UK and US Privilege:
Comparison and Contrast

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UK

- Legal advice privilege may apply to the confidential communications (written and oral) between the lawyer and the client that come into existence for the purpose of giving or receiving legal advice, in respect of the client’s legal rights and obligation. ‘Client’ is narrowly defined for the purposes of the application of legal advice privilege. This means that communications between a lawyer and the corporation’s employees are not covered by the privilege. Documents produced by employees who are not considered the ‘client’ will not be covered by the privilege.

- It is unlikely that an audit of the company’s compliance regime will generally fall within the scope of litigation privilege because litigation must be a real likelihood rather than a mere possibility although the chance of litigation need not be greater than 50%. Although a company may consider that litigation may result from non-compliance with local laws and regulations, it is unlikely that there are specific claims that a company could define as being a ‘real likelihood’.

- Privileged information may be disseminated within the organization without the waiver of privilege, but it is advisable to request undertakings to keep the information confidential from the individuals who receive the information.

- Privilege can be waived expressly or impliedly, so it is important that confidentiality is preserved and privileged information is only disclosed on the express basis that privilege is not waived.

US

- Attorney-client privilege and the work product doctrine operate much the same way as the UK’s legal professional privilege and litigation privilege.

- However, attorney-client privilege can apply to communications with third parties (including a company’s employees) if the purpose of the communication with the third party is to help the attorney provide legal advice to the client. Documents created by employees in response to requests for information from attorneys can attract privilege.

- Although lawyer investigations into a corporate client’s internal practices will usually be considered privileged, there are some instances when the courts have found that privilege did not apply to these investigations. Care should be taken in creating documents and communicating for the purposes of the lawyer’s investigation into compliance. Management should make it clear the purpose for which the investigation is being undertaken and ensure that the purpose of the investigation is for the client to take legal advice, and not for any other business-related purpose.

- Documents created as a result of the investigation are unlikely to be protected by the work product doctrine because the advice would be rendered before a claim has arisen or the client is subpoenaed.

- Disclosure of a single copy of a privileged document to third parties, including regulators (even if that disclosure takes place abroad), results in complete loss of privilege as to the entire subject matter of the privileged documents. However, sharing documents with other parties with a common interest will not waive privilege.
Europe

- In relation to investigations by the European Commission, privilege and confidentiality apply to written communications between lawyer and client provided the communication is made for the purpose and in the interest of the client’s right of defence. However, the privilege does not apply to in-house or non-EU qualified lawyers.

- Each member state of the EU has its own rules in relation to privilege and confidentiality. Some jurisdictions lack any concept of privilege, and several jurisdictions do not extend the privilege to in-house communications. Perhaps most concerning is the fact that, in many of these civil law jurisdictions, privilege covers only documents in the hands of a lawyer. Accordingly, any other document, even a letter of legal advice from a lawyer, will not necessarily be privileged in the client’s hands.

- In Russia, although some attorney-client communications may be privileged, this does not extend to communications with in-house lawyers.

The Law

England & Wales

Documents that are covered by legal privilege are protected from disclosure. Legal privilege comprises two main types:

- Legal advice privilege. This applies to confidential communications (written and oral) between a lawyer and his client that come into existence for the purpose of giving or receiving legal advice, in respect of the client’s legal rights and obligation. The “client” is tightly defined for these purposes. Communications between the lawyer and the client’s employees or third parties are not covered.

- Litigation privilege. This arises once litigation is in reasonable prospect. Documents and communications that come into existence at the request of a lawyer or at the request of a client with the intent to pass them on to the lawyer (including those generated by third parties, for example, witnesses and experts), will be privileged from disclosure, provided that they are made with the dominant purpose of use in, or for obtaining evidence for, or giving or receiving legal advice in connection with the litigation.

Legal Advice Privilege

Three Rivers

The leading cases on privilege in England & Wales is *Three Rivers District Council v The Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474 and *No 10* [2004] UKHL 48. These cases arose from the long-running litigation between the Bank of England and the liquidators and creditors of the collapsed Bank of Credit and Commerce International (BCCI) and concerned the Bank’s obligations to disclose material created during the Bingham Inquiry into the BCCI collapse.

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2. Ibid.
In No 5 the Court of Appeal decided that employees of the Bank were third parties for the purposes of claiming privilege. Documents they prepared could not attract legal advice privilege. Only those within the unit (the BIU) created by the Bank to deal with external lawyers in coordinating its response to the Bingham Inquiry were within the ‘client’ such that their communications with lawyers could attract legal advice privilege.

Subsequently, in No 10, the Court of Appeal looked at communications between the BIU and the Bank’s external lawyers. It held that these could attract legal advice privilege only if they were made for the purpose of the giving or receiving of ‘legal advice’, which the court said was advice on the party’s legal rights and obligations. Advice on how the Bank should present material to the Bingham Inquiry was ‘presentational’ and therefore not privilege. The court even queried whether legal advice privilege should exist.

These decisions caused much consternation. No 5 applied a narrower interpretation of ‘client’ than was previously understood and failed to give guidance for delineating this concept. It raised the question of whether every employee outside the small group dealing with external lawyers on a daily basis would always have to be treated as a third party. The Court of Appeal’s view of ‘legal advice’ in No 10 meant that practical advice risked falling outside the protection of legal advice privilege even where the communication was between the lawyer and ‘client’ as defined by No 5. The concern was that the uncertainties created by these judgments would lead to far fewer clients being prepared to confide in their lawyers.

The Bank won permission to appeal No 10 in 2004. As the issues involved were of general importance to all lawyers in the UK, the Law Society, the Bar Council and the Attorney-General all submitted intervening briefs.

Following a four-day hearing concluding on 29 July 2004, their Lordships overruled No 10 after just 15 minutes’ deliberation. In their reasoned judgment, handed down on 11 November 2004, the Lords reaffirmed the existence of legal advice privilege and held that the Court of Appeal’s view of ‘legal advice’ was too narrow. Provided a lawyer has been instructed to act in a ‘relevant legal context’, then any confidential communication between client and lawyer directly related to the performance of the lawyer’s duties should be protected, not just those communications containing advice on the law.

The Lords declined, however, to consider the Court of Appeal’s definition of ‘client’ in No 5, which will remain the guiding authority on that point.

**Practical considerations: Defining the client**

Consider carefully how best to define the ‘client’ at the outset of the retainer. There are divergent opinions on whether it is better to define the client very widely, narrowly or not at all and each case should be considered on its facts.

Giving too wide a definition of the ‘client’ could be considered as artificial should an issue ever arise.

Defining the ‘client’ as a very narrow group could give rise to practical issues for a large corporate entity and may give rise to problems if more people become involved with instructing the lawyers later on.

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3 PLC, Privilege: an overview, maintained, written by PLC Dispute Resolution in association with Allen & Overy LLP
While not defining the ‘client’ at all gives wider scope for arguments about who the client was in any subsequent challenge it leaves the position uncertain. Whatever definition is adopted in the retainer letter the court is likely to look at what actually happened during the course of the transaction and which parties were in fact charged with communicating with the lawyers.

Legal advice privilege will not cover internal documents generated by employees of the client even if they are necessary to provide information to lawyers to obtain legal advice (No 5) although these may be covered by litigation privilege.

Need for relevant legal context

If in doubt as to whether the advice was given in a relevant legal context an objective two stage test should be applied:

- Does the advice relate to rights, liabilities, obligations or remedies of the client either under private law or under public law?
- If it does, the advice will only be covered if it falls within the policy underlying the justification for legal advice privilege in English law.

If the advice involves risk management, then it is likely to be privileged since it arguably comes within the relevant legal context.

Wider communication

Communication of privileged advice from the recipient within the company to a company’s board of directors should not cause loss of privilege (either in the original document or in the subsequent communication), nor should oral submissions of advice at a board meeting (per Mann J in USP Strategies Plc & Another v London General Holdings Ltd & Ors [2004] EWHC 373 (Ch)). However, internal communications forming preparations for the instructions requesting legal advice will not be privileged.

Although it is unlikely that disclosure to the board could result in loss of privilege (since it goes against the policy reasons underlying the concept), clients could be advised that where the in-house legal team (assuming they are the ‘client’) pass on legal advice, they include the following wording:

- The documents are privileged.
- Providing them does not amount to a waiver of privilege.

Clients should also obtain confirmation that the documents will be held in confidence. An alternative would be to ensure that there is a long-standing instructions between the board and the legal department with equivalent effect.

Although in USP Strategies, Mann J held that legal advice privilege would also attach to transmission of advice by the client to third parties outside the client organization and outside the group of individuals who can be described as the client within the organization, ensure that the third party

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4 Ibid.
5 Ibid.
gives appropriate undertakings about the documents. Even where such undertakings are obtained, it is safer to resist disseminating privileged material widely.

Defining the lawyer

The underlying purpose of privilege is to allow free access to a lawyer’s professional skill and judgment. In this context, this includes all members of the legal profession: solicitors, barristers, in-house lawyers and foreign lawyers...

The position of in-house lawyers is difficult. Some of what they do is covered by legal advice privilege but that part of their work which is business advice or administration will not be privileged. In-house lawyers with management or compliance roles need to know that no privilege attaches to communications relating to these roles and they should therefore avoid including communications relating to their executive/compliance function in the same document as communications relating to their legal function. Confusion here could lead to loss of privilege in the whole document.

Litigation Privilege

To attract litigation privilege, the communication must have been made for the dominant purpose of litigation which is pending, reasonably contemplated or existing.

Dominant purpose

The ‘purpose’ is broad and can cover many aspects of the litigation process.

The ‘purpose’ test is one of dominance and not exclusivity. Documents are frequently brought into existence for more than one purpose. It will be necessary to determine whether the dominant purpose is litigation and close scrutiny of the purpose for which the document was created may be undertaken by the court.

The court will look at the purpose of the document objectively. The following will not be necessarily determinative of the issue:

- Statements within a document that it was prepared to enable the lawyer to advise on the litigation.
- Evidence put to the court that the document was prepared for a particular purpose.

Litigation must be pending, reasonably contemplated or existing

Litigation must be a real likelihood rather than a mere possibility (USA v Phillip Morris Inc and British American Tobacco (Investments) Ltd [2003] All ER (D) 191 (Dec), approved by Court of Appeal [2004] All ER (D) 448 (Mar)), although the chance of litigation need not be greater than 50%. Neither a distinct possibility that sooner or later someone might make a claim, nor a general apprehension of future litigation is enough.

Waiver of privilege

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6 Ibid
7 Ibid
8 Ibid.
Privilege may be waived in several different ways:

- By placing privileged material before the court.
- By loss of confidentiality in the material (confidential being an element of privilege). However, note that disclosure to another person on confidential terms will not necessarily lead to a loss of privilege.
- By express or implied waiver. However, note that the express or implied waiver must be by or on the authority of the owner of the privilege. The Judicial Committee of the Privy Council has held that where privileged documents have been disclosed to an individual on express terms that privilege in them is not waived, then privilege will not be lost in those documents (B v Auckland District Law Society [2003] UKPC 38), although this is only persuasive and not binding authority. This approach was also taken in USP Strategies.

**United States**

US jurisdictions recognize several legal privileges, with two being the most common: the attorney-client privilege and the work product doctrine.9

The attorney-client privilege protects confidential communications between an attorney and his client that are made:

- In the course of legal representation.
- For the purpose of providing legal advice to the client by the attorney.

It protects only the communication and not the underlying facts. A client cannot shield documents from disclosure simply by sending them to his lawyer. The privilege applies whether the lawyer is in-house or with an external law firm.

The work product doctrine protects documents and tangible things prepared in anticipation of litigation by an attorney or an attorney’s agent. It does not provide absolute protection. However, it does not prevent disclosure of an attorney’s mental impressions, conclusions, opinions or legal theories with respect to actual or reasonably anticipated litigation.

**Attorney-client Privilege**

3.17 – Focus on lawyer. The lawyer’s role is often at issue in corporate client communications. Simply stated: the lawyer must be acting as a lawyer. However… this issue may arise not only from the task the attorney performed (e.g., investigative), but also from the status of the attorney (e.g., in house counsel…).

3.18 – In-house counsel. No distinction should be made for the purpose of attorney-corporate client privilege between an attorney who is employed in-house and one who is outside the corporate organization...

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10 Gergacz, Attorney-Corporate Client Privilege, 3rd edition
3.20 – Multiple roles of in-house counsel. In-house corporate counsel may perform multiple roles within the firm. Although the existence of multiple roles will not preclude the in-house attorney from participating in privileged communications, it is important that the corporation indicate that the legal role was being assumed when the communication in question was made.

3.35 – Lawyers as investigators – In some situations an attorney may perform an investigation for the corporation at its direction. Is the individual performing the investigation as corporate counsel or as an investigator? If the investigation is performed in a business role, any inquiry about privilege ceases. No legal background would be necessary or even particularly useful in completing the task. Any competent fact-finder would do. That the investigator is a lawyer would be incidental. Conducting parallel investigations (one legal and one business)... may not yield a privilege finding for the lawyer-led one if evidence was not provided that the two investigations were conducted independent of one another.

By way of contrast, the lawyer conducts an investigation as a part of providing legal advice. Thus, legal training, skill and background bear on analyzing, and even acquiring, the facts.

Such an investigation provides information about: the client’s legal risk whether the client is in compliance with the law. These are legal questions that a lawyer’s investigation facilitates being answered. Three factors may be useful when evaluating whether lawyer-investigations may be privileged. Note that the analysis may include several issues: the role of the lawyer in the investigation, whether the investigation had a mixed legal and business purpose, and perhaps the role of agents who assisted with the investigation.

1. Who ordered the investigation?

For privilege to apply, the investigation’s purpose must be to provide information from which the attorney can develop legal advice. If the attorney ordered an investigation as a part of providing legal advice, the tie to law-related activities is strong. However, if as is often the case, management retains counsel to perform an investigation, care should be taken that business rationales do not become the motive. If they are, then the investigation will most likely not be privileged. Although strong precedent exists for cloaking an internal investigation with privilege, its aim must be to provide the corporation with legal advice. In *Upjohn v United States* 449 U.S. 383, for example, management ordered the investigation, but note the care with which the legal advice purpose was emphasized.

2. Document why the investigation was ordered.

The documentation should emphasize that the investigation was necessary so that counsel could provide the corporation with legal advice. Memos between management and counsel, letters that retain investigating counsel, board of directors minutes, and press releases are examples of places where care should be taken in describing why the investigation is being undertaken. Mixed signals about the purpose (e.g. provide legal advice and calm the financial markets) increases the probability that it will be deemed to be a business activity and thus not privileged.

3. Focus on how the investigative findings have been used.

The investigation itself must be used so that counsel can provide legal advice to the corporation. That legal advice, of course, may in the end recommend management action. So, in a sense, these actions are based on the investigation, but only after it has been filtered through the counsel’s legal advice. Management actions are triggered because of the legal advice, not because of the investigatory findings themselves. If management, on its own, used the findings for a business purpose a question may arise
about the investigation's purpose. For privilege to arise, the investigation is not to enable management to make decisions, it is so counsel can provide legal advice.

The issue of “lawyer as investigator” has risen in a number of major corporate privilege cases. Typically, the corporation is under investigation by a government agency (usually the SEC) and hires outside counsel (or uses available in-house counsel) to investigate the matter. *Upjohn* involved this type of investigation. Upjohn hired outside counsel and used its own in-house counsel to investigate questionable corporate payments made overseas. No question about whether counsel was acting as a lawyer or investigator was raised in that case.

These types of ad hoc, attorney-led investigations are generally considered law-related and the attorneys considered lawyers for purposes of the privilege. As the Supreme Court in *Upjohn* noted, “The first step in resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.” But not all judges have agreed with this conclusion and therefore some uncertainty exists about the status of the lawyer-investigator in these situations.

To illustrate, *Diversified Industries v Meredith* 572 F.2d 596 (8th Cir. 1978) first held that the lawyer would not be acting as a lawyer in the investigatory role. On a rehearing before the Eighth Circuit en banc, the opposite conclusion was reached. Each opinion contained a strong dissent.

A law firm was hired by Diversified to investigate questionable corporate practices and report them to the board. An issue arose whether corporate employee communications with the law firm created an attorney-client privilege for the corporation. The en banc approach was to recognize the attorney-investigator as a lawyer for privilege purposes. The nature of the investigation into statutory violations and the ensuing report to the corporation were more valuable when done by lawyers than when done by lay investigators. It involved more than mere fact-gathering because of its tie to legal advice. Thus, although the attorneys conducted the investigation, it was a means to carry out their legal role rather than an end in itself. As Judge Heaney wrote in *Diversified*, “Lawyers are acting in a professional capacity when they undertake a comprehensive examination of a corporation’s activities in order to determine whether the corporation is operating in accordance with the law and make recommendations on how to avoid illegal activities in the future.”

Thus, although the cases generally find the lawyer-investigator function as performed in *Upjohn* and *Diversified* to be “legal” for privilege purposes, such a conclusion should not be automatic. The investigative efforts of counsel, although a fact-gathering exercise, must be prompted by the legal expertise of counsel and the legal judgment that can be useful during the course of the investigation.

3.35, Footnote 1 – See also *Cruz v Coach Stores, Inc.*, 196 F.R.D. 228 (S.D.N.Y. 2000) (investigative audit was not privileged. It was commissioned by in-house counsel and her executive superior, who used the findings to dismiss implicated employees. It was not conducted consistent with *Upjohn’s* factors: Corporate employees were not informed that it was confidential and that its purpose was so the corporation could receive legal advice.); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459 (S.D.N.Y. 1996). Although *Kidder* was a work product case, its conclusion that the investigation was conducted primarily for a business purpose should be useful for privilege questions, too. The court found that Kidder’s internal problems created a business crisis in which management was primarily concerned with reactions by the public, the financial press and its competitors. This finding outweighed any “litigation preparation” purpose for the investigation. For privilege issues, the case may be used to illustrate the perils of mixed purpose internal investigations. The attorney who conducts one may not be deemed to have been acting in a legal role.
Thus, investigating counsel should, at the outset, evaluate the privilege implications of management’s intent. Use of boilerplate rational to overcome business-related intentions will not be sufficient to establish privilege (this was used by counsel in making the work product showing in *Kidder*). Two suggestions can be made:

1) Corporate management must understand the risks to the privilege when investigative counsel is retained as part of a strategy to manage a business crisis, which includes legal issues. Privilege will only attach when the primary purpose is to provide legal advice. If primary legal purpose cannot be documented and carried forward throughout the investigation, then the privilege will be at risk.

2) If two investigations are not feasible (one focusing on assisting business crisis management; the other focusing on gathering information to provide legal advice), counsel should act as if none of the investigative work may be protected from discovery.

3.55 – Corporate employees empowered to receive communications from counsel. ... The basic question would be: Who, given the corporate structure, should receive counsel’s communication in order to facilitate the organization taking action on it? Thus, the focus should be twofold: the role of the employee in the organization and the nature of the communication. The greater the employee’s involvement in the corporation’s using the attorney’s communication, the clearer that employee, in the corporate organization setting, replicates the individual client under the traditional privilege doctrine. Consequently, the assertion of the corporate privilege would also be stronger.

*Work product doctrine*¹¹

While litigation need not have begun in order for the work-product doctrine to apply, a mere possibility of litigation is not enough. With regard to civil litigation, the work-product doctrine applies only to materials prepared in anticipation of litigation after a claim has arisen, or as commencement of litigation becomes likely or imminent. In the context of a criminal grand jury proceeding, one court has held that the only material protected are those prepared after the attorney’s client has received a subpoena.

Advice on matters that “may or even likely will ultimately come to litigation” may not fall within the work-product doctrine if the advice is rendered before a claim has arisen or the client is notified of possible criminal liability.

*Waiver of privilege*¹²

The purpose of work-product immunity is to facilitate the adversarial process, a purpose frequently furthered by selective disclosures. Thus, unlike the disclosure of privileged communications, an attorney does not waive automatically work-product protection by showing the work product to a third person. A waiver only occurs if work-product materials are disclosed to others with the actual intention that an opposing party see the materials or under circumstances that substantially increase the opportunities for an opponent to obtain the information.

As with the attorney-client privilege, an exchange of work-product materials between attorneys representing parties sharing a community of interest does not waive the protection afforded by the

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¹¹ Bureau of National Affairs, Attorney-Client Privilege and Work-Product Doctrine: Corporate Applications, 22-4th, BNACPS No 22-4 s XVI.

¹² Bureau of National Affairs, Attorney-Client Privilege and Work-Product Doctrine: Corporate Applications, 22-4th, BNACPS No 22-4 s XVII.
doctrine. A community of interest exists when parties are defendants in separate lawsuits brought by the same opposing party for the same alleged wrongful conduct, or when a party exchanges work product with a non-party who is either threatened with similar litigation or has a mutual interest in the outcome of the suit.

US v UK Differences

Because of the shared origins and many similarities between the US and UK legal systems, there tends to be a common perception that the laws on privilege are broadly similar in both jurisdictions. This is true to a large extent, as the US attorney/client privilege and work product doctrine are the approximate equivalents of legal advice privilege and litigation privilege in the UK. However, in addition to the developments in legal advice privilege in *Three Rivers*, there are important differences between the two jurisdictions:

- Third party communications in the absence of litigation. One key difference between the two jurisdictions is that in the US, attorney-client privilege can apply to communications to third parties if the purpose of the communication to the third party is to help the attorney provide legal advice to the client, for example, where a financial adviser is hired by an attorney to assist the attorney in understanding the client’s financial information. By contrast, these communications would not be protected under UK law unless litigation was reasonably in prospect at the time.

- Selective waiver. A further important difference is the possibility of selective waiver in the UK, which allows the sharing of a copy of legally privileged communication with a third party without losing privilege. Under UK law, as long as the document has not entered the public domain and remains confidential, then privilege will not necessarily be lost by the fact that the document has been shared with a third party, provided the document was disclosed (by way of example to a regulator) for a limited purpose. This is not the case in the US. There, the majority view is that disclosure of a single copy of a privileged document to third parties, including regulators (even if that disclosure takes place abroad), results in complete loss of privilege as to the entire subject matter of the privileged documents.

- Definition of the ‘client’. Following the House of Lords’ refusal to review *No 5*, the Court of Appeal’s narrow definition of the ‘client’ remains good authority in England. This is in contrast to the position in the US. When examining the classes of employees that could create privileged documents, the US Supreme Court in *Upjohn* rejected the proposition that only a narrow class of employees could create privileged documents. In that case it was argued that only the ‘control group’ of employees responsible for acting on the legal advice received could create privileged documents. The Supreme Court, though, held that the documents created by other Upjohn employees in response to requests for information from attorneys could attract privilege.

EU

Distinct rules apply in the context of investigations by the European Commission.

Neither Articles 81 and 82 of the Treaty on the Functioning of the European Union (known as the EC Treaty or Rome Treaty before the Lisbon Treaty came into force on 1 December 2009), nor any of the

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14 Ibid.
regulations implementing them, contain any provisions in relation to legal privilege. The principles governing such privilege have largely been developed through the case law of the European Court of Justice (ECJ). The AM&S case (AM&S v Commission [1982] ECR 1575) established the principle that Regulation 17 (setting out the rules implementing Articles 81 and 82) must be interpreted as protecting the confidentiality of written communications between lawyer and client. (Regulation 17 has now been replaced by Regulation 1/2003, the Modernisation Regulation, but the position remains the same.)

This principle is subject to two conditions:

- The communications must be made for the purpose and in the interests of the client's right of defence.

- The communications must emanate from independent lawyers established within the EU (that is, the privilege of in-house and non-EU qualified lawyers is not respected).
Comparison of Privilege and Confidentiality Issues in European jurisdictions

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<td>France¹⁵</td>
<td>The relationship between a lawyer (avocat, admitted to the local bar) and his client is protected by professional confidentiality obligations (articles 226-13, New Criminal Code), which prohibit a professional who is subject to a confidentiality obligation from divulging information he obtained from his client. In addition, any material written by a lawyer in relation to a matter handled on behalf of a client, correspondence between a lawyer and a client, and correspondence between a lawyer and his opposing lawyers in relation to the matter, is protected by professional confidentiality unless there is express indication to the contrary (articles 66-5, Law of 31 December 1971). A client cannot release his lawyer from his obligation to keep these documents confidential but is not himself bound by this confidentiality obligation.</td>
<td>Correspondence between avocats and their clients is legally privileged and cannot be disclosed.</td>
<td>In-house counsel (juristes d’entreprise) do not hold the title of avocat. Avocats are considered to form a separate profession from in-house counsel and work only in law firms. In-house counsel are not covered by the rules of confidentiality of correspondence that apply to avocats. Only the in-house counsel's communications with external lawyers (that is, avocats) are privileged, and not correspondence with the management or employees of their company. However, this situation may change in a near future as the 2009 Darrois report recommends that avocats be allowed to work as in-house counsel without losing their status of avocat. One consequence of this would be that correspondence involving in-house counsel who also hold the title of avocat would be protected by the rules of confidentiality of correspondence. This proposal is currently under discussion and is not yet applicable.</td>
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¹⁵ PLC, Dispute Resolution: France, 1 Mar 2010, written by Joël Alquezar, Alexandre Bailly and Vanessa Bénichou, Winston & Strawn
| Germany16 | The relationship between a lawyer and his client is protected by a number of professional confidentiality regulations. In the absence of the consent of the client, a lawyer is prohibited from divulging any confidential information or documents obtained in the course of his professional activities (section 203(1), Criminal Code). This obligation to preserve confidentiality is mirrored by the right of the lawyer to refuse to divulge such information (sections 383 and 142(2), Civil Procedure Code, and section 53 of the Criminal Procedure Code).

In addition, documents entrusted to a lawyer in his professional capacity, and which remain in his possession, are protected from disclosure (section 97, Criminal Procedure Code). However, documents located at the client's premises that are not related to the client's defence of criminal or regulatory offences are not privileged from seizure by regulatory and other investigative bodies.

Since the parties are generally not obliged to disclose documents, the need for privilege does not usually arise. However, third parties requested to testify as a witness or to produce documents may need to invoke privileges.

There are a number of privileges under German law, for example:

- Family privilege, which applies to close relatives of a party.
- Subject matter privilege, which applies to certain kinds of information (for example, trade secrets of non-parties).
- Public servant privilege, relating to matters that public servants learned of in their official capacity.
- Professional privilege, which applies to various persons who, by virtue of their profession, are entrusted with confidential information (for example, attorneys, certified auditors or tax advisers).

The legal situation regarding privilege for in-house counsel is far from clear under German law. Arguably, in-house counsel can invoke professional privilege if their position and status within the company is comparable to that of an independent outside attorney. This can be the case if the in-house counsel is all of the following:

- Admitted to the Bar.
- Predominantly engaged in legal advice for his employer.
- Granted, due to his position in the hierarchy of the company, a certain degree of independence when acting in the capacity of legal counsel.

It is not clear whether a lawyer who is also an officer or director in the company should be protected by in-house counsel privilege.

| Italy17 | Specific rules relating to the disclosure of correspondence between counsel are set out in the Ethical Code for Italian Lawyers (Codice Deontologico Forense) (Ethical Code). The following correspondence cannot be filed or referred to in the court proceedings (Article 28, Ethical Code):

- Correspondence between the parties' counsel expressly qualified as confidential.
- Correspondence between the parties' counsel relating to the negotiation of an amicable settlement.

There is no recognised doctrine of privilege in Italy. However, there are certain circumstances in which Italian law will protect particular documents and communications from disclosure where it is necessary to safeguard the lawyer-client relationship. For example, a lawyer cannot be obliged to give evidence of any information acquired by reason of his profession, including conversations and communications with his clients (article 296, Italian Code of Criminal Procedure), nor can he be obliged to disclose any document, data or information which is in his possession.

The Ethical Code does not apply to in-house counsel. If the in-house counsel is registered with the Italian Association of In-house Lawyers (AIGI), he must follow the rules of conduct provided by the AIGI's Code. Although this does not contain specific provisions regarding confidential correspondence, it provides that in-house counsel must keep all the information of which they become aware by reason of their professional activity confidential (Article 6, AIGI Code), including after the termination of their employment.

### Need further information

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16 PLC, Dispute Resolution: Germany, 1 Mar 2010, written by Stefan Rützel, Stephan Wilske and Wolf H von Bernuth, Gleiss Lutz

17 PLC, Dispute Resolution: Italy, 1 Mar 2010, written by Monica Iacoviello and Andrea Carlevaris, Bonelli Erede Pappalardo Studio Legale
settlement of a dispute between their clients.

Correspondence between the parties’ counsel can only be produced if it relates to the implementation of an agreement concluded between the parties (for example, letters of intent and letters containing draft proposals). In addition, correspondence sent by the opposing party’s counsel can be produced if it contains the assurance that an obligation of the client shall be fulfilled.

Correspondence between the parties, and between one party’s counsel and the other party, is not confidential and can be produced in court.

If a lawyer intends to send a confidential or without prejudice letter or document to a lawyer in another member state, he should clearly express that before communicating the letter or document (Article 5(3), European Lawyers Code of Conduct). If the prospective recipient of the letter or document is unable to ensure that the letter will remain confidential or without prejudice, he should inform the sender without delay.

Those entrusted with a duty of confidence by status or by profession (such as priests, doctors, lawyers and notaries) cannot be forced to reveal confidential information (article 843a sub 3, Dutch Act on Procedure in Civil Matters (Wet-boek of Burgerlijke Rechtsvordering) (Ru) and article 165 sub 2b, Ru). The Professional Conduct Rules of the Bar forbid a lawyer from testifying to facts that were revealed to him by his client in the course of the exercise of his profession, although a client can give his lawyer permission to use specific confidential information.

This right to legal privilege relates only to information revealed to lawyers in their professional capacity.

Need further information

The Netherlands18

Correspondence between Dutch lawyers is confidential in nature and cannot be used in court, except where the client’s interests require this. However, even in such a case, the prior consent of the other party or the president of the local bar is required.

This right to legal privilege relates only to information revealed to lawyers in their professional capacity.

Need further information

Information about the client revealed to the lawyer by third parties is not subject to legal privilege, except where it has been revealed to him within a separate client relationship.

Lawyer-client communications held at the client’s office are protected from seizure by regulatory and other investigative bodies.

Spain

Lawyers (abogados, for whom membership of the bar is obligatory) must keep confidential all facts and matters they come to know through the conduct of their professional obligations (article 542, Law of Judicial Authority (Ley Orgánica del Poder Judicial)). This is reinforced by the imposition on lawyers of a duty not to disclose facts and documents that have come into their possession as a result of their professional activities (Spanish Professional Conduct Code (June 2000) and General Statute for Spanish Lawyers (Estatuto General de la Abogacía Española, approved by Royal Decree 658/2001 of 20 June).

Clients may not release their solicitor from this duty, although they are not bound by it themselves. However, relevant documents in the client’s possession continue to benefit from confidentiality and do not have to be disclosed to investigative bodies.

Disclosure of confidential information contrary to professional confidentiality obligations is punishable with a prison term, fine and/or disqualification from practice (article 199.2, Spanish Criminal Code).

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19 Ibid
| Switzerland | Information received by an independent lawyer from a client or from third parties in the context of an attorney-client mandate remains confidential. Lawyers are obliged not to disclose such information and can invoke a privilege based on the applicable procedural laws to protect it. | Certain documents are legally privileged, particularly correspondence between lawyers and their clients. Lawyer-client privilege only extends to lawyers registered in the lawyers register. The information is protected if it is in the lawyer's possession. The protection will include correspondence between lawyer and client, memoranda, notes and, to some extent, documents received from the client. All such material is protected provided it relates to legal advice. No protection is granted to information relating to other services by external lawyers. Privilege does not extend to material in the client's possession. As a result, correspondence between lawyer and client found at the premises of the client or third parties is not protected. An exception to this general rule exists in criminal proceedings, while in regulatory investigations the issue is subject to debate. | Lawyers employed by a company whose business does not involve offering legal services cannot register with the lawyers register. This is because 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. However, the government has drafted a bill that will, if approved by parliament, grant in-house counsel registered with a special company lawyers register a right to decline to disclose documents which are related to their work as in-house counsel.  

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| Russian Federation | An advocate may not disclose confidential client information. In addition, he cannot appear as a witness in court proceedings, nor be questioned on the information he has gained in the course of carrying out his professional duties as an attorney at law (2002 Russian Federation law No 63-FZ on Advocacy and the Bar). In contrast, a Russian lawyer (who can be anyone who has completed a law degree) does not benefit from such protection against disclosure and must disclose any information requested by an authorized regulatory or professional body. | Generally, there is no concept of privileged information. The Arbitrazh Procedure Code does not confer privilege on any type of documents. However, attorney-client communications are subject to privilege, which cannot be waived. Russian legislation recognizes as privileged any information or communications between an advocate (a lawyer who is qualified to represent clients in court) and his client, if they are produced in the course of the provision of legal assistance by the advocate to the client. Documents written by an in-house lawyer (domestic or foreign) are not privileged, and even confidential information (for example, personal data or commercial secrets) must be disclosed at the request of the courts. | Need further information |

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20 Ibid

21 PLC, Dispute Resolution: Switzerland, 1 Mar 2010, written by Urs Feller, Marcel Frey and Bernhard Lauterburg, Prager Dreifuss Attorney at Law


23 PLC, Dispute Resolution: Russian Federation, 1 Mar 2010, written by Timur Aitkulov and Roman Khodykin of Clifford Chance.
investigative state body. This extends to communication between lawyer and client held at the client’s premises.
Implications for Companies

The above table shows the scale of the difference among the concepts of legal privilege in the various jurisdictions. Perhaps most concerning for large companies is the fact that, in many of these civil law jurisdictions, privilege covers only documents in the hands of a lawyer. Accordingly, any other document, even a letter of legal advice from a lawyer, will not necessarily be privileged in the client’s hands.

In the past, this absence of privilege for documents in a company’s hands in these jurisdictions might have been less of an everyday concern, given the absence of the disclosure obligation in litigation in most civil law jurisdictions. However, that view can no longer be maintained, in light of the increase in regulation, and, particularly, the ability of regulators across the world to demand access to documents.

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