in this respect, therefore it is difficult to foresee the standpoint of the Slovak courts in this respect.

According to our information however, the Slovak Competition Authority tends to proceed in line with the European case law, thus its procedure in course of investigations shall be similar to the procedure of the European Commission in course of investigations.

Other remarks

As regards the legal privilege in course of competition law investigations, the Slovak Competition Authority seeks to adapt the procedures developed by the case-law of the European Court of Justice and in order to enforce the legal privilege, the undertaking shall prove to the Authority that respective document

(i) related to the subject of the investigation and
(ii) that document/correspondence relates to the communication between the undertaking and his advocate.

For this purpose the employees of the Authority conducting the investigations do have the right to look into the document in order to identify to whom is this document destined to but they have no right to investigate the content of such document.

Provided the undertaking will not allow the Authority employees to look into the document, he will have to provide to the Authority sufficient evidence that indeed these documents present documents relating to the communication with the advocate.

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Does legal privilege exist?
Yes, it is expressly provided in the Slovene Prevention of the Restriction of Competition Act (Zakon o preprečevanju omejevanja konkurence).

The Attorneys Act (Zakon o odvetništvu) and the Civil Procedure Act (Zakon o pravdnem postopku) set the general confidentiality obligation of attorneys towards clients and the possibility for exemption from testifying in court.

What is protected by legal privilege?
In an investigation proceeding under the Prevention of the Restriction of Competition Act all letters, notifications, or other means of communication between a company against which an investigation is conducted and its attorney are excluded (referred to as “privileged communication”).

Is in-house counsel protected by legal privilege?
This is not explicitly regulated by statutory provisions. However, since the protection under the Prevention of the Restriction of Competition Act refers only to communication with attorneys, this would indicate that in-house counsels are not protected. Attorney (odvetnik) is namely a special term indicating a lawyer who has been admitted as attorney (after passing the bar exam) and is practicing as such, independently representing clients.

Does legal privilege apply to the correspondence of non-national qualified lawyers?
The law does not specify any restrictions for application of the legal privilege in case of foreign qualified lawyers. But the law does expressly refer to the term odvetnik (attorney), which could be seen as a special term as used under Slovene law or as a more general legal term, which could also cover foreign such professionals. It could be argued that legal privilege would apply to the attorneys from EU-member states that fulfill the criteria for exercising attorney profession in Slovenia (including under a foreign title) as provided in the Attorneys Act. If analogy with the right to practice attorney profession is drawn, then also attorneys from other countries could be viewed as included in a general term attorney under the condition of actual mutuality.

What are the main differences between national legal privilege and EU legal privilege?
There are no significant differences.

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Does legal privilege exist?

Yes. Documents and communications exchanged between attorney-client are protected under Spanish law by the general rule of professional confidentiality/secrecy (article 542.3 of the Judiciary Law, and article 32 of the General Regulation of the Legal Profession, the “GRLP”). Besides these provisions, it is important to highlight that in Spain there is no express regulation on “privileged” documents or communications.

Notwithstanding the above, the antitrust case-law has stated that the only evidence that is subject of being protected by the legal privilege is the one related to communications/documents exchanged with external lawyers. In that order, advices from in-house counsel are not privileged.

As a sample of the recent case-law, we can mention the following cases related to dawn raids carried out by the National Competition Commission (“NCC”). In these resolutions, the NCC has established that the legal privilege only covers external lawyers communications/documents: Resolution NCC, Case SNC/0007/10 EXTRACO, of 6 May 2010; Resolution NCC, Appeal Case 0011/09 COLGATE PALMOLIVE, of 4 May 2009; Resolution NCC, Appeal Case 0010/08 TRANSITARIOS 3, of 3 February 2009; Resolution NNC, Appeal Case R/0009/08 TRANSITARIOS 2, of 3 February 2009; Resolution NCC, Appeal Case R/0008/08 TRANSITARIOS 1, of 3 February 2009; Resolution NCC, Appeal Case R/0006/08 STANPA, of 3 October 2008, Judgment of the National Audience of 30 September 2009; Resolution NCC, Appeal Case R/0005/08 L’OREAL, of 3 October 2008; Resolution NCC, Appeal Case R/0004/08 CP SPAIN, of 3 October 2008; and Resolution NCC, Case SNC/02/08 CASER-2, of 24 February 2008.

What is protected by legal privilege?

The general rule is that any spoken or written communications, documents or correspondence exchanged between an external lawyer and his/her client, opposing parties and other attorneys within the context of an attorney-client relationship must be kept confidential.

Any breach of this duty could lead to the attorney 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 (for instance, the NCC). However, in addition to this duty, the attorney is also afforded the privilege to maintain such confidentiality. Additionally, any internal document that merely reproduces an advice provided for an external lawyer shall be covered by the Legal Privilege, as it may be inferred from the recent case-law issued by the NCC (see for instance the Resolution NCC, Appeal Case 0011/09 COLGATE PALMOLIVE, of 4 May 2009). In this regard, it is important to highlight that when a dawn raid inspection is carried out, the raided company must explain and demonstrate to the NCC the reasons that justify the consideration of this type of information (i.e. reproducing an external legal advise) as a document protected by the Legal Privilege.

Is in-house counsel protected by legal privilege?

As stated above, in-house counsel is not protected by the Legal Privilege.

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

There are no specific rules on that regard. However, in line with the Akzo Nobel Judgment (Cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd v. Commission, judgement of 17 September of 2007) we consider that Legal Privilege may be applicable to non-national qualified lawyers, as long as they are not in-house lawyers.

What are the main differences between national legal privilege and EU legal privilege?

There are no significant differences.
Other remarks

As mentioned above, it is important to highlight that during dawn raid inspections the raided company shall prove to the NCC that certain documents gathered during the inspections are/may be covered by the Legal Privilege. In this line, it is important to obtain specialist legal advice from experienced lawyers, who know exactly how to deal with the inspectors.

Notwithstanding the above, recent case-law (i.e. Judgment of the National Audience of 30 September 2009, and Resolution NCC, Case SNC/0007/10 EXTRACO, of 6 May 2010) have narrowed the scope of the NCC powers for the performance of a dawn raid to the information/documentation specifically related to the objective of the inspection. As a result of that, any kind of information/documentation whose content is not related or is beyond the objective of the inspection, shall not be gathered by the NCC.

In this line, to be covered with the Legal Privilege it would be advisable that companies shall follow the following tips:

Before a dawn raid: (i) mark documents which are (or may be) protected by Legal Privilege; (ii) keep such documents separately; (iii) avoid internal memoranda; (iv) reduce written and e-mail communication to a minimum; (v) develop and audit compliance programs in close cooperation with external counsel.

During a dawn raid: (i) object immediately any request to inspect privileged communication; (ii) provide explanation and evidence to the NCC demonstrating that such communication/information is privileged.

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Does legal privilege exist?
Yes.

What is protected by legal privilege?
Correspondence between lawyers and undertakings is privileged material which the Competition Authority cannot take, whether pursuant to a request or through a dawn raid inspection.

Under Swedish law, the correspondence protected as privileged material covers such facts and information that lawyers or their associates can refuse to give testimony about in a court of law. If such information is in their possession or in the possession of a person protected by professional secrecy, e.g. an employee of undertaking under investigation, the material is privileged and cannot be seized by the Competition Authority.

Is in-house counsel protected by legal privilege?
No, not generally. Communications between in-house counsel and officers, directors, and employees of the companies they serve are not protected from disclosure by attorney-client privilege according to Swedish law.

Does legal privilege apply to the correspondence of non-national qualified lawyers?
This is not clear.

What are the main differences between national legal privilege and EU legal privilege?
Interestingly, the preparatory work is somewhat contradictory on this point. On the one hand, it states that the application of these rules should correspond to the similar rules under EU law. On the other hand, it states that only correspondence between the client and the lawyer concerning the case at hand is privileged. It seems—especially after the Akzo Nobel case where the court stated that working documents or summaries prepared by the client, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought are privileged—that more information is protected by privilege under EU law than only the information regarding the case under investigation by the Competition Authority. Therefore, an undertaking as well as a lawyer present should insist and see to it that the EU standard for privileged material is applied in dawn raids performed under chapter 2, section 1 of the Act.

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Does Legal Privilege exist in the Member state

Yes, legal privilege exists based on provisions of procedural law (see below) and the Swiss Penal Code (article 321). Professional rules are further set out in the Federal Act on Attorneys (Bundesgesetz über die Freizügigkeit von Anwältinnen und Anwälten, BGFA, SR 935.61).

Article 321 of the Swiss Criminal Code reads as follows: “[…], attorneys, […] who reveal a secret which they were entrusted with by virtue of their profession, or from which they have taken notice during the exercise thereof, shall, upon motion, be punished with imprisonment up to three years or pecuniary penalty.” (unofficial translation). The aforementioned provision is subject to exceptions (e.g. release) and duty of disclosure vis-à-vis authorities (see below, Section 1.2, Criminal Procedure).

The relevant provision in the BGFA reads as follows: “Attorneys are subject to professional secrecy without time limit and must keep confidential from all persons anything which they were entrusted with by virtue of their profession from a client. A release does not oblige them to surrender anything they were entrusted.” (article 13(1) BGFA, unofficial translation).

What is the scope of Legal Privilege? What does it cover?

External Counsel

Lawyer-client privilege only extends to lawyers registered in the cantonal lawyers register. In-house counsel do not benefit from this type of privilege and cannot legally hold back company documents which are in their custody. Correspondence relating to, and prepared in the course of, a specific mandate to or from external professional counsel is protected by privilege, irrespective of its location.

Civil Procedure (Federal Code on Civil Procedure – CCP)

As a general rule, parties to civil proceedings are under a duty to cooperate with the court with respect to the taking of evidence and establishing the facts of the case, and are therefore required, upon successful request by the opponent, to produce documents to the (Swiss) court (article 160 CCP); a party refusing to cooperate without justification cannot be sanctioned but may bear the consequences of adverse consideration of the evidence (article 164 CCP). Correspondence relating to and prepared in the course of a specific mandate to or from external professional counsel is protected by privilege, irrespective of its location (article 160(1)(b) CCP; article 166(1)(b) CCP).

Parties and witnesses of a civil trial do not need to testify and are entitled to withhold documents if they can invoke a statutory privilege (e.g., attorney-client confidentiality) or have a particularly close personal relationship to a party (e.g., being directly related or married). The rules of civil procedure also govern which documents may be withheld and who can withhold them.

Controversy exists to the extent companies with registered office in Switzerland or Swiss subsidiaries of foreign companies may be subject to pre-trial discovery in foreign proceedings. It is important to note in this respect that an obligation to surrender evidence located in Switzerland to foreign authorities or parties may constitute a violation of article 271 (prohibited acts for a foreign state) and article 273 (economic intelligence service) of the Swiss Criminal Code or other special statutory provisions (e.g. banking regulation, data protection regulation).

Switzerland is a party to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

Criminal Procedure (Federal Code on Criminal Procedure – CCrimP)

A defendant (including legal entities) cannot be held to incriminate himself (article 113 CCrimP). The applicable rules on criminal procedure specify who may also decline giving testimony. Attorneys may be held to testify provided that they are subject to a statutory duty of disclosure or have been released by the client or the competent supervisory authority of their obligation of professional secrecy (article 171 CCrimP). However, even if an attorney has been released of its obligation of
professional secrecy, the attorney may still rely on article 13(1) BGFA and refuse to testify. Communication between defence attorney and client made in connection with the defence must not be seized by the authorities (article 264(1)(a) CCrimP).

The CCrimP protects communication between counsel and defendant relating to defendant’s defence in the proceedings irrespective of their location. Such documents may not be seized by the prosecuting authorities.

With regard to foreign proceedings, see also above, Civil Procedure.

**Competition Law**

Parties to agreements, undertakings with market power, undertakings concerned in relation to concentrations and affected third parties shall provide the competition authorities with all the information required for their investigations and produce the necessary documents (article 40 of the Federal Cartel Act).

Defence communication is protected irrespective of its location and the time at which it was created and for this reason must not be seized by the competition authorities (article 264 CCrimP). Documents located at the searched
premises which contain legal advice from external counsel that is not related to the client’s defence, are not privileged from seizure. In-house counsel may be subject to testifying, unless they can invoke a right to refuse giving testimony pursuant to the rules set forth in the Federal Act on Federal Civil Procedure (not to be confused with the above mentioned CCP).

Searches (“dawn raids”) based on Swiss competition legislation are governed by the Federal Administrative Criminal Act (Bundesgesetz über das Verwaltungsstrafrecht, VStrR, SR. 313.0). Defendants subject to searches of their premises may immediately object to the search of books and business documents. Upon such objection, the concerned books and documents will be sealed and may not be used in the investigation until a decision on the admissibility of the search and the confiscated books and documents has been rendered by the Board of Appeal of the Federal Criminal Court (cf. article 50(3) VStrR).

With regard to foreign proceedings, see also above, Civil Procedure.

Is the in-house counsel protected by Legal Privilege?

Attorney-client privilege only extends to attorneys’ registered in the attorneys register. Lawyers employed by a company whose business does not involve offering legal services cannot register with the attorneys register as they do not qualify as being independent, a requirement for entry into the register. Therefore, in-house counsel do not benefit from this type of privilege and cannot legally hold back company documents which are in their custody.

A proposal by the Federal Government to enact legislation on the matter of legal privilege of in-house counsel failed in public consultations and hence was not sent to Parliament for consideration.

Does Legal Privilege apply to non-national qualified lawyers counselling/correspondence?

Attorneys not qualified in Switzerland but carrying out business in Switzerland pursuant to the BGFA are subject to the professional rules contained in the BGFA and are therefore subject to article 321 of the Swiss Criminal Code. Documents located at their premises are protected by legal privilege.