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**How privileged is attorney-client privilege?**

Legal privilege represents the bedrock of the relationship between a client and his attorney, especially in the criminal context, where it can turn out to be either a shield or a sword.

Nowadays, companies are forced to get more and more familiarised with preventing criminal matters and justifying their actions to assertive authorities. To meet this need, we have prepared a brief analysis of several issues of interest for corporations in relation to legal privilege in Romania.

Given that the Romanian regulation goes only to a limited extent and on top of it we lack significant case law when it comes to legal privilege, we must turn to the United Kingdom, as well as further across to the United States of America, as these countries have brought some light through their numerous cases with international companies.

**I. What is covered by privilege?**

Unlike in Romania, which recognises *one* all-encompassing type of legal professional privilege (“LPP”), both the US and the UK recognise *two* main types of LPP.

The first type is concerned with non-litigious scenarios and goes by the name “*attorney-client privilege*” in the US and “*legal advice privilege*” in the UK, respectively. The second type of LPP, called the “*attorney work product doctrine*” in the US and “*litigation privilege*” in the UK, applies where litigation or trial is contemplated.

- 1. In the absence of litigation:** the US “*attorney-client privilege*” protects confidential communications between the lawyer and the client and may take many forms, from e-mails to oral communications, as long as each communication is undertaken for the purpose of seeking or giving legal advice. Whilst the procedure is not uniform in all states, attorney-client privilege generally covers also communications with third parties if the aim is to provide legal advice to the client, for example where financial advisers are helping the lawyer understand the client’s financial situation. In contrast, the English “*legal advice privilege*”, which operates broadly

similarly to the US attorney-client privilege, would not cover such communications, unless litigation was reasonably in prospect at that time.

- 2. Where litigation or trial is anticipated:** the US “*attorney work product doctrine*” protects from disclosure an attorney’s or his agent’s documents containing mental impressions formed or legal theories developed in anticipation of such litigation or trial. The threshold is higher for the English “*litigation privilege*”, as this relates to confidential communications between a client, lawyer and third party, where **the** documents in question must have been prepared for the dominant purpose of being used in connection with contemplated, pending or actual litigation and generally, documents preceding that litigation will not be privileged.

In terms of scope, Romanian LPP is wider than its UK and US correspondents. The lawyer is obliged to maintain privilege with respect to every aspect of the matter that was entrusted to him. LPP covers information and data of every kind and format entrusted by the client to the lawyer, with the purpose of giving legal advice, as well as any documents created by the lawyer for the purpose of giving confidential legal advice. The following will be covered by LPP:

- matters for which legal assistance was solicited;
- information regarding the client soliciting legal assistance and the contract between the lawyer and the client;
- strategic and tactical plans for defence or representation;
- notes taken during a professional interview made by a lawyer with his client for the purpose of analysing the facts and tangible evidence given to the lawyer in the interest of preparing a defence;
- confessions given to the lawyer in his professional capacity;
- financial documents and banking operations regarding professional activities as well as information obtained about clients.

**Recommendations:**

- Always mark privileged communications and documents as “Privileged & Confidential, subject to legal privilege”.
- In the case of communications with third parties, such as tax advisers or accountants, these should always be filtered through the external legal counsel so as to ensure the best possible claim of LPP. This does not mean simply copying a lawyer in communications; rather, the communication with third parties should be in

furtherance of the lawyer giving legal advice.

**II. Which of the company's employees represent the client for the purpose of attorney-client privilege?**

In the context of representing a company, defining who the "client" is becomes crucial since not all employees in a corporation will qualify as representing the corporate client for the purposes of attracting LPP. Therefore, when dealing with corporates, a key issue is identifying which category of employees is covered by LPP.

US has rejected the proposition that only communications between lawyers and a company's upper management (the so-called "control group") was privileged, instead opting for a case-by-case analysis, which decides the applicability of privilege based on five factors, such as employees' role and the facts they possess. In contrast, the UK courts have recently endorsed a narrow and controversial definition, limiting the concept of client to those employees within the company who are authorised to communicate with and receive the lawyer's advice.

In Romania, lacking official guidance or relevant case law, it is likely that the Romanian authorities will tend to enforce an even narrower approach, limiting the "client" to those who, according to the corporation's charter, legally represent it and those authorised by the company to seek and obtain legal advice on its behalf.

**Recommendations:**

- Companies should make sure that the group of employees interacting with external legal counsel is limited to those authorised to obtain legal advice. At the outset of the attorney-client relationship, companies are advised to set out as clear as possible, either in the engagement letter or in another written document, who are the employees allowed to obtain legal advice.
- When forwarding legal advice internally, clients should be aware that any subsequent comments made by the recipients might not be covered by LPP if the employee to whom it was forwarded is not part of the group of people authorised to obtain legal advice.
- The company should also ensure that the group of employees authorised to obtain legal advice is neither too narrow, which would create issues in terms of gaining access to important facts in the case of a potential criminal matter, nor too wide, as this would run the risk of being considered artificial.

**III. Who is the attorney - are communications with in-house counsel protected?**

Across the pond, US LPP protects communications with in-house lawyers, but it is crucial for such communication to have been conducted by the in-house lawyer in his role as a legal adviser,

rather than for the purpose of providing business advice. In the same vein, English Law adopts a broad understanding of the term “lawyer” and makes no distinction between in-house lawyers and external legal counsel, with the key issue being whether the lawyer was consulted in his or her legal professional capacity.

Romanian law is not clear when it comes to communications with in-house legal counsels. Whilst it is certain that in-house counsels who are not Bar members and their employers do not benefit of privileged communications, the situation is to some extent uncertain regarding in-house counsels who are Bar members. This may raise issues especially since they are routinely involved in providing business advice, therefore exposing the company to a claim that the communications in question do not fall under LPP. Furthermore, as a result of a 2010 decision of the Court of Justice of the European Union, privilege does not cover communications with in-house counsel in the case of an EU competition investigation.

**Recommendations:**

- In order to benefit from the strongest claim possible as to the privileged nature of communications, companies should ensure that **only** external legal counsel is involved in providing legal advice when it comes to internally investigating a potential criminal matter or preparing a subsequent defence.

- In day-to-day non-sensitive matters, corporates should also advise their in-house legal counsel to separate legal advice from business advice, so as to create the best chances of preserving confidentiality for the legal advice in question.

**IV. Selective waiver**

Selective waiver consists in the sharing of a copy of a privileged document or communication with a third party, without losing privilege.

In the US, the overarching view is that disclosing a single copy of a privileged document to a third party, including a regulatory body, will result in the entire subject matter of the privileged documents losing the benefit of privilege. At the other end of the spectrum lies English Law, which allows for the possibility of selective waiver, provided that the document does not enter the public domain, preserves its confidentiality and is disclosed only for a limited purpose, such as for providing it to a regulatory body.

In Romania, the concept of selective waiver is not legally regulated, therefore there is nothing from precluding the waiver of LPP regarding a certain document or aspect of it, but the confidential nature of the document should be maintained at all times. This is because if the document or documents were to reach too many parties, a claim could be made that confidentiality was lost and therefore LPP is not applicable.

**Recommendation:** In order to manage the risk of losing LPP as a result of

disclosing one document, the communication to third parties should be made on the agreed understanding that the communication is privileged and confidential, made for a limited purpose and that privilege has not been waived.

#### V. Joint Interest

Joint interest privilege involves the same lawyer being retained by more than one party to advise them either by virtue of a joint retainer or by the parties having a joint interest in the subject matter of a privileged communication. Scenarios where joint interest privilege are likely to apply include a company on the one hand and either its directors, shareholders or wholly owned subsidiary, on the other.

Both in the US and in the UK, the privilege will belong to all parties and jointly represented clients must concur in waiving the jointly owned privilege. However, in the US, a client has the ability to waive the privilege over his own private communications with the joint lawyer in question.

In Romania, a joint representation of two clients will not diminish any of the rights that each client would normally benefit from as a result of the attorney-client relationship. However, the privilege rule does not apply between jointly represented clients. Therefore, where there is a clear common interest,

the same external legal counsel will be able to represent both the company and its directors, as in the majority of cases this is likely to enhance the quality of representation, since all parties involved will be coordinated in furthering their common interest. In any events, clients can be safe in the knowledge that, should a conflict of interest ever surface between the jointly represented clients, a lawyer will have to renounce representing all clients, and will not be able to use the information gained during the joint representation in any way.

**Recommendation:** In case that a joint representation is agreed, due care must be taken in establishing the terms of the joint retainer agreement for the purposes of LPP.

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As emphasised throughout this note, the purpose of LPP is to ensure that clients will be able to candidly discuss their legal situation with their lawyers, in complete confidence that the information communicated will not be disseminated. While there are still many questions without a clear answer regarding the status of LPP in Romania (like in other countries as well), by following the recommendations above, companies are likely to strengthen their chances that LPP will apply and serve its purpose.

This note is intended for informational purposes only, does not represent legal advice and does not focus on particular cases. For further information or analysis on specific matters, please contact Alexandru Ambrozie ([alexandru.ambrozie@pnsa.ro](mailto:alexandru.ambrozie@pnsa.ro)) or Ana Stoenescu ([ana.stoenescu@pnsa.ro](mailto:ana.stoenescu@pnsa.ro)).