Legal Professional Privilege
A Comparative Guide
Key themes

A review of law and practice relating to legal professional privilege in 25 jurisdictions across Europe, the Americas and Asia-Pacific.

Overview

The laws on legal professional privilege remain a significant point of interest and divergence across the global legal landscape. Advice that is privileged in one country may not be protected in others. Even within a jurisdiction, the scope and application of legal professional privilege may be the subject of debate amongst experts.

Is privilege a recognised concept?

A duty to keep legal advice confidential exists in most jurisdictions. However, the extent to which the concepts of privilege and disclosure are recognised varies widely. For example:

> Japan has no specific doctrine of legal professional privilege, although its lawyers are subject to confidentiality obligations.

> Under Portuguese law, legal professional privilege is relatively broad, covering information communicated to a lawyer and his/her agents, whether communicated by the client or a third party.

> In the UK, privilege is highly respected and maintained in most court proceedings and investigations.

Is there a duty to disclose?

> In some regimes, including most European jurisdictions, there is no formal duty of disclosure in court proceedings.

> In the UK, however, it is a sufficiently important stage of court proceedings that the legal sector has recently invested in an entirely new scheme intended to improve the efficiency of disclosure between parties.

Treatment of in-house counsel

The advice of in-house counsel is treated differently across jurisdictions.

> In Brazil and the UK, legal professional privilege applies to any lawyer, whether in a commercial organisation or private practice.

> This has been an area of development for Germany which, in 2016, enacted a law reforming the position of in-house lawyers and affording them the same legal status as external lawyers.

> However, many European countries, and indeed the Court of Justice of the European Union, do not recognise the concept of in-house lawyer privilege, despite moves to extend it that way.

Privilege in regulatory context

> As both litigation and regulatory investigations become increasingly international, differences in the treatment of legal professional privilege (and their potential consequences) present a significant risk for companies and their legal advisers.

> Regulators are becoming increasingly reluctant to accept parties’ claims to privilege over documents, making it all the more important to understand where the true boundaries lie. In many countries, regulatory and investigative bodies respect and apply privilege, but the differences between jurisdictions can be stark.

> Companies that operate internationally should therefore be alert to the risks that exist when disclosing documents and information in an overseas jurisdiction, whose interpretation of the scope of privilege might vary drastically with their domestic rules.
Key themes

Linklaters’ last review of legal professional privilege was published in May 2016. This revised and fully updated edition includes chapters on additional jurisdictions and continues to provide a quick reference tool to practice across the globe.

For 25 jurisdictions, including the EU, our guide provides at-a-glance answers to these basic questions:

> Is the concept of disclosure of documents recognised?
> Is a right to privilege recognised? If so, what types of document may be privileged?
> Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?
> What law determines whether privilege applies to a document or communication?
> Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

The review is intended to highlight issues rather than to provide comprehensive advice. If you have any particular questions about privilege, please do not hesitate to contact the Linklaters LLP lawyers with whom you work.

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Partner

In this review, “disclosure” (also known as “discovery”) means the process by which documents:

> are provided to the other side in the course of litigation, arbitration or other dispute resolution procedure, in accordance with rules of court or non-judicial procedure as appropriate; and
> which have to be provided to the authorities in the course of statutory and other regulatory investigations or enquiries, are so provided.

Law stated as at January 2019

Acknowledgements

Special thanks goes to our contributor firms:

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Their involvement and support are greatly appreciated.
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Is the concept of disclosure of documents recognised in this jurisdiction?
Yes. Parties to litigation are generally obliged to disclose documents in their possession or power relevant to the issues to be determined in any given dispute. The nature of those obligations is generally set out in the various court rules for each jurisdiction. Most key regulators also have the ability to compel persons (including corporations) to produce documents. The powers of regulators are generally set out in the legislation governing each regulator.

Does the jurisdiction recognise a right to legal privilege?
If so, what type of document may be privileged?
Yes. Confidential communications between a client and an independent lawyer made for the dominant purpose of the client seeking or being provided with legal advice will be protected from disclosure in the course of most legal proceedings and in the course of most regulatory investigations (commonly referred to as "client legal privilege").

Similarly, confidential communications made between a client and another person or between a lawyer and another person for the dominant purpose of the client being provided with legal services relating to actual or anticipated litigation to which the client is or may be a party, will be protected from disclosure in the course of most legal proceedings and in the course of most regulatory investigations (commonly referred to as "litigation privilege").

Privilege also generally attaches to communications made between persons in a dispute in connection with an attempt to negotiate a settlement of that dispute ("without prejudice privilege").

Privilege can be waived by a party acting inconsistently with maintaining confidentiality in the relevant communication or by disclosing the communication’s substance or effect.

Is the concept of in-house lawyer privilege recognised?
Are there any limiting factors?
Yes. In-house lawyers are accorded the same status as other lawyers for the purposes of the relevant Evidence Act (see below) and common law protections around privilege. That said, claims for privilege involving in-house lawyers can be the subject of scrutiny on the basis of questions as to whether the lawyer has the necessary degree of independence. As a general proposition, most in-house lawyers will satisfy the independence test if they were in a position to give professionally detached advice and there is no cause to question whether the lawyer’s personal loyalties, duties and interests could influence that advice.

What law determines whether privilege applies to a document or communication?
Both the Commonwealth and most states and territories have adopted Evidence Acts which regulate claims for privilege. The Evidence Acts largely mirror the common law in relation to privilege with the effect that the laws around privilege apply in all Australian jurisdictions (subject to some minor and effectively irrelevant exceptions for those states yet to adopt an Evidence Act).

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?
Yes. For the most part, key Australian regulators (including the corporate regulator, the competition regulator and the internal revenue regulator) respect and permit claims for privilege to be made in relation to documents which are the subject of compulsory notices. Notable exceptions include state ‘special commissions of inquiry’ and ‘Royal commissions’ which both routinely abrogate claims for privilege.

Regulators also often encourage companies not to assert privilege over investigation reports and other key investigation documents as part of a process of ‘cooperation’ with their investigations. Claims to privilege over investigation documents are also being challenged more frequently by regulators.

Claims to privilege over investigation documents are being challenged more frequently by regulators.
Belgium

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Is the concept of disclosure of documents recognised in this jurisdiction?
No. There is no formal process of disclosure. However, parties must produce their own bundle of exhibits on which they rely. These will be served on the other party and at court. There is a procedure for disclosure of specified documents provided by Article 877 et seq. of the Belgian Judicial Code, but the criteria for such an application to the court are stringent.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?
Pursuant to Article 458 of the Criminal Code 1867, persons entrusted with a duty of confidence by status or by profession (such as attorneys who are members of a Bar, doctors and pharmacists) cannot reveal confidential information entrusted to them by their clients, except where they are called to give evidence in legal proceedings or where the law requires them to disclose the information in question. This concept is referred to as “professional secrecy”. In addition, the Professional Conduct Rules of the Bar forbid a lawyer from testifying to facts that were revealed to him during the course of the exercise of his profession. However, a lawyer may reveal confidential information if it is necessary for his/her own defence in a criminal or civil case, particularly in the context of proceedings aimed at establishing his/her professional liability. In any event, clients are the sole beneficiaries of the legal professional privilege and lawyers may never benefit from such protection, especially when they are suspected of having committed an offence.

Case law also indicates that legal professional privilege is enshrined in Articles 6 and 8 of the European Convention on Human Rights. The documents protected are correspondence between attorneys and their clients as well as the attorneys’ legal opinions and the notes both from attorneys and from their clients regarding these communications.

Legal privilege does not apply to the case materials themselves and official documents, such as judgments or trial briefs, are public. The voluntary communication to third parties of documents protected by professional secrecy will result in those documents no longer being protected.

Correspondence between Belgian lawyers is also confidential in principle and cannot be used as evidence. However, some correspondence between lawyers will be classified as “official” and can be produced in court. The Professional Conduct Rules of the Bar determine how the distinction should be made. Conflicts are resolved by the Head of the Bar. Pursuant to Article 5.3 of the Code of Conduct for European Lawyers, correspondence between a Belgian attorney and an attorney from another EU Member State will only be privileged if it is expressly marked as “confidential” or “without prejudice”.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?
In-house counsel are not subject to Article 458 of the Criminal Code.

However, in-house lawyer privilege has been recognised, to a certain extent, by the Act of 1 March 2000 establishing a Company Lawyer Institute (Institut des juristes d’entreprise / Instituut voor bedrijfsjuristen). Pursuant to Article 5 of this Act, legal opinions rendered by in-house counsel – members of the Institute – for the benefit of their employers are confidential.

In-house lawyer privilege was recognised, with reference to the Act of 1 March 2000, by the Brussels Court of Appeal in a decision of 5 March 2013. While this decision concerned the specific context of an investigation by the Belgian competition authorities, its effect could go beyond this context and strengthen the recognition of this privilege in other areas as well.

Several conditions must be fulfilled before opinions given by in-house counsel may be deemed privileged. The advice must be legal in
nature, and not commercial or operational. Only opinions from in-house counsel who are members of the Institute and acting in their capacity as counsel are privileged. The privilege does not extend to mere correspondence. Furthermore, only advice given to the employer (as opposed to third parties) is privileged. The advice will lose its privileged status if it is treated non-confidentially by its author and its addressee. For example, legal opinions circulated to a large number of people may lose their privileged status.

What law determines whether privilege applies to a document or communication?
As a general rule, Belgian law applies – in particular, the following provisions:
> Article 458 of the Criminal Code;
> Article 5 of the Act of 1 March 2000 establishing a Company Lawyer Institute;
> the Professional Conduct Rules of the Bar; and
> the principles governing the rights of defence.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?
Evidence gathered in violation of the attorney-client privilege will be declared inadmissible by courts if they find that there is no proportionality between the irregularity of the investigators and the offence. Criminal prosecutions or other regulatory investigations may not be conducted on the basis of privileged information, apart from in exceptional circumstances (for instance, if the legally privileged document itself constitutes a criminal offence or could establish the attorney’s participation in a criminal offence). In civil cases, the court cannot accept privileged information as evidence.

A similar protection has been granted to in-house counsel’s legal opinions by the abovementioned case law in the framework of investigations conducted by the Belgian competition authorities. It is possible (and likely) that this approach will be extended to other areas, such as criminal prosecution. When, in the course of an investigation, the prosecution authorities come upon potential privileged documents, they must file the documents with the court in a sealed envelope. The judge overseeing the investigation will ask the Head of the Bar to review these documents and ensure the privileged documents remain sealed. This practice derives from a former agreement between the Brussels Bar Association and the Attorney General of Brussels. The practice may be extended to the seizure of in-house counsel’s legal opinions, with the Head of the Bar being replaced by a member of the Company Lawyer Institute.
Brazil

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Is the concept of disclosure of documents recognised in this jurisdiction?

In Brazil, as a general rule, a party may not be obliged to disclose documents against its interests (this is stipulated in the Brazilian Constitution, Code of Criminal Procedure and Code of Civil Procedure). Under Brazilian law, the basic rule is that the plaintiff has the burden of proving its rights and the defendant has the burden of proving its arguments of defence. In principle, each party must produce its own documents. Claims for disclosure require a detailed description and identification of the requested documents and an indication of the purpose for which they are being sought. The requesting party may also be compelled to state the reasons why they believe that the requested documents are in the other party’s possession and cannot be obtained otherwise. However, the judge may order the production of documents that are in possession of the other party (or a third party).

Does the jurisdiction recognise a right to legal privilege?

If so, what types of document may be privileged?

Article 7 (II) of Federal Law 8.906/94, which governs the Brazilian legal profession, provides that a lawyer has the right to the inviolability of their office or place of work, as well as their work instruments, and written, electronic, telephonic and telematics correspondence, as long as they are related to the lawyer’s practice of his or her legal profession. For the purposes of Brazilian legislation, communication of any kind between attorney and client is deemed to be confidential and not subject to disclosure to third parties. This may include documents that were prepared in anticipation of an attorney–client communication. Exceptions to the general rule of confidentiality occur in very few situations and any claim that an exception applies needs to be carefully analyzed.

Is the concept of in-house lawyer privilege recognised?
Are there any limiting factors?

In Brazil there is no distinction between the practice of law by an external attorney or by an in-house counsel with respect to the rights and duties of attorneys; the privileges apply equally to both. As long as the communication involves legal issues and provided that the attorney is licensed or registered at the Brazilian Bar Association, the privilege prevails.

What law determines whether privilege applies to a document or communication?

The Code of Ethical Conduct of the Brazilian Bar Association provides that communications of any nature between a client and their lawyer are deemed to be confidential and not subject to disclosure to third parties. The privilege covers all communications related to the attorney’s professional activity with a client and applies to any lawyer licensed at the Brazilian Bar Association.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

As these issues normally arise in the context of litigation, administrative proceedings or investigations, it is up to the judge or the person presiding over the administrative proceedings or investigations to determine whether attorney-client communications should be disclosed or not. Parties to proceedings may appeal in cases where the privilege is not observed. As previously mentioned, in Brazil, as a general rule, privilege is applied so that any kind of information between attorney and client is presumed confidential. As such, in a regulatory, criminal or civil context, the attorney has a right to refuse to testify with respect to facts of which he or she has become aware while practising law, even if authorised or requested to do so by the client.
The European Union/Court of Justice of the European Union

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Is the concept of disclosure of documents recognised in this jurisdiction?

Parties to proceedings before the Court of Justice of the European Union ("CJEU") disclose the documents on which they wish to rely. However, the European Commission has powers to demand disclosure of documents in the course of certain investigations, such as alleged breach of competition rules.

The Damages Directive (2014/104/EU) has significantly broadened the scope for claimants and defendants to seek and receive disclosure in litigation following on from a finding of a breach of EU or national competition law. Limitations on the rights of disclosure under that Directive include a right for Member States “to give full effect to applicable legal professional privilege under union or national law when ordering the disclosure of evidence” (Article 5(6)) and to ensure that disclosure is limited to what is proportionate (Article 5(3)). The approach taken by Member States in relation to disclosure requests remains to be seen, as does the impact of these provisions on areas of law outside of the competition sphere.

In January 2018, it was announced that the Directorate General for Competition of the European Commission was in the process of preparing best practice guidelines on requests for internal documents in merger cases. It is expected that the guidelines will be published in early 2019 and that they will contain some reference to legal advice privilege.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

No. Advice from and communications with in-house lawyers are explicitly excluded from the ambit of the AM & S decision. However, in the subsequent Hilt case, the General Court held that notes internal to the undertaking reporting the content of advice received from independent external lawyers are covered by the principle of confidentiality laid down in AM & S. In the Akzo and Ackros cases, the CJEU dismissed an appeal brought by Akzo and Ackros against a judgment of the General Court and confirmed that legal professional privilege does not extend to communications between parties and their in-house lawyers in the context of EU antitrust investigations.

In the Akzo and Ackros cases, the companies had challenged a Commission decision to seize and retain allegedly privileged documents during a dawn raid. In its final judgment, the General Court confirmed that only documents prepared exclusively for the purpose of seeking external legal advice in the exercise of rights of defence are privileged. Internal company documents will only be privileged...
if it is unambiguously clear that they were drawn up exclusively for the purpose of seeking external legal advice in the exercise of the company’s rights of defence. This will apply even if they have not been exchanged with an external lawyer nor created for the purpose of being physically sent to an external lawyer. However, the mere fact that a document has been discussed with a lawyer will not be sufficient to give it such protection.

**What law determines whether privilege applies to a document or communication?**

European law. The procedure for claiming privilege during an investigation has been clarified in the *Akzo* case and is set out in the European Commission’s notice on best practice for the conduct of proceedings concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union.

**Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?**

Yes. However, as outlined above, the doctrine is not respected in the cases of in-house or non-EU qualified lawyers.

In the context of a European Commission dawn raid, communications between companies and their in-house counsel will not attract legal privilege and, if relevant to the investigation, must be surrendered to the Commission. However, the General Court in the *Akzo* case clarified the procedure for dealing with privileged documents during a dawn raid:

> The company is entitled to refuse to allow Commission officials even a cursory look at documents which it claims are privileged, if it would be impossible to do so without revealing the documents’ contents. The company must give the officials appropriate reasons for its view.

> If the Commission believes that the documents are not privileged, it may place copies of the documents in a sealed envelope and retain them (without reviewing them) until the dispute is resolved.

> The Commission is not permitted to read such documents until it has adopted a decision giving the company the opportunity to challenge the rejection of privilege before the General Court. To do so prior to the resolution of the dispute could cause irreparable harm to the company.

This makes it particularly important that all privileged documents (including e-mails) are headed “Privileged and Confidential”.

In addition to the Commission, other EU institutions and agencies possess investigatory powers which also raise the question of legal professional privilege. For example, since 2014 the European Central Bank (“ECB”) has acted as bank supervisor as well as a central bank. Recital 48 to the Single Supervisory Mechanism Regulation (“SSMR”) states, “Legal professional privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union” (although this theme is not elaborated upon in the main body of SSMR). This suggests that the limits to privilege which are already established in connection to competition cases would also apply in relation to supervisory enforcement action by the ECB.

Another example is the European Supervisory Agency (“ESMA”) which also has a direct supervisory role (albeit limited). It supervises EU trade repositories under the European market infrastructure regulation (“EMIR”) and EU credit rating agencies regulations (“CRAR”). Recitals 63 and article 23A of CRAR indicate that when regulating credit rating agencies, ESMA information disclosure powers cannot be used to require disclosure of information subject to legal privilege. Article 60 of EMIR provides a similar limitation in respect of ESMA supervision of trade repositories.

If the Commission believes that the documents are not privileged, it may place copies of the documents in a sealed envelope and retain them (without reviewing them) until the dispute is resolved.
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Is the concept of disclosure of documents recognised in this jurisdiction?

There is no process in French civil procedure that is equivalent to documentary discovery or disclosure. There is no obligation for a party to list or produce documents under its control which are relevant to the dispute.

Parties to civil proceedings in France will generally only produce the documents that they consider support their respective cases. This will occur at the same time as the parties exchange formal pleadings setting out their positions on the facts, evidence and the applicable principles of law.

It is possible for a party to civil proceedings in France to apply to the court for an order obliging either a party to the proceedings or a third party to produce documents. An application for a production order in relation to documents can be resisted on the basis that the relevant party or third party has a legitimate reason (motif légitime), such as:

- that the documents are protected by some form of legally recognised confidentiality obligation; or
- that they cannot be produced due to a situation that qualifies as “force majeure”.

Before civil proceedings are commenced, investigation measures, such as an order to a third party to produce documents, may also be granted at the request of any interested party by way of a motion or by summary proceedings. The measure must be justified by a legitimate need to preserve or establish evidence for a future legal action and must have a limited scope.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

The relationship between a lawyer (avocat, admitted to the local Bar) and his client is protected by the general professional confidentiality obligations set out in the Criminal Code, article 226-13, which prohibit a professional who is subject to a confidentiality obligation from divulging information obtained by him from his client. The client is not, however, bound by this confidentiality obligation.

In addition, article 66-5 of the Law of 31 December 1971 on the status of lawyers provides that any written communications addressed by a lawyer to his client (correspondence, meeting notes and generally all documents forming part of the client’s file) and between a lawyer and his opponents in relation to a matter handled on behalf of a client, are protected by professional confidentiality unless expressly indicated to the contrary. In 2018, the European Court of Human Rights criticised the French position and ruled that a folded sheet of paper on which a lawyer had written a message with his contact details before handing over to his clients under police escort was confidential and could not be seized. A client cannot release his lawyer from his obligation to keep documents confidential. However, as mentioned, the client is not himself bound by this confidentiality obligation.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

No. This concept is not recognised in France. Avocat status may not be retained by in-house lawyers and they cannot represent their employers in judicial proceedings where representation is compulsory.

There have been recurrent discussions in relation to a merger of lawyers with in-house lawyers, which would extend the duty of professional confidentiality to the latter. In September 2018, the Conference of Bar Heads (Conférence des bâtonniers) officially stated that it remained opposed to the creation of a legal privilege status for in-house lawyers.

What law determines whether privilege applies to a document or communication?

French law will determine whether a communication is privileged. However, where the correspondence is between lawyers from different jurisdictions, internation
EU states, they will have to agree at the outset of their relationship how they will treat correspondence between themselves. If they have not discussed this issue, the rule is that the correspondence will not be treated as confidential.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

In civil and commercial matters, the doctrine of privilege is binding and respected by regulatory and other investigative bodies. Regulatory bodies (e.g. competition and financial authorities) cannot order the production of, nor rely upon, documents protected by professional confidentiality while investigating and carrying out checks.

In criminal, customs and tax matters the position is slightly different. In theory, documents protected by professional confidentiality cannot be seized during searches conducted by the investigating magistrate. Nor can they be removed by regulatory and certain public bodies (competition and financial authorities, customs and tax) when they undertake court-authorised house searches. Such searches are only permitted when they are intended to collect evidence of a criminal offence or certain customs and tax offences.

The prohibition of seizure extends to lawyer-client communications held at the client’s premises.

Contrary to the approach applied in investigations by the financial regulator, the Sapin 2 law (which aims to prevent corruption in France) does not provide any exception pertaining to lawyers’ professional secrecy. Created in 2017, the French Anticorruption Agency (“AFA”) has published its Charter of Rights and Duties of Parties Involved in the Inspection, in which it indicates that companies cannot invoke legal privilege in order to refuse disclosure of information or documents.

The AFA has also publicly indicated that it considers that its agents are authorised to access privileged documents and information in order to assess the efficiency of compliance programmes. This position is highly disputable and we expect discussions, notably with the Bar Associations, to clarify this issue in the near future.

The Code of Criminal Procedure sets out one exception to the rules on professional confidentiality in relation to lawyers: documents and objects (such as mobile phones, laptops etc.) are no longer protected by professional confidentiality when they are seized as evidence of a lawyer’s commission of a criminal offence or certain customs and tax offences. If the seizure is made at the domicile or office of a lawyer the search may only be carried out by a judge and the president of the Bar Association or his delegate must be present during the search.

In addition, the Criminal Chamber of the Supreme Court (Cour de cassation) reconfirmed the distinction drawn between documents relating to the exercise of the defence rights and documents relating to the drafting and negotiating activities of a lawyer; documents which are not related to the exercise of defence rights can be seized if it is necessary for ascertaining the truth and on condition that the breach of professional confidentiality is strictly proportionate.

The Sapin 2 law ... does not provide any exception pertaining to lawyers’ professional secrecy.
Germany

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Is the concept of disclosure of documents recognised in this jurisdiction?

There is no doctrine of pre-trial disclosure in Germany. One party may not inspect the files of the other party nor those of the other party's lawyers. There is no duty to disclose documents to the other side, other than those upon which a party intends to rely.

Only very limited means of obtaining disclosure from the court exist. Section 142 of the Civil Procedure Code grants the right to request the production of specific documents or narrow categories of documents if the requesting party can substantiate their main content and its relevance to the outcome of the case. “Fishing expeditions” are not allowed.

Moreover, there is also only a limited substantive right of disclosure, arising from the duty to perform obligations in good faith according to section 242 of the Civil Procedure Code. For competition litigation, however, the legislator made use of the wide discretion provided by the EU Cartel Damages Directive to introduce a substantive rather than a procedural right to disclosure from cartel members, as well as from third parties, upon a substantiated request (section 33g of the Act against Restraints of Competition). The effects of the new rules in practice are still to be evaluated as they were only introduced in mid-2017.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

The relationship between a lawyer and his client is protected by a number of professional confidentiality regulations. In the absence of the consent of his client, a lawyer is prohibited from disclosing any confidential information or documents obtained in the course of his professional activities. This obligation to preserve confidentiality provided by section 203(1) of the Criminal Code is mirrored by the right of the lawyer to refuse to disclose such information pursuant to, e.g., sections 383 and 142(2) of the Civil Procedure Code and section 53 of the Criminal Procedure Code.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

The status of in-house lawyers in Germany is complex and there is very little case law on the matter. Until 2016, lawyers admitted to the Bar (known as Rechtsanwälte) could act as in-house counsel, in which case they were known as Syndikusanwälte. Although they retained some rights gained from being a member of the Bar, in other respects they were treated as normal employees of the company. With respect to privilege, the legal situation was rather unclear.

However, the law to reform the legal position of in-house lawyers (Gesetz zur Neuordnung des Rechts der Syndikusanwälte und zur Änderung der Finanzgerichtsordnung) that came into force on 1 January 2016 has clarified some important questions. The new law establishes, by and large with exceptions, the same legal status for external independent lawyers and in-house lawyers.

Regarding privilege, the situation is as follows:

> In the context of criminal procedure, i.e. criminal prosecution or trial, in-house lawyers cannot invoke privilege. They may not refuse to testify simply because of their status as in-house lawyer, nor are documents in their possession excluded from seizure by state authorities (sections 53, 97 of the Criminal Procedure Code).

> In this respect, German national law now resembles European cartel law. As the ECJ pointed out in a judgement from 2010 (“Akzo/Nobel”, C-550/07 P) the Commission is allowed to seize correspondence between an in-house-lawyer and the management of the company, since the in-house-lawyer does not have the same level of independence as an external lawyer.

Completely different rules now apply to areas of the law other than criminal procedure and European cartel law. In-house lawyers can now invoke privilege (section 46c (1) of the Lawyers’ Code). That involves, for example, the right to refuse to give testimony in civil proceedings (section 383 (1) no. 6 of the Civil Procedure Code) and in certain...
circumstances to refuse to disclose documents that are requested by the court (section 142 (2) in conjunction with section 383 of the Civil Procedure Code).

What law determines whether privilege applies to a document or communication?
German law (including German private international law) will apply.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?
The legal situation with respect to natural persons is quite clear. A recent decision of the Federal Constitutional Court relating to the search of the Munich offices of a US law firm pertaining to Volkswagen’s internal investigation into the “diesel emissions scandal” has also shed some light on the situation of legal entities:

> Section 148 of the Criminal Procedure Code protects correspondence between a lawyer and his client regarding the defence from prosecution for a criminal or regulatory offence.

> Section 97 of the Criminal Procedure Code protects against seizure documents and communications which have been entrusted to a lawyer in his professional capacity and which remain in his possession. In mid-2018, the Federal Constitutional Court confirmed that this prohibition only applies in the context of relationships of trust between a person subject to professional confidentiality and the person charged with a criminal offence within a specific criminal investigation. It also held that the provision does not apply only to a person actually charged with a criminal offence (Beschuldigter), but also to a person in a position similar to that of a person charged with a criminal offence (beschuldigtenähnliche Stellung). In this context, the Federal Constitutional Court stated that the provision may also apply to legal entities, provided that, according to objective criteria, there is potential for the legal person to be subject to future investigation (for example, in the case of a suspected regulatory offence (Ordnungswidrigkeit)).

> Section 160a (1) of the Criminal Procedure Code states that investigative measures are inadmissible if they are directed against a lawyer and will potentially result in information about which the lawyer is entitled to refuse to testify. The prevailing opinion, however, is that this provision does not apply to the seizure of documents which is instead governed by sections 148, 96 of the Criminal Procedure Code. The Federal Constitutional Court did not object to this interpretation.

While the Federal Constitutional Court addressed some issues with regard to the scope of legal privilege in Germany, it missed the opportunity to make a strong statement in favour of a broad form of legal privilege. Crucially, however, this decision did not call into question the existing statutory protection of attorney-client communications, outlined above. As before, the interpretation and application of these protections will rest with the lower and regional courts. Although the pertinent case law does differ in some respects, the risk of law firms being searched will remain extremely low and limited to exceptional circumstances (such as the ones in the case before the Federal Constitutional Court in which the proceedings related to events at Audi AG, a subsidiary of the Volkswagen AG, which itself had not instructed the US law firm being searched). In particular, documents (for example, the findings of internal investigations) remain protected provided that they were prepared by defence counsel with a clear view to defending the company against an ongoing criminal or administrative investigation by the authorities.

In addition, the current grand coalition in Germany announced in early 2018 that it would be considering a reform of the statutory rules on search and seizure, with a particular focus on legal privilege and internal investigations. So far, no draft bill has been presented to parliament, so it remains to be seen whether the legislator will further strengthen attorney-client privilege. Until then, given all the uncertainties in this field of law, it is generally recommended that sensitive lawyer work products are retained by external counsel.
Hong Kong

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Is the concept of disclosure of documents recognised in this jurisdiction?
Yes. Disclosure is made by each party of those documents which are, or have been, in their possession, custody or control and which relate to the matters in question in the action. As part of its case management powers, the court has broad powers to limit the scope of disclosure of its own motion (without necessitating an application from any party) and to direct the manner of disclosure and the time for inspection of documents.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?
Yes. There are two categories of legal professional privilege recognised in Hong Kong: (i) legal advice privilege; and (ii) litigation privilege. Subject to one key difference regarding the scope of legal advice privilege (see below), legal professional privilege is recognised in Hong Kong in the same way as it is under English law.

As to the scope of legal advice privilege, in *Citic Pacific Limited v Secretary for Justice & Commissioner of Police* [2015] 4 HKLRD 20 ("Citic Pacific"), the Hong Kong Court of Appeal held that the definition of "client" should be interpreted more broadly than the narrow definition applied by the English Court of Appeal in *Three Rivers (No 5)*, discussed in the chapter on the law in the UK. The Court of Appeal also held that Hong Kong should adopt the “dominant purpose” test to set the proper limit for legal advice privilege. It is now clear that, provided a document comes into existence as part of the continuum of communication between a lawyer and a client (as more broadly interpreted) and with the sole or dominant purpose of obtaining legal advice, it should be protected by legal advice privilege. This could potentially include internal documents generated during the information gathering process at different levels of the corporate structure of a client (e.g., interview notes; factual documents; preparatory materials etc.), as well as documents prepared for and communications with, external legal advisers.

For the purposes of identifying what materials may be privileged, "document" includes everything on which evidence or information is recorded.

The Hong Kong Court of Appeal confirmed in *Super Worth International Ltd & Ors v Commissioner of the ICAC & Secretary for Justice* [2016] 1 HKLRD 281 ("Super Worth") that legal advice privilege does not extend to advice by non-lawyers.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?
An in-house lawyer's communications will be privileged as long as he is exercising professional skill as a lawyer, i.e. acting as a lawyer in a relevant legal context. Where he communicates with a party in an executive or general managerial capacity, the communication will not be privileged. This distinction between relevant legal context and acting in a managerial capacity only is in line with the established principles of legal advice privilege which were recently re-affirmed by the English High Court in *PAG v RBS* [2018] EWCA Civ 355.

What law determines whether privilege applies to a document or communication?
In Hong Kong, the general position is that the *lex fori* determines whether or not privilege applies to a document or communication (thus, Hong Kong law will apply in Hong Kong litigation). This principle was confirmed by the Court of Appeal in the *Super Worth* case.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?
Yes. Express provision is made for the preservation of privilege in respect of legal advice in various regulatory statutes. Where a lawyer-client communication is held at a client’s premises and meets the dominant purpose test it will generally be privileged from production to such regulatory and investigative bodies. For example, the Guidance

An in-house lawyer’s communications will be privileged as long as he is exercising professional skill as a lawyer.
Note on Cooperation with the Securities and Futures Commission ("SFC") updated in December 2017 ("Guidance Note") recognises professional privilege as a fundamental right and that a bona fide refusal to waive privilege will not be regarded as uncooperative conduct. However, the Guidance Note also provides that voluntarily waiving privilege to a document (even on a limited basis) may be recognised as cooperation, which the SFC may take into consideration in determining the outcome of an investigation.

There are, however, exceptions to the doctrine of privilege. For instance, under section 13 of the Prevention of Bribery Ordinance, the Commissioner for the Independent Commission Against Corruption may authorise an investigatory officer to seize all relevant accounts, books and documents relating to the matter under investigation. Section 15 of the same Ordinance excludes documents in the possession of a legal adviser from this requirement but documents held at a client’s premises may not fall within this category.

Further, following the Court of First Instance decision in Citic Pacific, privilege over documents provided to a regulatory authority for the purposes of its investigation will be waived only for the limited purpose of enabling the regulatory authority to conduct that investigation. However, to ensure that the waiver of privilege is indeed limited and otherwise continues to be maintained in respect of the relevant documents, that position should be expressly asserted at the time the relevant documents are provided to the regulatory authority.
India

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Is the concept of disclosure of documents recognised in this jurisdiction?
Yes. As a general rule, a party is bound to produce every document in its possession which is material or relevant to the case, unless it is protected by privilege.

The law also permits a party to file an application before the court directing the other party to produce a document in its custody if such a document contains information directly or indirectly relevant to the case in question. The court, however, has the discretion to allow or disallow production of such a document depending on its relevance to the case. The court can also, on its own motion, require a person to produce a document.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?
Yes. Legal privilege is attached to documents or communications made during the course of the professional employment of an advocate. The advocate is not permitted, at any point of time, to disclose details of any communication or document pertaining to the client without express consent from the client. Legal privilege of documents and communications between an advocate and client also extends to the interpreters, clerks and servants of the advocate.

Protection is given to what might constitute legal advice and not to any other communication from the advocate. Such protection is not granted to any communication to further an illegal objective or any fact observed by an advocate in the course of his employment, which shows that a crime or fraud has been committed since the commencement of his employment.

The common law principle of 'litigation privilege' i.e., privilege over documents prepared for the purpose of or in anticipation of litigation, is not yet recognised in India. This is because Indian law applies strictly to documents or communication between the client and advocate, whereas the principle of 'litigation privilege' can apply even outside of the client advocate relationship.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?
Communications between an in-house lawyer and officers, directors and employees of a company are not protected as privileged. Only legal advisers, and not ‘advocates’ registered under the Advocates Act 1961, are allowed to work under a contract of in-house employment. An in-house lawyer who is a salaried full-time employee of a company therefore ceases to be an advocate and will not benefit from legal privilege for so long as such employment continues.

What law determines whether privilege applies to a document or communication?
Sections 126 to 129 of the Indian Evidence Act 1872 determine whether privilege applies to a document or communication.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?
Yes, a person cannot be compelled to disclose to a court any confidential communication which has passed between him and his legal professional adviser. However, where a person voluntarily offers himself as a witness, he may be compelled to disclose such communication which appears necessary to be known to the court in order to explain the evidence which he has given.
As a practical matter, where the client’s premises are searched by regulatory and investigative bodies, such bodies typically seize all documents within the scope of the investigation being undertaken. This may be due to the limited time available during any such search. However, seizure of any privileged documents can be challenged by the client, as can disclosure or reliance on such documents in a court.

For instance, if a document is submitted to a regulatory or investigative body, the parties can claim confidentiality over the document on the grounds that it is privileged vis-a-vis the other parties and therefore should be kept confidential. However, clients should be aware of the practical risks involved in the disclosure to other parties or the press of privileged/confidential information, particularly potential reputational damage. It may be difficult to maintain confidentiality in such circumstances, despite the strong notional protection given to the doctrine of privilege.

“Seizure of any privileged documents can be challenged by the client, as can disclosure or reliance on such documents in a court.”
Indonesia

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Is the concept of disclosure of documents recognised in this jurisdiction?

Indonesian law does not in a strict sense recognise the concept of disclosure of documents. Parties will generally only disclose those documents which assist their case and on which they wish to rely. This will occur at the same time as the parties exchange formal pleadings setting out their positions on the facts, evidence and the applicable principles of law. However, the court may order the disclosure of a document on its own initiative (Article 138 of the Indonesian Code of Civil Procedure) or at the request of a party (Article 137 of the Indonesian Code of Civil Procedure). In criminal proceedings, the court may also order the disclosure of a document on its own initiative for evidence purposes (Art. 180 the Indonesian Code of Criminal Procedure).

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

The concept of the right to legal privilege (as commonly recognised in common law systems) is only partially recognised under Article 19 of the Indonesian Advocate Law, which provides that advocates/lawyers:

> must keep confidential and cannot be forced to reveal any confidential information which is obtained from their clients except where otherwise provided by law; and
> are entitled to the confidentiality of their relationship with clients, including protection of their documents and files from confiscation or inspections and protection from any surveillance on their electronic communication devices.

The same protection is also provided under Article 170 of the Indonesian Code of Criminal Procedure and Article 146 of the Indonesian Code of Civil Procedure. Persons entrusted with a duty of confidence by profession (e.g., lawyers) may request the court to release them from their obligation to testify in court proceedings as a witness and the court will assess such requests. However, an Indonesian advocate/lawyer is not entitled to refuse to provide any documents or testimony when they are required to do so by court order.

This right to legal privilege only relates to information revealed to lawyers in their professional capacity (Art. 19 of the Indonesian Advocate Law). The Professional Conduct Rules of the Bar forbid a lawyer from testifying to facts that were revealed to him/her during the course of the exercise of his/her profession.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

There is no specific law in Indonesia in relation to the in-house lawyer. Some in-house lawyers obtain a bar licence and in practice, to a certain extent, do represent the company before the court. However, in our view, the concept of the legal privilege under the Advocate Law does not apply to in-house lawyers. This is because in-house counsel would not, in our view, be considered to be an advocate for the purposes of the Advocate Law considering his/her association with his/her company, due to the employment relationship the in-house lawyer has with the company. Article 5 of the Indonesian Advocate Law requires a lawyer to be independent.

What law determines whether privilege applies to a document or communication?

Article 19 of the Indonesian Advocate Law states that lawyers must keep confidential and cannot be forced to reveal any and all confidential information which is obtained from their clients, except where otherwise provided by law.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, the legal privilege concept regulated under Article 19 of the Indonesian Advocate Code is respected and applied by the regulators. Documents or information covered by professional confidentiality (including information stored or communicated electronically) cannot be seized or used in evidence.
Italy

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Is the concept of disclosure of documents recognised in this jurisdiction?

No. There is no formal process of disclosure. The parties must produce their own bundle of exhibits on which they rely, which will be served on the other side and at court. In civil proceedings, any party can apply for a court order that the other party or a third party disclose any documents which contain relevant evidence of any important facts. Any such application must clearly identify:

> the document, production of which is requested; and

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

There are certain circumstances in which Italian law recognises a right of privilege from disclosure:

> lawyers cannot be obliged to give evidence of any information acquired by reason of their profession (article 200 of the Code of Criminal Procedure). In addition, lawyers cannot be obliged to testify before any court on facts and information of which they have gained knowledge in the course of the exercise of their professional activities, save for exceptional cases provided by law (article 6 of Law 247 of 31 December 2012);
> lawyers are subject to a duty of confidentiality and may not disclose to third parties facts and circumstances of which they have gained knowledge in the course of their professional activities, both as a general legal adviser and as a legal representative in court proceedings. Disciplinary sanctions may follow a breach of this duty (article 6 of Law 247 of 31 December 2012);
> conversations and communications by a lawyer, including conversations and communications with his clients, are privileged from disclosure (article 103, paragraph 5 of the Code of Criminal Procedure);
> correspondences between a lawyer and his client is privileged from disclosure provided that it clearly states on its face that it is "corrispondenza per ragioni di giustizia" ("correspondence for judicial reasons") and where there are insufficient grounds to believe that such correspondence represents a Corpus Delicti (article 103, paragraph 6 of the Code of Criminal Procedure); and
> documents relating to the defence held by any lawyer are privileged from disclosure unless they evidence a Corpus Delicti (article 103, paragraph 2 of the Code of Criminal Procedure).

The legal privilege is also recognised in some circumstances relating to anti-money laundering and competition law:

> Anti-money laundering. Lawyers cannot be obliged to disclose information acquired in the course of their professional activities, both as a general legal advisor and as a legal representative in court proceedings, and cannot be obliged to report suspected money laundering activities on the basis of such information (article 35, par. 5, Legislative Decree 231/2007 as modified by Legislative Decree 90/2017);
> Competition law. In cases of claims for compensation for damages due to a violation of Competition Law, conversations and communications by a lawyer, including those with his clients, are privileged from disclosure (article 3, par. 6, Legislative Decree 3/2017).
Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Under Italian law, legal privilege will apply to in-house counsel, provided that the counsel is a lawyer duly registered with the Bar Association and appointed by the defendant to act in the proceedings. However, as in-house lawyers are normally employees of a company and, as such, cannot be registered with the Bar Association, legal privilege does not usually apply to them. Certain major Italian corporations (mainly state-owned companies and public entities) have their own in-house lawyers registered in a special section of the Bar List. However, their standing in court is strictly limited. They are not normally authorised to act in criminal matters to which the company may be a party, but will be limited to matters such as debt collection. It is therefore highly disputable whether legal privilege would apply to them.

What law determines whether privilege applies to a document or communication?


Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, it is normally respected and applied. Before carrying out any seizure of documents which could represent a Corpus Delicti in a lawyer’s office, the competent authority must inform the Bar Association in order to allow its president or a member of the Bar Association to assist and verify the propriety of the seizure. Documents and information acquired in contravention of the right to legal privilege cannot be admitted in evidence by the Court (article 103, paragraph 7, and article 271 of the Code of Criminal Procedure). Where lawyer-client communications are not Corpus Delicti, they cannot be seized by the authorities so long as the document in question indicates:

> the full name of the client;
> the full name of the lawyer;
> the professional title of the lawyer;
> the signature of the sender; and
> the details of the proceedings to which the correspondence refers. The document must also be marked “corrispondenza per ragioni di giustizia”.

The document must also be marked “corrispondenza per ragioni di giustizia”.

Italy
Japan

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Is the concept of disclosure of documents recognised in this jurisdiction?

There is no concept of disclosure equivalent to that of the UK or US in Japan. Parties to civil cases will generally only produce documents on which they rely as evidence in their respective cases. However, a party may apply to the court for an order that the holder of specific documents (including the other party) disclose the documents.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Japan does not have any specific doctrine of legal professional privilege akin to the client-attorney privilege or the US work product doctrine. However, pursuant to Article 23 of the Lawyers’ Law (Law No. 205 of 1949), lawyers are subject to a confidentiality obligation which prohibits them from disclosing confidential information obtained in the course of the exercise of their professional activities. Therefore, Japanese law stipulates the following rules (although these rules do not apply to lawyers if their clients consent to such disclosure):

> in a civil case, even if a party to the case applies to the court for an order that a lawyer disclose a specific document possessed by that lawyer, when the document includes confidential information, the lawyer may refuse disclosure and the court may not order the lawyer to disclose it (Article 220 of the Code of Civil Procedure of Japan, Law No. 109 of 1996, as amended). In this context, the term “document” is defined in Article 231 of the Code of Civil Procedure as including anything in or on which information may be recorded, including tapes, photographs, electronic documents and emails;

> in a criminal case, a lawyer may refuse to permit the seizure of articles containing confidential information subject to the lawyers’ confidentiality obligation mentioned above (Article 105 of the Code of Criminal Procedure of Japan, Law No. 131 of 1948, as amended);

> in both civil and criminal cases, a lawyer may refuse to give testimony in court on the facts which are subject to the lawyer’s confidentiality obligation.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Japanese law does not recognise the difference between in-house and external lawyers. The rules set out above apply equally to in-house lawyers.

What law determines whether privilege applies to a document or communication?

The Code of Civil Procedure or the Code of Criminal Procedure will apply to cases proceeding in Japan.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

There are no concrete rules on this. However, pursuant to the lawyer’s confidentiality obligation mentioned above, in practice, it is not common for these bodies to seek the disclosure of lawyer-client communications possessed by the lawyer which include a client’s confidential information. No prohibition has been recognised on such bodies seizing lawyer-client communications held at the client’s premises.

Japanese law does not recognise the difference between in-house and external lawyers.
Luxembourg

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Is the concept of disclosure of documents recognised in this jurisdiction?

There is no formal framework for disclosure of documents. The parties to legal proceedings must disclose to each other and the court those documents on which they want to rely. The court may order the disclosure of a document on its own initiative or at the request of a party. In certain limited circumstances, a party may ask the court for an interim injunction to preserve or obtain disclosure of certain documents. Disclosure of documents held by third parties may also be obtained before proceedings have actually started. This may be ordered by a judge at the request of any interested party, by way of a motion or by summary proceedings. Strict conditions must be met to obtain such an order: the disclosure must be justified by a legitimate need to preserve evidence for a future legal action and must have a limited scope; the outcome of the contemplated action on the merits must depend on the evidence to be preserved; the reason to identify or preserve the evidence must be legitimate; the application must be legally admissible; and the request must be filed before any action on the merits is launched.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Legal privilege is recognised under the Luxembourg law of 8 August 1991 (as amended) on the legal profession (art. 35) by reference to the general protection of professional secrecy as provided by the Criminal Code (art. 458). The Luxembourg Bar Association Regulations of 9 January 2013 (art. 7.1) provide further guidance on legal privilege which applies to all members of the Luxembourg Bar (avocats), membership of which is compulsory for any person providing legal advice on a professional basis.

Legal privilege applies to all information concerning a client and his dealings that has been brought to the attention of a lawyer by the client or of which a lawyer gains knowledge during the course of his profession, no matter the source of the information. Legal privilege also applies to all documents and communications originating from a lawyer, both when providing advice and when representing the client in court. Most notably, the following types of information are covered under legal privilege rules:

> advice addressed from a lawyer to his client;  
> correspondence exchanged between a lawyer and his client, as well as correspondence between lawyers;  
> meeting notes, confidences and information generally received by a lawyer in the exercise of his profession;  
> names of clients and a lawyer’s professional calendar/diary; and  
> fee arrangements between a lawyer and his client.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

In-house lawyers do not benefit from legal privilege in Luxembourg. Indeed the Luxembourg law of 8 August 1991 (as amended) on the legal profession does not allow in-house counsel to become members of the Luxembourg Bar.

Professional secrecy rules applicable to certain sectors may give in-house lawyers working for companies in that sector certain rights or duties of confidentiality. The most notable example is the Luxembourg ‘bank secrecy’ rule which obliges employees working in the Luxembourg financial and insurance sectors to keep all information regarding their clients confidential.
What law determines whether privilege applies to a document or communication?
The following legal provisions provide the framework for legal privilege:
> article 35 of the Luxembourg law of 8 August 1991 (as amended) on the legal profession, and
> article 458 of the Luxembourg Criminal code, and
> article 7.1 of the Luxembourg Bar Association Regulations of 9 January 2013.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?
In civil, commercial and administrative matters, regulatory bodies (such as competition and financial authorities) have to respect professional confidentiality in their investigations. For example, competition authorities may seize documents pursuant to a court order but are also bound to abide by professional confidentiality. Where a party disagrees with a regulatory body on the confidential nature of a document, the practice is to put any disputed document in a sealed envelope pending resolution at a later stage.

As a matter of principle, in criminal, customs and tax matters, documents protected by professional confidentiality cannot be seized during searches conducted by the investigating magistrate. In this context, legal privilege applies to communications and documents exchanged between a lawyer and his client in relation to the facts that are subject to the investigation.

When an investigating magistrate authorises a search on the premises of a law firm, the search may only be carried out if the Chairman of the Bar Council or his representative is present, or has at least been informed and invited to participate. This condition is aimed at protecting professional secrecy (although the Chairman of the Bar Council only has the power to opine on the confidential nature of the documents examined, and not make a final ruling).
Netherlands

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Is the concept of disclosure of documents recognised in this jurisdiction?

Dutch law does not provide for a general duty to disclose comparable to the UK or US discovery rules. At the outset of the proceedings, parties will generally only disclose those documents which assist their case and on which they wish to rely. However, the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering (“DCCP”)) does contain a limited number of specific regulations which allow the court to order the disclosure of specific documents, either upon request of a party (article 162, 843a and 843b DCCP) or ex officio (article 22 and 162 DCCP).

In addition, article 3:15j of the Dutch Civil Code (Burgerlijk Wetboek) allows certain (restricted) parties to file a claim seeking the disclosure of any documents relating to an administration. Such a claim can be filed in separate (summary) proceedings before a district court. The provision may be invoked by e.g. creditors in an insolvency if they have a direct and sufficient interest.

The court can render an ex officio order pursuant to article 22 DCCP at any stage of the proceedings. If it considers it has serious grounds to do so, the relevant party can disregard such an order or inform the court that only the court is allowed to take note of the requested documents. If the court considers that such a refusal or restriction is not justified, it may draw any conclusion it deems appropriate. The same applies to a refusal to comply with an order pursuant to article 162 DCCP, which relates to the disclosure of books and documents which any of the parties are obliged to keep pursuant to the law (e.g. accounts). In the event that the examination of certain documents may damage a party’s physical or mental health or disproportionally harm a party’s personal life, the court can rule that the examination is limited to authorised persons only (article 22a DCCP). If, upon request of the court, a party fails to substantiate the purpose or essence of documents submitted by it, the court may disregard these documents (article 22b DCCP).

Pursuant to article 843a DCCP, a party can claim disclosure of documents from the party who has control of those documents only if (i) the claimant has a legitimate interest to review or receive the documents, (ii) the documents are sufficiently described (bepaald) and (iii) the documents relate to a legal relationship to which the claimant is a party. The party who has the documents can refuse disclosure if there are serious grounds to do so or if it can be reasonably assumed that the proper administration of justice is still safeguarded without disclosure of those documents. Furthermore, Article 843b DCCP provides that if a party has lost any evidence but a third party can provide evidence of fact or circumstance relating to it, the party can request that the evidence is produced by the third party in the proceedings.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Pursuant to Dutch law, a limited group of people who, by virtue of their status or by profession are obliged to observe confidentiality of all that is entrusted to them in their capacity (such as priests, doctors, lawyers and notaries), cannot be forced to reveal confidential information before a court. This right of non-disclosure only relates to information revealed to these persons in their professional capacity.

In the interest of the clients, article 11a of the Dutch Counsel Act (Advocatenwet) (“DCA”) explicitly sets a duty of confidentiality for all lawyers admitted to the Dutch Bar (advocaat) with regard to anything the lawyer becomes aware of in the performance of its profession, whether or not such knowledge would be confidential. A derivative right of legal professional privilege applies to staff employed by and/ or assisting the lawyer, such as paralegals and secretaries. Article 11a DCA acknowledges that a lawyer may be prosecuted pursuant to section 272 of the Dutch Penal Code (Wetboek van Strafrecht) if he/ she breaches his/her confidentiality duty. A duty of confidentiality for lawyers can also be found in the Rules of Professional Conduct 2018 (Gedragsregels 2018), which subjects violations of this duty to disciplinary law.
Under Dutch law there is no distinction between legal advice privilege and litigation privilege. Any client-attorney correspondence or materials will in principle be covered by privilege. Correspondence between Dutch lawyers will be confidential if agreed amongst the lawyers. However, in any event, correspondence between lawyers relating to settlement negotiations is confidential by nature and cannot be used in court, except where the client’s interests would require this. In such a case, prior consent by the other party’s lawyer or the President of the local Bar is required.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

The Court of Justice of the European Union (“CJEU”) ruled in the Akzo case (discussed further in the chapter on the European Union) – in short – that an in-house lawyer does not have the right to legal privilege as he/she would lack independence.

However, in a judgment from 2013 (ECLI:NL:HR:2013:BY6101), the Dutch Supreme Court (Hoge Raad) considered that the ruling from the CJEU only relates to European competition law. It does not prevent the Dutch courts from accepting (what was already practice in the Netherlands) that a Dutch qualified in-house lawyer can invoke privilege. In the Netherlands, certain rules exist which protect the independence of the in-house lawyer. On that basis, taking into account Dutch practice and its safeguards in respect of the practice of in-house lawyers, the Dutch Supreme Court considered that there is no reason to assume that privilege rights would not apply to in-house lawyers acting in their capacity as lawyer (advocaat) merely because they are in-house lawyers.

This is the only ruling the Dutch Supreme Court has rendered in this respect. Consequently, some questions remain unanswered, including how to distinguish between activities an in-house lawyer undertakes as an advocaat (privileged) and those he undertakes in another capacity (not privileged). In any event, it is important to consider the extent of a person’s privilege rights carefully when circulating sensitive documents within a company.

What law determines whether privilege applies to a document or communication?

This issue has not been decided in the Netherlands and the answer is therefore not unambiguous. It depends on whether legal privilege would fall under Dutch procedural law, i.e. lex fori, or under the substantive law of the case.

Is the doctrine of privilege respected and applied by regulatory and investigative bodies?

Documents covered by professional confidentiality and held in lawyers’ offices cannot be seized or used in evidence. Regulatory and other investigative bodies in general respect this principle. This prohibition also applies to all materials held at the client’s premises if these would fall under legal privilege if held at the lawyer’s offices. However, depending on the applicable rules of the regulatory and/or investigative body in question, this prohibition does not cover all lawyer-client communications.

For example, Article 12g of the Dutch Establishment Act of the Authority for Consumer and Markets provides that the communication between the lawyer and the organisation is confidential (e.g. internal documents prepared to seek or assess legal advice, advice as provided by the lawyer). This principle, however, does not automatically extend to original documents found at the premises of that organisation solely because the document had been sent to the lawyer. The fact that documents, which can be found at the offender, have been sent to the lawyer as well does not mean that these documents cannot be seized/used by the Authority for Consumer and Markets.

The Financial Intelligence Unit (“FIU”), which deals with prevention of money laundering and terrorist financing, does not have to follow the general rule. In certain circumstances the FIU is, in principle, allowed to seize privileged documents held in lawyers’ offices. Similar to other European jurisdictions, lawyers have a duty to report unusual and suspicious transactions to the FIU.

In certain circumstances the FIU is, in principle, allowed to seize privileged documents held in lawyers’ offices.
People’s Republic of China

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Is the concept of disclosure of documents recognised in this jurisdiction?

There is no equivalent concept of disclosure of documents recognised in China. However, if one party is able to establish that specific documents in support of its case are possessed by the other party, it could apply to the court for an order to disclose those specific documents. If the other party refuses to disclose without justification, the court would presume the genuineness of the content as asserted by the applicant.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

The concept of legal privilege is not recognised in China. Pursuant to the PRC Lawyers Law, a lawyer must keep confidential state and trade secrets of his clients which he acquires during his professional practice. If so requested by a client, a lawyer’s confidentiality obligations shall extend to information relating to the client or other related persons which the lawyer learns as a result of his professional practice. However, a lawyer’s confidentiality obligations do not extend to facts and information relating to impending or ongoing criminal acts of clients or other individuals which may damage state or public security, or cause other severe damage to personal safety. Generally, a lawyer’s confidentiality obligations to his clients will also exempt him from disclosing confidential information in court proceedings or pursuant to requests from a government authority.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

There is no concept of in-house lawyer privilege recognised under the PRC Law.
Poland

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Is the concept of disclosure of documents recognised in this jurisdiction?

There is no obligation on parties to litigation to disclose any documents other than those on which they intend to rely. However, the court may ask the parties to disclose documents proving facts that are essential for the court to decide on the merits. The parties may refuse to comply with the court’s request on the same grounds on which they could refuse to testify before the court.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

In Poland, there are two separate bodies representing the legal profession, each with its own independent governing body and regulations: advocates (advokaci) and legal advisers (radcowie prawni). The main difference between the two is that only legal advisors may work under a contract of employment while practising their profession. However, should they want to represent clients in criminal and tax-related criminal proceedings, their situation is the same as advocates – they cannot work under a contract of employment at all.

Both the Advocates Law 1982 and the Legal Advisers Law 1982, as amended, provide that advocates and legal advisers are obliged to keep confidential all material obtained in connection with giving legal advice. This obligation extends to all support staff working with a given advocate/legal adviser. All facts and information connected with rendering legal assistance are subject to protection; the format of the information is irrelevant.

There are certain exceptions to privilege concerning money laundering cases and certain limitations contained in particular in the Polish Criminal Procedure Code.

According to Polish anti-money laundering ("AML") regulations (in force since 13 July 2018), advocates and legal advisors are obliged to register, and subsequently report, certain transactions they conduct for their clients if those transactions could be considered to be for money laundering or terrorist financing purposes. However, this reporting obligation is discharged in the case of information gathered by an attorney in the course of, or in connection with, court proceedings, especially when acting as a defence attorney.

According to articles 180 and 226 of the Criminal Procedure Code, a court may release an advocate/legal adviser from his confidentiality obligation where a fact cannot be discovered by way of any other evidence and it is necessary for the proper administration of justice.

According to article 261 of the Civil Procedure Code, an advocate/legal adviser may refuse to answer questions if the answer may breach a significant professional confidentiality obligation. It is therefore the advocate/legal adviser who decides which information is significant in character and which is not.

Contrary to the exceptions existing in the AML law and the Polish Criminal Procedure Code, the Polish Civil Procedure Code and the Polish Code on Administrative Proceedings do not contain any limitations on professional confidentiality.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Legal advisers, but not advocates, are allowed to work under a contract of employment and these are the lawyers who will be employed in-house. However, in other respects, Polish law does not distinguish between external and internal lawyers. In particular, it does not differentiate between their obligations with respect to confidentiality – the rules on the treatment of confidential information are the same.

What law determines whether privilege applies to a document or communication?

Polish law applies to keep relevant communications confidential irrespective of the place in which the communication occurred.
Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

The rules relating to the doctrine of privilege are respected and applied by the courts and regulatory and other investigative bodies in Poland. However, due to the Polish state recently adopting a more stringent approach generally towards financial and tax-related crimes, it can be noted that there has been an increase in advocates and legal advisors being released from their confidentiality obligations in criminal cases. Moreover, the Polish Competition Authority, when undertaking official searches at business premises, currently interprets its competence with respect to privileged information in accordance with the EU Commission’s approach towards in-house lawyers (although at the time of writing, this approach still has no basis in the Polish legal system).
Portugal

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Is the concept of disclosure of documents recognised in this jurisdiction?

There is no stage in litigation proceedings at which each party is required to disclose all documents relevant to the facts in dispute; this does not exist in Portugal.

In certain circumstances, a party may try to obtain a compulsory disclosure of documents which are essential to its case and in the possession of the counterparty or even of third parties. In this case, the party shall identify the documents to be disclosed and shall specify the facts that it intends to prove with such documents. If the court considers that such facts are relevant to the proceedings, the party in possession of the documents is then notified to present them.

However, the party in possession of the documents may invoke legal professional privilege in order to refuse disclosing the documents. In those circumstances, the court may review the legal privilege invoked and deem it legitimate (in which case only a higher court may order the disclosure, after carefully balancing the interests at stake) or illegitimate (and order the documents to be disclosed).

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Under Portuguese Law, legal professional privilege is considerably broad. It applies both to general legal advice and to representation in litigation proceedings and covers all facts which a lawyer ("advogado", and a member of the Portuguese Bar) becomes aware of during the course and as a result of the exercise of his/her legal profession.

In particular, legal professional privilege covers information communicated to the lawyer or its agents (such as the personnel with whom he collaborates, for example, secretaries etc.) by:

> the client;
> a third party under instructions of the client;
> another lawyer with whom he collaborates;
> a co-party or its lawyers; and
> a counterparty or its lawyers.

As the information itself is covered by legal privilege, any communications (e.g. letters, emails, memos etc.), documents (meeting notes etc.) or other type of material directly or indirectly related with such facts are also covered by legal professional privilege.

Therefore, the way in which the information was conveyed is not important. As long as it was transmitted during the course and as a result of the exercise of the legal profession, the information is covered by legal professional privilege.

In addition, communications and documents related to settlement negotiations in the context of litigation proceedings are expressly deemed to be privileged under Portuguese Law. This rule is interpreted as granting a stricter duty of secrecy regarding negotiations where lawyers are involved, and this stricter duty has an impact in the assessment to be made regarding situations of waiver of privilege, as described below.

A lawyer in Portugal may waive his/her duty of confidentiality if it is absolutely essential to preserve the lawyer’s or the client’s reputation, their legal rights and legitimate interests, and provided that prior authorisation from the relevant entities of the Bar Association is obtained.

Any communications disclosed in breach of legal privilege will not be acceptable as evidence in court proceedings.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

The legal provisions concerning legal professional privilege are equally applicable to in-house lawyers for as long as they are registered as “advogados” in the Portuguese Bar Association.

Legal professional privilege also extends to those who collaborate with the lawyer in the course of his/her professional activity.
What law determines whether privilege applies to a document or communication?

The legal privilege provisions set out by Portuguese law are applicable to all lawyers registered in the Portuguese Bar Association in the exercise of their legal profession, both in Portugal and abroad. Likewise, the aforementioned rules also apply to European Union lawyers who exercise their profession in Portuguese territory, as long as they are members of a foreign Bar Association (articles 2.2 and 199 of the Bar Association Professional Conduct Rules, established by Law 145/2015 of 9 September 2015).

While foreign lawyers exercising their profession in foreign territories are not bound by Portuguese law provisions, if a document is produced by a foreign lawyer in a foreign territory at the request of a Portuguese lawyer, Portuguese provisions will be applicable.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Legal professional privilege is usually respected by regulatory and other investigative bodies.

Regarding criminal investigations and investigations carried out by regulatory authorities, the investigative bodies always require judicial authorisation before searching premises and seizing documents.

When the search is carried out in a lawyer’s office, it must be led by the judge and the presence of a Portuguese Bar Association member is always required. The investigative bodies may interview lawyers and request disclosure of information or documents relevant to the inquiry. However, it is not permissible to seize documents covered by professional secrecy, unless they themselves form part of a criminal offence.

Where searches are conducted at a client’s premises, such bodies are unable to seize documents protected by privilege (i.e. lawyer-client communications). However, it is advisable to have the enforcement of this prohibition supervised by a lawyer.

It should be noted that some investigation authorities, in the context of regulatory investigations (such as competition law infringements), understand that they can review the context of attorney-client communications that are found on the clients’ premises during dawn raids conducted by those authorities. This view has already been challenged in Court, but there are still no known decisions on this regard.

If a lawyer files a complaint due to breach of legal professional privilege during a search, the judge must interrupt the investigations of the documents, seal the documents and wait for the President of a Court of Appeal to decide whether or not such documents can be accessed.

In criminal proceedings, legal professional privilege may be waived by a judge from a higher court, upon application by the Portuguese Bar Association (article 135 of the Criminal Procedure Code), when the court believes that such waiver is essential for the discovery of truth.

In civil proceedings, legal professional privilege may also be waived in the same terms but case law has considered this to be an exceptional measure.
Russia

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Is the concept of disclosure of documents recognised in this jurisdiction?

No. However, if the court requires a party to disclose certain documents, it is obliged to do so.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Russian legislation recognises as privileged any information/communication between an attorney-at-law and his client, if it is produced in the course of the provision of legal assistance by the attorney-at-law to the client. An attorney-at-law 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. In contrast, a lawyer without the status of “attorney-at-law” must disclose any information requested by an authorised regulatory or investigative state body. All types of documentary material are covered, including hard copies and electronic form.

An “attorney-at-law” is a lawyer who has obtained that status pursuant to law. Attorneys-at-law are independent professional legal advisors with at least two years’ post-graduation experience and who have passed additional exams. They may not enter into contracts of employment except for scientific, training and creative work or positions in central or regional government or the civil service.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

This concept is not recognised in Russia. If requested by the court, an in-house counsel has to disclose the requested information.

What law determines whether privilege applies to a document or communication?


Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Communications and documents protected by attorney-at-law privilege remain protected and regulatory and investigative bodies generally respect this principle.

In a Resolution dated 17 December 2015 No. 33-P the Constitutional Court of Russia clarified that attorney-at-law privilege applies only to the documents and materials obtained by an attorney-at-law in the course of providing legal services to a client provided they do not relate to the commission of any criminal offence. It does not apply to materials which are:

> directly connected with the criminal violation by the attorney-at-law or his client committed in the course of the particular case;
> connected with crimes committed by third parties; or
> instruments of crime or materials possession of which is restricted in Russia.

Specific mechanisms in the Criminal Procedure Code allow for an attorney to be subject to searches and examinations, but these are only possible under a special court order with limited powers in relation to the seizure of materials and documents. Information, objects and documents obtained during such investigative actions can be used as prosecution evidence but only in cases which do not relate to legal services provided by the attorney to his or her clients. However, the same exceptions listed above also apply here, which means that protection does not extend to instruments of crime, nor to items which are prohibited from circulation or the circulation of which is limited under Russian Federation legislation.

However, as noted, a lawyer without the status of attorney-at-law will have to comply with a request to provide information from an authorised regulatory or investigative state body.

Communications and document provided by attorney-at-law privilege remain protected and regulatory and investigative bodies generally respect this principle.
Singapore

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Is the concept of disclosure of documents recognised in this jurisdiction?

Yes. Subject to privilege (see below), parties are obliged by appropriate order of the court to disclose certain categories of documents which are or have been in their possession, custody or power, including documents upon which they rely or, documents which adversely affect their or another party’s case. In October 2018, the Ministry of Law and Supreme Court launched a consultation on proposed dramatic reforms to Singapore civil procedure, which may significantly reshape the scope of disclosure in proceedings; however, we expect that disclosure will remain a significant feature of civil proceedings.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Legal professional privilege

Legal professional privilege (recognised in two forms – legal advice privilege and litigation privilege) exists under the Evidence Act (Cap.97) (the “Act”) sections 128(1), 128A, 129 and 131, and also the common law to the extent that it is not inconsistent with the Act.

Documents which can be covered by legal professional privilege include a document in writing as well as any plan, drawing, photograph, film, marks and any device on which sounds, visual images or other data are recorded.

Legal advice privilege

Section 128(1) of the Act imposes a duty on an advocate or solicitor (that is, a lawyer admitted to the Singapore Bar to practice law in Singapore) not to disclose, without his client’s consent (i) any communication made by or on behalf of the client to the advocate or solicitor in the course of and for the purpose of his employment as advocate or solicitor, (ii) the contents of any document obtained during the course of his employment, or (iii) advice given to the client in the course of and for the purpose of his employment. Section 131 of the Act provides the client with a corresponding right to refuse to disclose communications with his legal professional advisers, unless he agrees to appear as a witness in court, in which case he may be compelled to disclose any such communications as may appear to the court to be necessary in order to explain any evidence he has given.

Common law provides that all letters and other communications passing between a party and its solicitor are privileged from production if they are confidential and written to or by the solicitor in his professional capacity, for the purpose of obtaining legal advice or assistance. Communications between a client and his foreign legal advisor are covered by the common law.

Generally, communications for the purpose of obtaining business advice, as opposed to legal advice, or for any other purpose, are not privileged.

The privilege under section 128 would not extend to the following circumstances:

> any such communication made in furtherance of any illegal purpose; and
> any fact observed by any advocate or solicitor in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

Litigation privilege

Under the common law, legal professional privilege extends to communications and documents made for the dominant purpose of litigation where there is a reasonable prospect of litigation and applies to communications between lawyers and third parties regardless of whether the third parties were the client’s agents.

The doctrine of litigation privilege is also contemplated by Section 131 of the Act (see above).
Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Yes. Section 128A of the Act further provides that legal counsel in an entity will have the benefit of legal professional privilege when they act in their capacity as legal advisors and in the context of rendering legal advice, regardless of whether they hold a practising certificate.

However, the privilege does not extend to the following circumstances:

- communications made in furtherance of any illegal purpose;
- facts observed by any legal counsel in an entity in the course of his employment as legal counsel, showing that any crime or fraud has been committed since the commencement of his employment as legal counsel;
- communications made to the legal counsel which were not made for the purpose of seeking his legal advice; or
- any document with which the legal counsel became acquainted otherwise than in the course of and for the purpose of seeking his legal advice.

The persons who fall within the category of “legal counsel” are persons who are employed by an entity to provide legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes. These persons need not necessarily be licensed to practise law in Singapore or any other jurisdiction and include public officers in the Singapore Legal Service.

Usefully, Section 128A of the Evidence Act recognises the common reality that a legal counsel of a multi-company business may often give advice to other group companies who are not their formal employer.

What law determines whether privilege applies to a document or communication?

Insofar as proceedings before Singapore courts and in Singapore-seated arbitrations are concerned, the applicable law would be Singapore law.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

The doctrine of privilege is respected and applied by regulatory and other investigative bodies. Various Singapore statutes take account of legal professional privilege by allowing lawyers and persons under investigation to refrain from disclosing privileged information and documents in certain circumstances. These include securities and futures and competition laws. Appropriate documents will be privileged regardless of whether they are held at the client’s premises or the lawyer’s.

There is, however, a more open question in respect of the ability to withhold on privilege grounds disclosure of documents prepared with the assistance of lawyers but which were not for the purposes of legal advice and/or litigation. These may include notes of interviews conducted by lawyers and internal fact-finding reports generated in the course of real or anticipated regulatory investigations. While it may be arguable on the basis of common law that privilege should apply to these documents, our experience suggests that this view is not always shared by regulators who may yet insist on disclosure.
South Africa

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Is the concept of disclosure of documents recognised in this jurisdiction?
Yes. In action and arbitration proceedings, after close of pleadings, all parties to the proceedings are required to disclose all documents which may be relevant to the matters in dispute. There is an especial obligation to disclose documents which are potentially adverse to one’s case / defence.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?
Yes. South African law recognises legal advice privilege (attorney / client privilege), litigation privilege and settlement (or ‘without prejudice’) privilege. Privilege is recognised as a fundamental right (and not simply a rule of evidence) and may, unless waived, forgone or statutorily excluded, operate against the whole world.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?
This issue has not finally been settled in South African jurisprudence. There is textbook and High Court authority recognising the existence of privilege in these circumstances. Such recognition is in accordance with the general principles and rationale underpinning privilege. In our view, the privilege should apply in cases where the in-house legal adviser performs (independent) advisory functions akin to those of an attorney in private practice.

What law determines whether privilege applies to a document or communication?
Privilege is a principle of South African substantive common law. It is also a well-recognised exclusionary principle of the South African law of evidence. To the extent that privilege is dealt with under the law of evidence, it is important to note that this is likely to be governed by English law as it stood on 30 May 1961, in accordance with section 42 of the Civil Proceedings Evidence Act 1965.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?
As a general rule, yes. Regulatory and investigative bodies are subject to the requirements of the rule of law and the Constitution of the Republic of South Africa, including adherence to the requirement that privileged material is not subject to production. If, however, such material is provided or disclosed voluntarily or inadvertently to investigating authorities, either by the holder of the privilege or a third party, the question will arise as to whether the privilege was lost or waived through that provision or disclosure (or some antecedent conduct). Whether loss or waiver is established is a matter of fact to be assessed on a case by case basis. A loss or waiver of rights is, however, not easily imputed or presumed in South African law and ordinarily requires clear proof of an intention to abandon rights.

It is not settled in South African case law whether the preparatory processes in responding to a regulatory investigation will be covered by litigation privilege. There is, however, no reason in principle why litigation privilege should not extend to such circumstances insofar as, at the stage of the relevant communication, litigation is contemplated as a reasonable possibility, and the regulatory processes are precursors to such litigation. Of course, legal advice privilege will continue to apply to advice and other relevant communications as between a legal practitioner and client, regardless of whether the communications are related to litigation.

A loss or waiver of rights is not easily imputed or presumed in South African law and ordinarily requires clear proof of an intention to abandon rights.
Spain

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Is the concept of disclosure of documents recognised in this jurisdiction?

No. However, the court will require that a party provides evidence of its case. Disclosure will therefore be made of the documents that a party intends to use to support its own case, so that an opponent is able to prepare its defence.

Articles 256 et seq. of the Civil Procedure Act stipulate that a party can ask a judge to order the opposing party, or even a third party, to produce a document in its possession. The document must be of considerable importance to the case and the requesting party will have to be able to identify the document in question to a fairly precise degree. The requesting party will also have to post a bond to cover both the costs and damages that exhibition may cause to the other party.

The court will allow the course of action if it finds that the proceedings are in accordance with the object pursued and that a justified legitimate interest exists in the request for disclosure of documents.

Spanish courts have tended to show a greater willingness to grant requests for specific disclosure. This is probably due to the influence of common law jurisdictions. Nevertheless, such orders have been granted only in exceptional circumstances and remain contrary to common practice.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Lawyers (abogados, for whom membership of the Bar is obligatory) are obliged by Article 542 of the Judicial Power Act to keep confidential all facts and matters which come to their knowledge through the conduct of their professional obligations. This is reinforced by the Spanish Professional Conduct Code (November 2002) and General Statute for Spanish Lawyers 658/2001 in its Article 32, which impose on lawyers the duty not to disclose facts and documents that have come into their possession as a result of their professional activities.

Professional confidentiality is a principal right and duty of lawyers. The client is the beneficiary of this duty. It is based on a relationship of trust between the lawyer and the client and on the obligation to protect the client’s privacy. Privilege may attach to all information that the client has provided to the lawyer, and all information in the lawyer’s possession due to the conduct of their professional activities. It does not matter in what format the information is recorded. Privilege also relates to communications with the client and means lawyers cannot be forced to release certain information.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

Many lawyers are employed in-house and advise their employers in legal matters. If the lawyer is registered with the Spanish Bar Association (Colegio de Abogados), they have the same rights and duties as any other lawyer.

Spanish law imposes the same obligation of maintaining professional secrecy on both internal and external lawyers. In fact, the independence of the in-house lawyer is crucial and an essential requirement for adding value to their work for the company.

However, there is an ongoing discussion on the legislative reform of the General Tax Law that the Spanish Ministry of Finance aims to undertake in order to transpose a Directive on cross-border transactions. The draft bill discusses legal privilege of lawyers and tax advisors, based on the idea that in-house lawyers should not have legal privilege. Nevertheless, the approach proposed under the draft bill stresses the importance of legal privilege of both internal and external lawyers to ensure legal certainty and the right of defence for citizens and companies. In this context, therefore, the legal controversy about whether or not in-house lawyers have the right to legal privilege is again alive and well.

In recent years there have been several legislative developments which erode the right to confidentiality in the fields of tax and financial matters.
What law determines whether privilege applies to a document or communication?

Privilege is determined by the law that governs the relationship between the lawyer and the client. However, all lawyers registered in Spain must observe the duty to maintain professional confidentiality in their activities in and outside Spain.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Legal provisions on privilege must be respected by regulatory and other investigative bodies in their conduct, insofar as they constitute current legislation. These bodies may only seize documents if they have a court order authorising them to do so or the party under investigation consents. Court orders are based on legal depositions authorising the disclosure of information protected by professional confidentiality obligations in these cases.

Spanish anti-trust authorities have begun looking at the position under EC law in antitrust investigations, in which communications from internal lawyers are not protected from disclosure. So far, this development has been restricted to antitrust investigations, and remains at odds with the position with regard to in-house legal communications, which are otherwise protected under Spanish law.

In recent years there have been several legislative developments which erode the right to confidentiality in the fields of tax and financial matters, such as money laundering and competition investigations.

In the field of financial regulation, in accordance with the Spanish Prevention of Money Laundering and Terrorist Financing Act, an exception exists to the application of legal professional privilege. When involved in the conception or carrying out of, or advising on, certain types of financial transactions, lawyers are subject to the following obligations (amongst others) under Article 2.1.h) of the above-mentioned Act:

- To notify Spain’s financial intelligence unit, the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC) of any event or transaction, even if merely tentative, if they have evidence or are certain that the aforementioned event or transaction is connected with money laundering or terrorist financing; and
- To provide all documents and information requested by the SEPBLAC in the exercise of its duties.

The above obligations do not apply when lawyers receive information from or about their clients as part of determining their client’s position in legal proceedings or in relation to those proceedings. This obligation applies when advising at the start of proceedings and on how to avoid certain proceedings.
Sweden

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Is the concept of disclosure of documents recognised in this jurisdiction?

There is no concept of disclosure of documents under Swedish law equivalent to that in the UK. There is no general obligation for a party to produce all documents under its control that are relevant to the dispute. During the preparation for trial, however, each party shall submit all documents they wish to present as evidence.

Furthermore, a party shall, upon request of the counterparty, indicate what additional items of written evidence are in its possession. Also, the court can, upon request, order a party (as well as non-party holders of documents) to produce specified documents, or groups of documents, which it holds that are believed to be of importance as evidence.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

Yes, although it is limited in scope and depends on the identity of the lawyer. The scarcity of case law and legislative commentary makes it difficult to reach firm conclusions. Swedish advokats (that is, members of the Swedish Bar Association) and their assistants have a right to legal privilege which protects all confidential information gained by them in the provision of legal services generally, as well as any related knowledge of the advokat / assistant. Legal privilege available to non-advocate trial lawyers is limited to protecting only confidential client communications entrusted to the lawyer for the purposes of the litigation.

Irrespective of the medium in which information is recorded, it may be privileged. Legal privilege applies to relevant information and documents that are held by the client’s advokat / assistant or his non-advocate trial lawyer and, as regards legal advice by such counsel concerning a litigation, by the client itself.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

No. Legal privilege is according to the general rule only recognised for advokats that are employed by a law firm. Therefore, in-house lawyers will not qualify for lawyer privilege. If in-house counsel act as trial representatives, they may to some extent be protected by the more limited legal privilege for non-advocate trial lawyers with regard to communications made in the furtherance of litigation.

What law determines whether privilege applies to a document or communication?

The Swedish rules on legal privilege are contained in the Swedish Code of Judicial Procedure and the rules of the Swedish Bar Association.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, in general it is. There are instances, however, of Swedish tax authorities demanding confidential (and possibly privileged) information from advokats, including client names and details of work done for the client, when determining the taxes payable by the advokat.

Sweden
Switzerland

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**Is the concept of disclosure of documents recognised?**

Swiss law does not provide for a duty to disclose documents in pre-trial discovery proceedings such as in certain common law jurisdictions. Moreover, the document production within proceedings extends only to documents which are specifically described and which are *prima facie* suitable to prove alleged and disputed facts.

Within civil proceedings, article 160 para. 1 lit. b of the Swiss Civil Procedure Code (“CPC”) grants each party the right to request the court to order the counterparty or a third party to produce documents, provided the following conditions are met:

- the counterparty or the third party is in possession of the documents or these can be easily obtained;
- the documents are described in sufficient detail (no *fishing expeditions*);
- the documents are relevant insofar as they are *prima facie* suitable to prove a material alleged and disputed fact.

Before *lis pendens*, article 158 CPC provides for a precautionary taking of evidence by the court in summary proceedings (interim measure). These proceedings are applicable if either granted by statutory law or if the applicant is able to credibly show that the evidence in question is at risk or that he has a legitimate interest. According to the Swiss Federal Supreme Court (“FSC”), such legitimate interest is specifically not given if the applicant only wants to assess his chances of success in potential ordinary proceedings (and only alleges a respective interest). Rather, the applicant has to make credible that there is a specific set of facts, which – if proven – would lead to a claim against the counterparty, and that these specific facts can be proven by the evidence to be taken precautionarily. Only then does the clarification of its own chances in the following ordinary proceedings constitute a legitimate interest.

The CPC provides for certain grounds on which the counterparty or the third party may refuse the production of documents, e.g. – as discussed below – legal professional privilege (articles 163, 165 and 166 CPC). The court’s order to produce documents is not enforced against the counterparty, but an unjustifiable refusal will be taken into consideration to the counterparty’s detriment in the assessment of the evidence. In contrast, the court order is enforceable against third parties by means of fines and compulsory measures.

**Is a right to privilege recognised? If so, what types of document may be privileged?**

Yes. The legal professional privilege is based on various legal sources (civil law, criminal law, professional law), the underlying idea being that a relationship of unconditional trust between client and lawyer is fundamental to the functioning of the legal profession as well as to the functioning of the judicial system.

- The legal professional privilege is specifically laid out in article 13 of the Swiss Federal Law on Lawyers’ Free Circulation (“LLCA”). According to this provision, the lawyer is subject to legal professional privilege for an unlimited period of time vis-à-vis any person for all matters entrusted by his client. Even if a lawyer is relieved from their obligation of professional secrecy by the competent cantonal Supervisory Commission (within special proceedings, in which the client is also heard), this does not oblige him to disclose privileged information.

- According to article 321 of the Swiss Criminal Code (“SCC”), it is criminally punishable for a lawyer to disclose a secret entrusted to him by his client.

- Furthermore, when entering into a contractual relationship with his client, this contract in principle submits to the rules of agency contracts. According to these rules, the agent (lawyer) owes a duty of allegiance which *inter alia* contains a duty of discretion (article 398 para. 2 of the Swiss Code of Obligations, “CO”).

- Finally, the CPC (article 163 para. 1 litera b) as well as the Swiss Criminal Procedure Code (CrimPC, article 171) provide for a lawyer’s right to refuse involvement in civil or criminal proceedings (i.e. a right to refuse disclosure of legally privileged documents), provided certain conditions are met.
It is crucial to distinguish activities (and documents resulting thereof) that are protected by this legal professional privilege and those that do not benefit from such protection.

Only lawyers’ “typical activities” benefit from the protection granted by legal professional privilege. These traditionally consist of representing clients before jurisdictional and administrative authorities as well as providing legal advice. In the scope of the lawyer’s typical activities, the protection of facts and documents entrusted to the lawyer derives from the particular relationship of trust between the client and the lawyer; the client must have confidence in being able to trust the lawyer completely. However, the FSC ruled that what was said during a public hearing is not considered confidential, irrespective of whether an audience was present or not.

Whilst it is unanimously accepted that representation in court proceedings is an activity covered by legal professional privilege, the assessment is more delicate when the activities of the lawyer are of an advisory nature (i.e. corporate or contractual advice). All of the activities that are not linked to the lawyer’s mandate *stricto sensu*, such as private, political, commercial or social activities, are not covered by legal professional privilege. According to case law, the following activities are not covered by legal professional privilege: mandate as a board member of a company, asset management for the client and mandate as a trustee. On the other hand, if the lawyer acts as a testamentary executor in the sense of article 517 of the Swiss Civil Code (“CC”), this is covered by legal professional privilege.

In a milestone decision dated 20 September 2016 (1B_85/2016), the FSC ruled that the legal privilege regarding work products from outside counsel no longer applied to a bank which *in effect delegated to external counsel its compliance-related obligations under the Swiss Anti-Money Laundering Act (“AMLA”) and its relevant ordinances. The reasoning of the court was that compliance (including the monitoring/controlling and documenting thereof) under the AMLA is a general obligation of the bank and cannot be brought under the protection of attorney-client privilege if outsourced to external counsel, as this is not part of typical legal counsel work.

What law determines whether privilege applies to a document or communication?

Swiss Law, in particular the statutes referenced in question two above.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

Yes, the legal provisions on legal professional privilege are not only respected in court proceedings and criminal investigations, but also in administrative procedures conducted by regulatory and other investigative bodies.

The cooperation obligation in such administrative procedures does not extend to the handover of items and documents used in communications between a party and his or her lawyer, provided the lawyer is entitled to represent clients before the Swiss courts in accordance with the LLCA (article 13 para. 1bis Administrative Procedure Act, “APA”). Equally, such lawyers may in general refuse to testify before such regulatory and other investigative bodies (article 16 para 1 APA in connection with article 42 para 1 and 3 of the Federal Act on Federal Civil Procedure).
Thailand

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Is the concept of disclosure of documents recognised in this jurisdiction?
In civil proceedings there is no general discovery process. Any party to proceedings intending to rely upon any document as evidence in support of its allegations or contentions must deliver a copy to the court and to the opposing party. In criminal and certain regulatory proceedings, the police and regulators have wide powers to demand production of evidence.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?
Yes. Under the Civil Procedure Code section 92 and the Criminal Procedure Code section 231, privilege will be available to prevent the disclosure by a lawyer of any confidential document or fact that was entrusted or imparted by a party or witness to the lawyer in his capacity as a lawyer. The privilege belongs to the client or witness, who may give permission for the disclosure. For privilege to apply, the information must relate to legal professional advice or representation. The privilege attaches to communications which include or refer to documents or facts provided in confidence to the lawyer for this purpose. Communications between lawyer and client which do not fall into this category are not privileged. The relevant law does not so state, but is in practice generally applied to permit a party to proceedings to refuse to disclose advice or other confidential communications from his lawyer in connection with such proceedings.

Note also that, under the Penal Code, disclosure of confidential information by a lawyer may be an offence. Furthermore, under the regulations governing professional ethics of lawyers, disclosure of clients’ confidential information by a licensed lawyer without the clients’ consent may also be subject to certain sanctions, e.g. probation or suspension of practice.

“Document” is defined as any paper or other material used for expressing information, by way of printing, photography or other means.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?
No different treatment is accorded whether or not the lawyer is “in-house”.

What law determines whether privilege applies to a document or communication?
There is no law that governs when a privileged relationship starts. Consequently, it is generally held to commence at the time of the first communication. Questions of privilege and the admissibility of evidence are procedural/evidential matters and, if raised in a Thai court, would be governed by Thai law under the relevant Civil or Criminal Procedural Code. Thai law will apply in these circumstances to any documents in Thailand, including those created abroad.

Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?
The express provisions on privilege only apply in court proceedings or criminal investigations. However, while the law is unclear and practice is inconsistent, arguably the provisions on privilege also apply in relation to regulatory or other proceedings, by analogy. Further, under the Civil Procedure Code section 92 and Criminal Procedure Code section 231, regulatory and other investigative bodies are prevented from seizing lawyer-client communications from the client’s premises.
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Is the concept of disclosure of documents recognised in this jurisdiction?
Yes. Generally in commercial cases, the courts have broad powers to consider the extent of disclosure appropriate to the task in hand, and to make orders accordingly. Parties to litigation in the courts should, therefore, expect to be placed under an obligation to disclose documents (although the precise extent of this may vary from case to case), including documents which may not be helpful to its case. On 1 January 2019, a new disclosure pilot scheme came into force in the Business and Property Courts of England and Wales. This places an even greater onus on the parties to agree the appropriate scope of disclosure, and even more flexibility in respect of the court’s powers. The pilot scheme also places the parties under certain duties, including a duty to disclose “known adverse documents” once proceedings are commenced.

Does the jurisdiction recognise a right to legal privilege?
Yes. In the UK, privilege is a substantive right which allows a party to withhold documents in circumstances in which they are otherwise disclosable. Documents that are protected by legal privilege are not disclosable to an opposing party in court litigation.

Two of the most significant authorities on privilege in English law are the Court of Appeal’s decision in Three Rivers No. 5 [2003] QB 1556 and the House of Lords’ decision in Three Rivers No. 6 [2004] UKHL 48. Legal professional privilege comprises two principal types:

(i) 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 a relevant legal context. The “client” is narrowly defined for these purposes and will only include those individuals specifically authorised to communicate with the lawyer. Communications between the lawyer and the client’s other employees, or third parties, are not covered by this privilege.

(ii) Litigation privilege – this arises once litigation is in progress or is reasonably contemplated. In such circumstances, confidential communications between a client, or its lawyer, and a third party for the purpose of obtaining information or advice in connection with that litigation are privileged, but only if those communications came into existence for the dominant purpose of conducting the litigation.

A “document” includes anything on or in which information is recorded and documents which evidence privileged communications will also attract privilege themselves.

Is the concept of in-house lawyer privilege recognised?
Yes. In-house lawyers are treated in the same way as outside counsel. Privilege will be granted to internal communications made by the lawyer when acting in a legal capacity and if the communication was created for the purposes of obtaining or giving legal advice, or made with a view to litigation.

What law determines whether privilege applies to a document or communication?
The law of England and Wales will apply to determine whether a document is privileged. So far as a party is obliged to disclose documents in litigation, it must disclose those which are or have been within its control. Generally, a party has “control” of a document if it has or had physical possession of it, has or had a right to physical possession of it, or has or had a right to inspect or copy it, no matter where the document is located. Privilege impacts on the obligation to disclose that document.

Courts have broad powers to consider the extent of disclosure appropriate to the task in hand, and to make orders accordingly.
Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

As described below, UK regulatory and investigative bodies are frequently required to respect legal professional privilege. It should however be noted at the outset that the extent to which documents created in an investigatory context attract legal professional privilege can be a highly fact-sensitive issue and one which has seen repeated judicial consideration in recent years. Companies potentially faced with such questions may well wish to seek specialist legal advice.

Financial regulators

The Financial Services and Markets Act 2000 (“FSMA”) recognises a limited form of privilege in the context of a regulatory investigation, which applies where documents are required by the Financial Conduct Authority (“FCA”) or Prudential Regulation Authority (“PRA”). A regulated firm is entitled, under s.413 FSMA, to withhold production of a “protected item”, unless that item is held with the intention of furthering a criminal purpose.

The definition of protected item essentially follows the tests for legal advice and litigation privilege at common law, although there are some differences in scope. There may also be circumstances during a regulatory investigation in which common law privilege will apply.

A regulated firm or individual can, under English law, disclose a copy of a privileged document to the FCA or PRA without waiving privilege in it against the rest of the world.

Serious Fraud Office (“SFO”)

The SFO, which investigates serious and complex fraud and financial crime in the UK, has the power to compel disclosure of documents and information from a company or person under investigation or any other person it believes has relevant information (section 2 Criminal Justice Act 1987 (“CJA”)), other than information or documents over which a claim to legal professional privilege could be made in court proceedings. In practice, however, the waiver of any right to privilege by a company under investigation may be seen, or even required, as a sign of cooperation by the SFO, particularly in the context of a decision by the SFO whether or not to offer the company a deferred prosecution agreement to settle alleged corporate wrongdoing.

Competition proceedings

In the context of competition law, section 30 of the Competition Act 1998 provides that persons will not be required, under any provision of Part I of the Competition Act, to produce or disclose privileged communications as defined therein.

“... A regulated firm or individual can, under English law, disclose a copy of a privileged document to the FCA or PRA without waiving privilege in it against the rest of the world.
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Is the concept of disclosure of documents recognised in this jurisdiction?

Disclosure (discovery) does take place, but it is principally up to the parties to request disclosure of documents from the opposing party, as the mandatory disclosure requirements under the federal rules are quite limited and the states in the main have no such rules.

Does the jurisdiction recognise a right to legal privilege? If so, what type of document may be privileged?

U.S. jurisdictions recognise several legal privileges, with two being the most common: the attorney-client privilege and the work product doctrine. The attorney-client privilege protects confidential communications between an attorney and his or her client which are made (i) in the course of legal representation and (ii) for the purpose of rendering legal advice to the client by the attorney. It protects only the communication and not the underlying facts. A client cannot shield documents from discovery simply by sending them to his or her lawyer. 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 will prevent disclosure of an attorney’s mental impressions, conclusions, opinions or legal theories with respect to actual or reasonably anticipated litigation.

The attorney-client privilege protects “communications”, which may be either oral or written. The work product doctrine protects “documents and tangible things”. According to one leading treatise, this term has no pre-set limitation, and has been interpreted to include such items as letters, interview notes, interview transcripts, surveillance tapes and studies.

Other applicable privileges in the U.S. are the common interest privilege, spousal privilege and privilege against self-incrimination. This is not an exhaustive list.

In court proceedings, parties may assert applicable privileges to prevent disclosure of confidential documents. A failure to do so may result in a total waiver of privilege, since the concept of “limited waiver” is only recognised in certain limited circumstances in the U.S. If a confidential communication protected by attorney-client privilege is voluntarily disclosed for affirmative use in a proceeding, the privilege is waived both as to the communication disclosed and all other communications concerning the same subject matter. Unless the disclosure does not substantially increase a potential adversary’s ability to obtain the information, such as where material is provided to a party with whom there is a common interest, work product protection will be waived if disclosure is made to third parties. While some U.S. courts limit work product waiver to the actual items disclosed, other courts may find the entire subject matter of disclosed material waived, depending on the specific facts of the case and the policies underlying the work product doctrine.

Is the concept of in-house lawyer privilege recognised? Are there any limiting factors?

In-house counsel are generally treated in the same manner as outside counsel. However, communications made by and to in-house counsel acting in a purely business advisory role are not protected.

What law determines whether privilege applies to a document or communication?

The federal common law on privilege (under Federal Rule of Evidence 501) and Federal Rule of Evidence 502 generally apply in federal court proceedings except with respect to an element of a claim or defence governed by state law, in which case the law of privilege of a particular state may apply. When there is a conflict between U.S. and foreign law privilege, the court will look at factors such as where the allegedly privileged relationship arose and where the relationship was centered at the time of the communication or creation of the document.
Is the doctrine of privilege respected and applied by regulatory and other investigative bodies?

In theory yes, but it is not always simple in practice to determine which materials are privileged and which are not. Disputes over the application of privilege arise frequently.

Privilege is available during regulatory investigations. The Department of Justice (“DOJ”) has issued specific guidance forbidding prosecutors from requiring investigation subjects to waive privilege, and describing the circumstances under which it will consider an entity’s waiver of privilege in deciding whether to bring criminal charges.

However, there can be some tension, because the DOJ and the Securities and Exchange Commission assess whether cooperating entities have provided “all relevant facts” when making decisions regarding whether they will bring charges and, if so, the amount and type of penalties they will recommend.

“The DOJ and the Securities and Exchange Commission assess whether cooperating entities have provided “all relevant facts” when making decisions.”