VOGEL & GLOBAL

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Global Competition Newsletter

The confidentiality of legal advice in Competition Law

Confidentiality of legal advice: In-house legal advice and legal professional privilege remain insufficiently protected



What you will find in detail in this Newsletter

The practical scope of these protections continues to vary significantly from one jurisdiction to another.

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Confidentiality of legal advice: In-house legal advice and legal professional privilege remain insufficiently protected



BY

Louis Vogel and Joseph Vogel

Vogel & Vogel

THE CONFIDENTIALITY OF LEGAL advice has become an increasingly important issue for companies. The development of compliance has profoundly changed the way in which competition law and economic regulation operate. Companies are no longer merely required to refrain from committing infringements. They are increasingly expected to identify legal risks themselves, assess the legality of their practices and prevent infringements before they occur, especially in the field of Competition law.

This evolution has considerably strengthened the preventive role of both in-house legal departments and external lawyers. Yet the legal protection afforded to their advice remains incomplete and, in some respects, paradoxical. Companies are encouraged to detect legal risks and implement compliance programmes, while the legal analyses produced for that very purpose may subsequently be accessed and used by investigating authorities.

Two distinct issues must be considered. The first concerns the confidentiality of legal advice prepared by in-house counsel, which should be regarded as a specific mechanism designed to enable corporate legal departments to perform their compliance function effectively. The second concerns legal professional privilege, which protects communications between external lawyers and their clients and constitutes a fundamental guarantee of the lawyer-client relationship.

These two protections pursue different purposes and should not be confused.

I. In-house legal advice: confidentiality as an essential tool for compliance

A. A SPECIFIC PROTECTION JUSTIFIED BY THE DEVELOPMENT OF COMPLIANCE

1. The transformation of the role of in-house counsel

The development of compliance has considerably transformed the role of corporate legal departments.

Competition law provides a particularly clear illustration. Since the modernisation of competition enforcement, undertakings have increasingly been required to assess their own practices and determine whether their agreements and conduct comply with competition rules. Similar developments have occurred in other areas of economic regulation, including anti-corruption, corporate vigilance, export controls and data protection.

Compliance is therefore no longer based solely on vertical enforcement by public authorities. It increasingly relies on the ability of companies themselves to identify legal risks and prevent infringements internally.

In-house counsels play a central role in this process. They are required to identify potentially unlawful practices, alert management, recommend corrective action and contribute to the implementation of effective compliance programmes.

This function can be performed effectively only if internal lawyers are able to give candid legal assessments. If a written warning identifying a possible legal risk can subsequently be seized and used as evidence against the company, the legal department may find itself creating incriminating material precisely because it sought to prevent an infringement.

Confidentiality of in-house legal advice is structurally linked to the development of modern compliance. Its purpose is not to conceal infringements, but to make their prevention more effective.

2. Confidentiality of in-house legal advice is different from legal professional privilege

The confidentiality of in-house legal opinions should not be confused with legal professional privilege.

Legal professional privilege is attached to the legal profession and protects the relationship between a lawyer and a client. It constitutes a guarantee enabling individuals and companies to seek legal assistance without fear that their exchanges with their lawyer will subsequently be disclosed.

The confidentiality of in-house legal advice serves a different purpose. In-house counsel remain employees of the company. Recognising confidentiality does not transform them into external lawyers or confer upon them all the prerogatives attached to the legal profession.

The purpose is more limited: to protect specifically defined internal legal opinions so that corporate lawyers can perform their preventive and compliance functions effectively.

This distinction is important. The approach consisting in presenting the debate merely as a proposed "*extension*" of lawyers' legal professional privilege to in-house counsel is misguided. Lawyers' professional secrecy and confidentiality of in-house legal opinions are two distinct mechanisms governed by different purposes and rules.

Lawyers' professional secrecy is general and indivisible. By contrast, protection for in-house advice can be restricted to specifically defined legal consultations, particular recipients and prescribed formal conditions. It can also be excluded where the legal consultation itself is intended to facilitate unlawful conduct.

Such a mechanism can therefore protect compliance without creating a general immunity from investigation.

B. CONFIDENTIALITY CAN BE RECOGNISED WITHOUT IMPAIRING EFFECTIVE ENFORCEMENT

1. The traditional objection based on lack of independence is no longer sufficient

The traditional objection to the protection of in-house legal advice is based principally on the employment relationship.

Because an in-house lawyer is economically dependent on the undertaking, it has been argued that he or she does not possess the independence traditionally required of an external lawyer.

That objection may be relevant when determining whether in-house counsel should benefit from the same professional privilege as lawyers, but it does not fully answer the separate question whether defined internal legal opinions should receive a specific confidentiality protection.

The modern compliance function has changed the terms of the debate. The question is no longer simply whether an employed lawyer is sufficiently independent to be assimilated to an external lawyer. It is whether companies can realistically be expected to identify and prevent infringements internally if the legal assessments produced during that process remain fully exposed to subsequent investigation.

The development of compliance justifies reconsidering the traditional approach to in-house legal advice.

2. The new French regime illustrates a different approach

France has recently adopted a specific statutory mechanism based precisely on this distinction.

Law No. 2026-122 of 23 February 2026, promulgated following Constitutional Council Decision No. 2026-900 DC of 18 February 2026, establishes confidentiality for certain legal consultations prepared by in-house counsel.

The new regime does not protect every document produced by a legal department.

First, the author must satisfy statutory qualification requirements. The consultation must be prepared by an in-house lawyer or, at his or her request and under his or her supervision, by a member of the legal team. The relevant legal professional must hold a master's degree in law or an equivalent qualification, and the in-house lawyer must have completed specific training in ethical rules.

Second, the recipients are expressly limited. The consultation must be intended for specified management, administrative or supervisory bodies of the employing company or, subject to the statutory conditions, of companies within the same corporate group.

Third, the protected document must genuinely constitute a legal consultation. The law defines it as a personalised intellectual service providing an opinion or advice based on the application of a rule of law.

Finally, strict traceability requirements apply. The document must bear the wording "*confidentiel – consultation juridique – juriste d'entreprise*", identify its author and be subject to specific filing arrangements. Successive versions satisfying the statutory requirements receive the same protection.

The purpose is not to conceal infringements, but to make their prevention more effective.

The French approach therefore demonstrates that confidentiality can be precisely defined rather than indiscriminately attached to everything produced within a corporate legal department.

3. Important limits to the protection

The French reform also illustrates how in-house confidentiality may be accompanied by significant safeguards.

Protected consultations cannot, in civil, commercial or administrative proceedings, be seized or made subject to an obligation to disclose them to a third party, including a French or foreign administrative authority. However, the protection is expressly subject to the investigative powers of EU authorities. It is also unavailable in criminal and tax proceedings

The company may itself waive confidentiality.

Most importantly, confidentiality is not intended to protect unlawful conduct. During an administrative procedure, the competent judge may lift confidentiality where the consultation was intended to facilitate or encourage infringements punishable in the relevant proceedings.

These limitations demonstrate that effective protection of internal legal advice does not necessarily imply immunity from investigation.

The French law will enter into force on a date fixed by decree of the Conseil d'État and, in any event, no later than 1 February 2027.

II. Legal professional privilege: a fundamental protection under increasing pressure in competition investigations

A. EUROPEAN LAW PROTECTS BOTH DEFENCE AND LEGAL ADVICE

1. Legal professional privilege is not limited to the exercise of defence rights

The position of external lawyers is fundamentally different.

The confidentiality of lawyer-client communications constitutes a basic guarantee of the legal profession. Yet in competition matters its scope has sometimes been interpreted restrictively by reference to the exercise of the rights of defence.

Recent European case law strongly challenges such a restrictive understanding.

In its judgment of 26 September 2024, the Court of Justice held, on the basis of Article 7 of the Charter of Fundamental Rights, that the enhanced protection afforded to lawyer-client communications covers not only defence activities but also legal consultation.

This point is particularly important in competition law, where most of the lawyer's work for an undertaking may consist of preventive advice rather than representation in pending proceedings.

2. Both the content and the existence of the consultation are protected

The Court's reasoning goes further.

According to the judgment, Article 7 protects legal consultation both as regards its content and its existence, and a lawyer's legal advice benefits from reinforced protection irrespective of the field of law concerned.

The protection is not absolute. Restrictions may be permitted where they are provided for by law, respect the essence of the right and satisfy the requirements of necessity and proportionality in pursuit of an objective of general interest.

However, an approach that removes an entire category of ordinary legal advice from protection raises a much more fundamental issue than a narrowly defined exceptional limitation.

B. THE EFFECTIVENESS OF LEGAL PROFESSIONAL PRIVILEGE REMAINS PROBLEMATIC IN COMPETITION INVESTIGATIONS

1. The restrictive French approach to seizure of lawyer-client communications

French competition investigations provide a striking example of the gap that may exist between professional secrecy in principle and protection against seizure in practice.

The Criminal Chamber of the Cour de cassation continues to hold that lawyer-client correspondence may be seized during an operation conducted under Article L. 450-4 of the Commercial Code where it does not concern the exercise of the rights of defence

This conception excludes legal advice relating to ordinary business risks, preventive compliance work and even certain warnings concerning possible future litigation where no sanctioning or judicial proceedings yet exist.

Protection is of limited value if investigators can read a disputed document before an independent authority determines whether it is privileged.

In practical terms, the scope of protection may therefore be considerably narrower than the scope of the lawyer's duty of professional secrecy.

2. A restriction increasingly difficult to reconcile with European law

This restrictive French case law is incompatible with the recent case law of the Court of Justice.

Where a national competition authority applies EU competition law, the Charter is applicable. In Vogel & Vogel's analysis, Article 7 should therefore prevent the exclusion of ordinary legal consultation from protection merely because it was not prepared for an existing defence procedure.

This issue is particularly acute in competition law because authorities themselves encourage undertakings to implement compliance programmes, assess their behaviour and seek legal advice at an early stage. A system in which preventive lawyer advice may subsequently be seized creates an obvious tension with those compliance objectives.

3. Effective privilege requires effective procedural safeguards

Finally, the substance of legal professional privilege cannot be separated from the procedures used during investigations.

Protection is of limited value if investigators can read a disputed document before an independent authority determines whether it is privileged. Access to the content may itself reveal legal strategy and influence the subsequent direction of the investigation.

Procedural mechanisms should therefore prevent premature disclosure of disputed legal communications and provide for an effective and independent review of privilege claims.

The new French regime governing in-house legal consultations is instructive in this respect. Where confidentiality is asserted during an administrative inspection, the disputed document must be placed immediately under closed seal by a commissaire de justice, and the issue may then be determined by a judge in an adversarial procedure.

Whatever the precise legal regime concerned, effective confidentiality ultimately requires not only a substantive rule of protection but also procedures capable of ensuring that the protection is respected before the confidential information has been disclosed.

Conclusion

The protection of legal advice is currently evolving in two different directions.

On the one hand, the development of compliance increasingly supports recognition of a specific confidentiality regime for defined in-house legal consultations. The new French legislation illustrates how such a regime can be carefully limited and accompanied by safeguards designed to preserve the effectiveness of investigations. EU case law remains reluctant to recognize the protection of in-house legal consultations even though in-house counsels are asked to do more and more compliance work to prevent infringements of competition law.

On the other hand, the protection traditionally attached to communications with external lawyers should not be reduced to defence after proceedings have commenced. Recent Court of Justice case law confirms that legal professional privilege also protects the lawyer's advisory activity, both as regards the content and the existence of the consultation. If recent judgements of the ECJ are in favour of a larger protection of client-attorney privilege, the same protection is often not granted at the level of Member States.

The two issues should therefore not be confused. In-house confidentiality must be developed as a specific tool of compliance, while legal professional privilege must retain its full protective function for lawyer-client legal advice.



Rue de la Loi, in the European Quarter, Brussels. Photo: Trougnouf, Wikimedia Commons, CC BY 4.0

Legal advice receives strengthened protection but the status of in-house counsel remains insufficiently protected



BY

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THE COURT OF JUSTICE has recently strengthened the protection afforded to legal consultations provided by external lawyers.

In its judgment of 26 September 2024, the Court held that the protection guaranteed by Article 7 of the Charter of Fundamental Rights covers not only a lawyer's defence activities but also legal consultation. The secrecy of a legal consultation is protected both as regards its content and as regards its existence, and the protection applies irrespective of the field of law concerned.

The protection is reinforced rather than absolute. Interferences may be justified only subject to the conditions identified by the Court, including a legal basis, respect for the essence of the right, necessity and proportionality.

This development is particularly relevant to competition law. The reasoning under Article 7 is not confined to the factual context in which the preliminary reference arose and should also be considered when national competition authorities implement EU law.

In-house counsel: a different question

The recent case law does not establish a general EU privilege for in-house counsel.

The traditional EU competition-law case law has treated independence from the client as a condition of legal professional privilege. A *Competition Policy Brief* written by Commission officials and published in November 2025 maintained that an extension of legal professional privilege to in-house counsel was not justified. The publication contained the usual disclaimer that its content did not necessarily represent the position of the Commission.

Our firm strongly contests the terms in which the issue is framed. In its view, recognising confidentiality for in-house legal opinions should not be treated simply as extending lawyers' privilege to employees. Confidentiality of in-house advice and lawyers' legal professional privilege are different mechanisms, serving different purposes

The former is intended primarily to allow corporate lawyers to fulfil their compliance function; the latter protects the lawyer-client relationship.

The disappointing Broadcom ruling of the EU General Court

The order of the President of the General Court of 3 August 2026 in *Broadcom and VMware International v Commission* (T-280/26 R) is disappointing on two counts.

Regarding in-house counsel, the General Court reiterates, at the interim relief stage, the traditional case law established in AM&S (1982) and *Akzo Nobel* (2010), according to which communications with in-house lawyers do not benefit from legal professional privilege because they are not considered sufficiently independent from their employer. This exclusion applies even where the communications are protected by legal professional privilege under the laws of third countries. The Court thus maintains a restric-

tive approach without reconsidering the essential role now played by in-house counsel in corporate compliance and the prevention of infringements.

For external lawyers, the case also raised the question of the confidentiality of legal advice provided by US-qualified lawyers. However, the Commission ultimately agreed, exceptionally and on grounds of international comity, to exclude communications with independent external lawyers, including those qualified outside the EU, from its request for information. The General Court therefore did not have to rule on whether such communications were protected under EU law.

The order is nevertheless disappointing in that it continues to rely primarily on decades-old case law. Although it refers to the Court of Justice's judgment of 26 September 2024, it does not genuinely address the implications of the recent case law recognising strengthened protection for lawyers' legal consultations under Article 7 of the Charter of Fundamental Rights, independently of the exercise of defence rights. Nor does it refer to the judgment of 8 December 2022. The order therefore represents a missed opportunity to reconsider the traditional restrictive approach to legal professional privilege in light of these more recent developments.



The Berlaymont, seat of the European Commission, Brussels. Photo: Trougnouf (Benoit Brummer), Wikimedia Commons, CC BY 4.0

A new confidentiality regime for in-house legal advice — against a restrictive approach to lawyer-client privilege in competition investigations



BY

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FRANCE HAS ADOPTED A specific statutory regime protecting certain legal consultations prepared by in-house counsel.

Law No. 2026-122 of 23 February 2026, promulgated following Constitutional Council Decision No. 2026-900 DC of 18 February 2026, inserted a new Article 58-1 into the Law of 31 December 1971 governing legal and judicial professions.

The law will enter into force on a date fixed by decree of the *Conseil d'État* and, in any event, no later than 1 February 2027.

A narrowly defined protection

The reform does not confer a general privilege on corporate legal departments.

A qualifying consultation must be prepared by an in-house lawyer or, at that lawyer's request and under his or her supervision, by a member of the legal team. The statutory legal-qualification requirements must be satisfied and the in-house lawyer must have completed the prescribed ethics training.

The recipients are limited to specified management, administrative or supervisory bodies of the employing company and, within the limits laid down by the legislation, relevant bodies of controlling or controlled group companies.

The document must constitute a personalised intellectual service providing an opinion or advice based on the application of a rule of law. It must also bear the prescribed confidentiality wording, identify the author and be specifically classified in the company's records. Successive versions complying with those conditions are protected.

Opposability and limits

Protected consultations cannot, in civil, commercial or administrative proceedings, be seized or made subject to an obligation to disclose them to a third party, including a French or foreign administrative authority, subject to the powers of the authorities of the European Union.

Confidentiality is not opposable in criminal or tax proceedings. The employing company may also waive it.

In administrative proceedings, confidentiality may be lifted where the consultation was intended to facilitate or encourage conduct subject to sanctions in the proceedings concerned.

A specific procedure during inspections

Where confidentiality is claimed during an administrative inspection, the disputed consultation may be apprehended only by a commissaire de justice and must immediately be placed under closed seal

The administrative authority may then refer the matter to the *juge des libertés et de la détention*. The judge opens the seal in the presence of the parties and decides after an adversarial hearing whether confidentiality applies or should be lifted. An appeal may be brought before the First President of the Court of Appeal or his or her delegate.

External lawyers remain subject to a different regime

The new protection for in-house consultations contrasts with the position currently taken by the Criminal Chamber of the Cour de cassation in competition dawn raids.

The Criminal Chamber continues to hold that lawyer-client correspondence covered by professional secrecy may nevertheless be seized where it does not concern the effective exercise of the rights of defence.

This restrictive approach is incompatible with the broader protection of legal consultation recognised by recent Court of Justice case law. The firm's analysis stresses that preventive advice may otherwise remain exposed precisely when it is intended to identify and prevent infringements.

France may therefore develop an unusual dual structure: qualifying in-house consultations will benefit from a dedicated statutory regime and specific procedural safeguards, while external lawyer advice remains, in competition inspections, subject to the restrictive defence-rights test currently applied by the Criminal Chamber.



The Seine and the Palais de Justice from the Pont Saint-Michel, Paris. Photo: Wolfgang Moroder, Wikimedia Commons, CC BY-SA 3.0

Professional status rather than employment determines the scope of protection



FROM THE CONTRIBUTIONS OF

Joan Miquel Rascagneres
Eurolex Andorra

ANDORRAN LAW DOES NOT recognise a separate confidentiality regime merely because legal advice has been produced by an in-house legal department.

The decisive criterion is instead the professional status of the author. A duly registered practising lawyer admitted to the *Collegi Oficial d'Advocats d'Andorra* may benefit from lawyers' professional secrecy even when working as an employee. By contrast, a corporate legal adviser who does not have that professional status does not benefit from an equivalent statutory privilege.

Professional secrecy is not confined to litigation. Legal opinions and preventive advice supplied by a duly registered lawyer are, in principle, protected, including advice in the fields of compliance, competition law and regulatory matters.

The protection is also considered to extend, subject to statutory exceptions, to information revealing the existence of the lawyer-client relationship.

The position is less developed concerning digital communications. No specific statutory rule or published case law has been identified concerning emails in which a lawyer is merely copied. Similarly, the effect of subsequent internal circulation of external legal advice is not expressly regulated. The contribution considers that protection should continue where circulation remains limited to persons who need the advice for the company's legal affairs and does not amount to disclosure inconsistent with its confidential nature.

Andorra has not identified a specific privilege-filter procedure equivalent to closed sealing and adversarial sorting. Searches and seizures are nevertheless subject to judicial control, and particular safeguards apply to searches of lawyers' offices, including the intervention of the Dean of the CADA or a substitute.



Andorra la Vella. Photo: Diego Delso, Wikimedia Commons, CC BY-SA 3.0

Broad protection of lawyers' communications

FROM THE CONTRIBUTIONS OF

NEDELKA KUBÁČ ADVOKÁTI

LEGAL PROFESSIONAL PRIVILEGE for lawyers is generally recognised. For email chains, direct exchanges between lawyer and client as protected. Once an external lawyer's advice has validly been obtained, however, subsequent internal circulation remains protected.

The national competition authority takes a pragmatic approach to the identity of external legal advisers. Lawyers identified by the company as its advisers benefit from protection without systematic verification, for example, of Czech Bar membership. However, this practice could change.

Where privilege is disputed during an inspection, documents may be sealed pending resolution of the issue or judicial review of the inspection.



Hradčany seen from the Malá Strana Bridge Tower, Prague. Photo: Uoaei1, Wikimedia Commons, CC BY-SA 4.0

Broad professional secrecy for lawyers — but an EU-style distinction for in-house counsel in competition investigations

FROM THE CONTRIBUTIONS OF
BERNITSAS

GREEK LAW DISTINGUISHES BETWEEN the broad professional secrecy applicable to lawyers generally and the narrower legal professional privilege applied during competition investigations.

Article 38 of the Greek Lawyers' Code imposes a general and indivisible duty of confidentiality covering lawyers' work for their clients. Preventive legal opinions issued by external counsel are therefore protected, including competition and compliance advice.

The position of in-house counsel is different in investigations by the Hellenic Competition Commission.

The HCC applies the EU case law under which privilege requires an independent external lawyer not bound to the client by an employment relationship. In-house legal advice may therefore be inspected and seized notwithstanding the broader professional secrecy rules governing lawyers generally.

The distinction does not necessarily expose every internal legal document. Documents summarising or reporting advice received from external counsel, as well as material prepared exclusively for the purpose of obtaining such advice, may benefit from protection.

External counsel advice also retains its protection when circulated internally. An in-house opinion, however, does not become privileged merely because of the manner in which it is circulated.

The lack of an in-house privilege may affect the way companies organise compliance work. Sensitive competition matters may be routed through external counsel rather than documented entirely within the legal department.

Procedural safeguards exist during HCC investigations. Documents obtained during a dawn raid are unsealed at the HCC's premises in the presence of the investigated undertaking, usually represented by external counsel. Privileged or out-of-scope documents are removed from the file, and disputes concerning privilege are decided by the HCC Chairman.

Inspection orders and unsealing protocols may be challenged independently before the Council of State under Council of State Decision No. 923/2023



The Acropolis seen from the Areopagus, Athens. Photo: Ggia, Wikimedia Commons, CC BY-SA 3.0

In-house privilege at the centre of an unresolved dispute



FROM THE CONTRIBUTIONS OF

Krzysztof Kanton

Sołtysiński Kawecki & Szlęzak Legal

THE POSITION OF IN-HOUSE counsel remains contested in Poland. The Polish Competition Authority does not recognise legal professional privilege for in-house counsel, relying on the requirement that protected counsel be independent from the undertaking.

That approach has nevertheless been challenged before the courts. Some judicial decisions support the application of legal professional privilege to in-house counsel, while the Polish Competition Authority continues to maintain its restrictive position. No final resolution had been reached at Supreme Court level.

The practical consequences are significant. In-house correspondence has been secured during dawn raids and the lack of recognised protection leads companies to involve external counsel in particularly sensitive matters.

For external lawyers, the position is significantly broader. Legal professional privilege is general and indivisible, with no distinction between advocacy and legal advice. Preventive legal opinions are fully protected.

The protection also extends to the existence of the advisory relationship.

Internal circulation does not necessarily destroy privilege. An external lawyer's opinion remains protected where it can be established with certainty that the legal advice originated from external counsel. By contrast, for email chains direct lawyer-client exchanges are the protected category.



Warsaw seen from the Palace of Culture and Science. Photo: A.Savin, Wikimedia Commons, CC BY-SA 3.0

In-house lawyer confidentiality recognised by statute — but challenged by the competition authority

FROM THE CONTRIBUTIONS OF
MLAB

SPANISH LAW PROVIDES A particularly interesting example of the distinction between the general rules governing lawyers' confidentiality and their application in competition investigations.

Under Spanish law, confidentiality of legal consultations prepared by in-house counsel is recognised where the author has the professional status required to practise as a lawyer. The legal basis identified includes Article 24 of the Spanish Constitution, Articles 13 and 16 of Organic Law 5/2024 on the Right of Defence *"Ley Orgánica del Derecho de Defensa"* ("LODD"), Article 542(3) of the Organic Law on the Judiciary and the General Statute of the Spanish Legal Profession.

Unlike the French model, Spanish law does not create a separate confidentiality regime specifically for in-house legal consultations. The same legal professional privilege regime applies to both in-house and external lawyers.

Professional status rather than specific document formalities

The protection does not depend on the status of the recipient and no specific confidentiality notice, author-identification requirement or dedicated filing mechanism is reported.

The decisive condition concerns the author. Under Article 13 LODD, the legal adviser must hold the official qualification required to practise law and be registered with a Bar Association as a practising lawyer.

This distinguishes Spain from systems in which an employment relationship automatically excludes privilege. Under the Spanish regime, an in-house lawyer may in principle benefit from the same confidentiality protection if they retain the required professional status.

The protection is attached to the communication or document rather than personally to the lawyer. Article 16(1) LODD protects *"all communications"* between the lawyer and the client.

Advice and defence are both protected

The Spanish system does not distinguish, for privilege purposes, between advocacy and ordinary legal advice.

Article 16(1) LODD is relied upon as protecting all lawyer-client communications, while Article 21 of the General Statute of the Spanish Legal Profession extends professional secrecy to facts, communications, data, information, documents and proposals known, issued or received by the lawyer during professional practice

Preventive advice is therefore covered in principle. Communications exclusively between lawyers acting for the parties in connection with litigation or proceedings are confidential regardless of when they occur or their purpose, including at the pre-litigation stage.

The protection is not intended to cover conduct falling outside legitimate legal practice. The Spanish Supreme Court has held that privilege does not extend to a lawyer's participation in criminal activity, concealment of clearly criminal conduct or acts going beyond legitimate legal advice and defence. Specific limitations also apply under anti-money-laundering legis-

lation where legal advice is used to facilitate money laundering or terrorist financing

The key issue: a conflict with the CNMC's approach

The central difficulty arises in competition investigations. The Spanish Competition Authority ("*La Comisión Nacional de los Mercados y la Competencia*" or "*CNMC*") considers that the Court of Justice's *Akzo* judgment excludes confidentiality for communications with in-house lawyers in proceedings before competition authorities, whether the authority is the European Commission or a national competition authority.

However, our correspondent argues that *Akzo* should not prevent national law from protecting in-house lawyer communications in proceedings conducted by a national competition authority. Since Article 16 LODD protects communications between a lawyer and client without distinguishing between external and employed lawyers, our correspondent considers that confidentiality should be enforceable against the CNMC, whether it applies Spanish competition law or EU competition law.

The dispute is not merely theoretical. There are at least two pending appeals before the *Audiencia Nacional* concerning the incorporation into CNMC files of communications with in-house lawyers obtained during inspections.

EU investigations remain different

There is an important distinction where the investigation is conducted directly by the European Commission.

Confidentiality of communications with in-house lawyers is not enforceable against the European Commission in an EU investigation, since the *Akzo* rule would apply in that context.

The Spanish position therefore illustrates particularly clearly the potential difference between national and EU investigations: our correspondent argues that Spanish law should protect qualifying in-house lawyer communications against the CNMC, while accepting that the same communications would not be privileged in a Commission investigation under the current EU competition-law regime.

Broad legal professional privilege for external lawyers

For external lawyers, the position is considerably clearer. Spanish law does not distinguish between advocacy and legal advice for purposes of legal professional privilege, and preventive opinions are stated to be protected.

The LODD has expressly codified the standards developed in the case law concerning the protection of defence rights and legal professional privilege.

Whether the protection extends to the mere existence of the consultation has not been expressly settled. Nevertheless, there is a 2023 Supreme Court order which, at least on a *prima facie* basis in *interim proceedings*, relied on Court of Justice case law recognising protection for both the content and the existence of legal consultations.

Nor has Spanish legislation specifically resolved the situation in which a lawyer is merely copied on an email. However, pursuant to Article 21(1) EGAE, the right (and duty) to a professional secrecy applies to all facts, communications, data, information documents and proposals received or issued by a lawyer during professional practice.

Foreign lawyers: registration in Spain is decisive

Legal professional privilege applies only where the relevant lawyer is registered with a Spanish Bar Association as a practising lawyer, relying on Articles 13 and 16 LODD.

Procedural protection during CNMC inspections remains imperfect

There are important procedural issues.

The CNMC has, at least in one case, placed disputed documents under seal. However, in this specific case, the head of the inspection team subsequently opened the envelope, carried out a brief review of the documents and required the company to substantiate its privilege claim before transmitting the material to the Competition Directorate.

More generally, the CNMC's usual practice is first, to examine the documents and to allow the undertaking to assert and substantiate its privilege claim before the documents are formally included in the case file.

This procedure raises the same practical question encountered in other jurisdictions: whether legal professional privilege is genuinely effective where investigators are permitted to review disputed communications before an independent determination of the privilege claim.



Gran Vía, Madrid. Photo: ajay_suresh, Wikimedia Commons, CC BY 2.0

Legal professional privilege limited by independence, defence rights and timing

FROM THE CONTRIBUTIONS OF

Paksoy

TÜRKIYE APPLIES A RESTRICTIVE conception of legal professional privilege in competition investigations. Communications with in-house counsel are not protected against the Turkish Competition Authority. Privilege requires an independent external lawyer who has no employment relationship with the undertaking.

Independence is not sufficient. The communication must also be directly related to the exercise of the undertaking's defence rights.

Following the *Enerjisa* litigation, there has been an additional temporal restriction: the document must have been prepared when a competition investigation or related proceedings already existed.

The consequences for preventive advice are significant.

In *Enerjisa*, a competition compliance audit prepared by independent external counsel before an investigation was opened was seized. A first-instance court accepted the privilege claim, but that judgment was reversed on appeal on the ground that no competition investigation or related proceedings existed when the report was prepared. The Council of State subsequently upheld that restrictive approach.

The Competition Board has continued to apply the same reasoning to documents pre-dating the opening of proceedings.

Merely copying an external lawyer does not create privilege. Turkish decisional practice has rejected protection where the lawyer appeared only in the CC field of otherwise internal correspondence and the substance of the exchange did not genuinely constitute a protected lawyer-client communication.

The narrow protection also influences corporate compliance organisation. Sensitive competition assessments, training and risk analyses may be routed through independent external counsel rather than handled exclusively in-house.

Where privilege is asserted during an inspection, the disputed document may be placed in a sealed envelope without being examined and submitted to the Competition Board for determination. The objection must, however, be raised by the undertaking. For digital material examined subsequently at the TCA's forensic laboratory, the undertaking may be represented when the sealed material is opened and reviewed.

No immediate judicial appeal against the privilege determination is reported during the inspection, although an annulment action may subsequently be brought against the reasoned Board decision.

Finally, the Turkish Constitutional Court's *Ford Otomotiv* judgment identified a broader constitutional issue concerning on-site inspections performed without prior judicial authorisation. The Court found the statutory framework incompatible with the constitutional protection of the domicile and referred the structural issue to Parliament for legislative revision.



Court of Justice of the European Union, Luxembourg. Photo: Kjell Kettelhut, Wikimedia Commons, CC BY-SA 4.0

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