

LEGAL PRIVILEGE AND PROFESSIONAL SECRECY - WHAT YOU NEED TO KNOW



The Luxembourg
Banking & Financial
Law Association



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You may have seen emails being sent using these terms sometimes even from non-lawyers

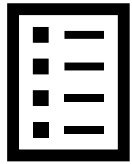
- ✉ “legally privileged and confidential”
- ✉ “attorney work product”
- ✉ “prepared for EU legal defence”
- ✉ “attorney client privileged”
- ✉ “subject to legal privilege”



Overview of common law legal privilege



Privilege prevents disclosure of certain communications. What is covered by legal privilege?



Legal advice privilege: applies to confidential communications between a lawyer and their client that come into existence for the dominant purpose of giving or receiving legal advice;



Litigation privilege: covers confidential communications between a client or its lawyer and a third party for the dominant purpose of obtaining information or advice in connection with pending or reasonably contemplated litigation.



Does not cover business advice, but includes advice on “*what should prudently and sensibly be done in the relevant legal context*” (Balabel v Air India [1988] 1 Ch 317). Unless marked confidential and privileged, unlikely to qualify.



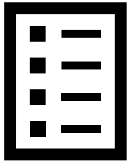
To whom does it apply?



Must be between a client and lawyer (external or internal).
A client can include group companies. The person requesting the advice can do so based on an implied authority.
Only client can waive privilege as it is **their** not the lawyer’s right. If loses confidentiality (e.g. widely circulated) not privileged.

Overview of professional secrecy in Luxembourg

Privilege prevents disclosure of certain communications. What is covered by legal privilege?



Art. 35 of the law on the profession of lawyers referring to art. 458 of the Luxembourg Code Pénal
Title 7 of the Internal Rules of the Luxembourg Bar



All information on the client and the matter obtained by the lawyer regardless of its source (advice, correspondence, notes, name of clients, payments by the client etc) regardless of the area of practice (dispute resolution, corporate, tax).
The lawyer's office is specifically covered.

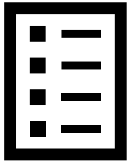
To whom does it apply?



Lawyers registered on one of the two bars in Luxembourg. Only qualified lawyers registered at the bar as opposed to in-house counsel



Overview of professional secrecy in the EU



Draft text for a future convention for the protection of the profession of lawyers.
Applicable from May 2025.



Communications among the lawyer and his/her client. The lawyer's office is specifically covered.
This convention will apply in all countries of the Council of Europe and be open to signature by third party countries.

To whom does it apply?



Lawyers qualified and authorised to practice the profession of lawyer. Only independent qualified lawyers as opposed to in-house counsel.



Earlier ECJ judgments



EU legal professional privilege only expressly covered advice provided by an external lawyer (qualified to practice in the EEA) for the purposes and in the interests of the client's rights of defence



Akzo Nobel Chemicals Ltd v. Commission

Extended protection since ECJ judgment of December 2022

“... in the light of Article 7 of the Charter, it is apparent from the case-law of the ECtHR that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients... Like that provision, **the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence.** As the ECtHR has pointed out, individuals who consult a lawyer can reasonably expect that their communication is private and confidential (ECtHR, judgment of 9 April 2019, *Altay v. Turkey (No 2)*, CE:ECHR:2019:0409JUD001123609, § 49). Therefore, other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.

[This] is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants... That fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client...”

Judgment of the Court (Grand Chamber) of 8 December 2022. Orde van Vlaamse Balies and Others v Vlaamse Regering.



Preliminary ruling C-432/23/ Opinion of Advocate General Kokott

➤ Fundamental mission of lawyers in every democracy: defense of citizens.

➤ A client must be able to trust his lawyer and communicate in full confidence: professional secrecy is a right for the client and an obligation for the lawyer (individual interest of the client).

➤ Lawyers participate in the access and administration of justice which is essential to comply with the rule of law (public interest).

➤ The special protection of the professional secrecy derives from the principle of the rule of law on which the EU is based pursuant to article 2 TEU.



Why extend to internal counsel in UK?

- UK courts recognise that in-house counsel can provide independent advice to employer.
- Independence inherently aligns with obligations as a lawyer (e.g. SRA principles include obligation of independence)
- The ECJ disagrees (Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities (Case C-550/07 P)) and privilege is only for external counsel
- Some bars allow in-house counsel to be on the bar or recognise privilege. At time of Akzo, 6 out of 27 and now 16 out of 30 recognise privilege for in-house lawyers.¹ France just passed law recognising privilege for in-house counsel which has been struck down by Conseil d'Etat on procedural grounds. It was re-passed by a narrow majority on 30 May 2024 in the National Assembly.



¹ <https://www.law.com/international-edition/2023/09/14/we-cant-do-our-job-the-fight-for-legal-privilege-for-in-house-counsel-in-europe/>

Professional Secrecy in Luxembourg



- The Luxembourg Bar favours a “one profession” solution.
- The two principles of professional secrecy and independence are inseparable foundations of the legal profession and together justify the special protection afforded to lawyers.



Limits to lawyers' professional secrecy



➤ Professional secrecy is not absolute: general interest may justify exemptions or limits, when the duty to lift secrecy becomes paramount to the duty to respect it.

Some exemptions:

- Document search: discovery of the truth vs professional secrecy.
- Testimony in court: the lawyer remains free to talk or not to talk.
- AML



Privilege and the FCA's powers



- Heads of legal are excluded from being subject to the FCA's senior manager regime, partly due to concerns that this would infringe on legal privilege.
- Heads of Legal or other legal personnel however are covered by the Certification regime (which requires firms to certify they are 'fit and proper').
- Lawyers are subject to the FCA's Individual Conduct Rules including being obliged to:
 - be "open and cooperative with the FCA, PRA and other regulators" (Rule 3); and
 - disclose to the FCA appropriately anything relating to the firm of which the regulator would reasonably expect notice (Principle 11).
- Relevant client / lawyer communications remain protected by privilege.
- If an in-house lawyer's conduct is scrutinised by the FCA to consider compliance with the Conduct Rules, it is important for the lawyer to be able to evidence what steps and decisions they took, when and why. However, this material is likely to be legally privileged and that privilege will belong to the client. The client may consider waiving privilege over this information at least on a limited basis especially if the firm is facing scrutiny from the regulator on the same matter.

Legal privilege is a particular focus in the ongoing Post Office enquiry, including where privilege was used by external and internal counsel potentially to avoid disclosure of evidence

NEWS

Legal privilege used to 'cloak' messages, key Post Office figure admits

By John Hyde | 25 April 2024

Privilege and Luxembourg authorities

Autorité de la Concurrence/CNPD

- Investigations by the local competition authority/CNPD
- Reference to article 35 of the law on the profession of lawyers.
- Article 26 of the law of 30 November 2022 relating to competition

Commission de Surveillance du Secteur Financier

- Can the CSSF access communications between a bank and its lawyer? Or, the duty of cooperation with the CSSF versus professional secrecy?
- Can third parties access privileged documents held by the CSSF?
- What about CSSF commissioned reports: Can they be protected by professional secrecy?

Administration des contributions directes

- Article 117 AO and Panama Papers: Is the decision still valid in light of Advocate General Kokott's opinion in the preliminary ruling 432/23?



Specific situations where privilege does not apply

- Lawyers acting outside the scope of their profession (economic activity)
- Lawyers being the subject of criminal investigations.

References

- <https://www.lawsociety.org.uk/topics/in-house/the-long-read-legal-professional-privilege-an-update-for-in-house-lawyers>
- <https://www.lawsociety.org.uk/topics/in-house/the-long-read-privilege-in-a-post-enrc-world>
- SRA principles require acting with independence: <https://www.sra.org.uk/solicitors/standards-regulations/principles/>
- <https://www.assemblee-nationale.fr/dyn/16/amendements/1440/AN/1512>
- <https://www.law.com/international-edition/2023/09/14/we-cant-do-our-job-the-fight-for-legal-privilege-for-in-house-counsel-in-europe/>
- In 2010, only six of the 27 EU member countries recognized LPP for in-house counsel: the Netherlands, Greece, Portugal, Poland, the U.K., and Ireland, according to a [legal opinion](#) delivered in a seminal case on in-house LPP in European competition law cases. Today, 16 of the 30 European Economic Area countries do, Ramírez told Law.com International.
<https://www.law.com/international-edition/2023/09/14/we-cant-do-our-job-the-fight-for-legal-privilege-for-in-house-counsel-in-europe/>
- https://www.coleurope.eu/sites/default/files/research-paper/researchpaper_5_2011_schicho_0.pdf
- <https://www.assemblee-nationale.fr/dyn/16/amendements/1440/AN/1512>
- <https://www.vie-publique.fr/loi/293979-confidentialite-consultations-juriste-entreprise-proposition-de-loi-2024>

THANK YOU!
ANY QUESTIONS?



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