Legal privilege in Romania: a cross-border perspective: White-Collar Compliance & Defence

Legal professional secrecy and privilege represent the bedrock of the relationship between a client and their lawyer, especially in the criminal and regulatory context, where confidentiality can become either a shield or a point of challenge.

Companies are increasingly required to prevent, investigate and explain potentially sensitive conduct before assertive authorities. To meet this need, this note provides a practical cross-border analysis of issues of interest for companies in relation to legal privilege and legal professional secrecy in Romania.

In practice, internal investigations involving Romanian companies are often initiated or driven from abroad - typically from the United States, the United Kingdom, or France - whether by foreign parent companies, regulators, prosecutors or external counsel based in those jurisdictions. Because privilege issues may be assessed by reference to the rules of the jurisdiction conducting or driving the investigation, rather than solely under Romanian law, and because Romanian law provides only limited guidance and still lacks significant domestic case law on legal privilege, this note compares the Romanian position with that of the United States, England and Wales, and France, all of which have seen significant developments in recent years.

I. What is covered by privilege?

Unlike in Romania, where the relevant framework is framed primarily as the lawyer's statutory and professional secrecy obligation rather than as a developed set of common-law privilege doctrines, both the United States and England and Wales recognise two main categories of protection.

The first category is concerned with non-litigious scenarios and goes by the name "attorney-client privilege" in the United States and "legal advice privilege" in England and Wales. The second category, called the "attorney work product doctrine" in the United States and "litigation privilege" in England and Wales, 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 emails to oral communications, as long as each communication is undertaken for the purpose of seeking or giving legal advice. While the procedure is not uniform across all states, attorney-client privilege generally also covers communications with third parties if the aim is to

enable the lawyer to provide legal advice to the client - for example, where financial advisers are helping the lawyer understand the client's financial situation. In contrast, English "legal advice privilege", which operates broadly similarly to US attorney-client privilege, would not generally cover such communications with third parties unless litigation was reasonably in prospect at that time. Following The Civil Aviation Authority v R (Jet2.com) Ltd [2020] EWCA Civ 35, English legal advice privilege also requires that the giving or obtaining of legal advice be the dominant purpose of the communication.

2. Where litigation or trial is anticipated: the US "attorney work product doctrine" protects from disclosure documents and other tangible things prepared in anticipation of litigation or for trial by or for a party or its representative, including the party's attorney, consultant, surety, indemnitor, insurer or agent. Heightened protection applies to "opinion" work product, namely the mental impressions, conclusions, opinions or legal theories of counsel or other representatives. The threshold is framed differently under English "litigation privilege", which protects confidential communications between a client, lawyer and third party, as well as certain documents, where they are created for the dominant purpose of conducting, obtaining advice in relation to, or aiding in the conduct of contemplated, pending or actual adversarial litigation. In Al Sadeq v Dechert LLP [2024] EWCA Civ 28, the Court of Appeal confirmed that litigation privilege can be claimed even by a non-party to the anticipated litigation, provided the dominant-purpose test is satisfied, and that the narrow Three Rivers (No. 5) approach to identifying the "client" (see Section II) does not apply to litigation privilege.

France protects communications with avocats through legal professional secrecy (secret professionnel). Separately, Law No. 2026-122 of 23 February 2026, inserting a new Article 58-1 into the Law of 31 December 1971, will, once it enters into force - on a date to be fixed by decree, and at the latest in February 2027 - confer confidentiality on certain written legal consultations prepared by qualified in-house counsel (juristes d'entreprise), provided strict conditions are met and the document is labelled "confidentiel - consultation juridique - juriste d'entreprise". That confidentiality is not opposable in criminal or tax proceedings.

In formal statutory and professional-duty terms, Romanian law frames the lawyer's duty of professional secrecy broadly. The lawyer must preserve secrecy with respect to any aspect of the matter entrusted to them, and the protection extends to information, data and documents connected with the lawyer's professional mandate. However, unlike in the United States or England and Wales, Romanian law has not developed a detailed body of case law distinguishing between legal advice privilege, litigation privilege, work product protection and selective waiver.

II. Which of the company's employees represent the client for privilege purposes?

In the context of representing a company, defining who the "client" is becomes crucial in common-law systems, since not all employees in a corporation will necessarily qualify as representing the corporate client for privilege purposes. In Romania, the analysis is less developed in case law, but the same practical question matters in investigations: who instructs counsel, who receives advice and how is confidential legal material circulated within the company?

In Upjohn Co. v. United States (1981), the US Supreme Court rejected the proposition that only communications between lawyers and a company's upper management - the so-called "control group" - could be privileged. Instead, it adopted a functional, case-by-case approach, focusing on matters such as the employee's role, the information held by that employee, and whether the communication was made for the purpose of enabling counsel to provide legal advice to the company. More recently, in In re FirstEnergy Corp. (6th Cir. 2025), the Sixth Circuit reaffirmed strong protection for internal-investigation materials, emphasising that the key question is whether the company

sought legal advice, not whether it later used that advice to make business or governance decisions. In contrast, courts in England and Wales continue to apply the narrow and controversial definition in Three Rivers District Council v Bank of England (No. 5) [2003] EWCA Civ 474, limiting the "client", for legal advice privilege purposes, to those employees authorised to seek and receive legal advice on behalf of the company. That restriction remains the position for identifying the relevant client group in legal advice privilege. However, Al Sadeq v Dechert LLP [2024] EWCA Civ 28 confirmed that it does not apply to litigation privilege, and Aabar Holdings v Glencore [2026] EWHC 877 (Comm), a first-instance Commercial Court decision, has more recently clarified that legal advice privilege may extend to intra-client documents created or shared within the authorised client group for the dominant purpose of seeking legal advice.

In France, the new in-house regime looks not only at who drafts the advice but also at who receives it: the consultation must be addressed only to the legal representative, a delegated representative, the corporate-governance bodies or specified group entities, and circulation beyond those categories may undermine the protection.

In Romania, in the absence of significant official guidance or domestic case law on this point, companies should not assume that every internal communication touching on legal issues will automatically benefit from the same protection. The safer approach is to define and document the communication channel for the legal mandate from the outset.

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

In the United States, attorney-client privilege may protect communications with in-house lawyers, provided that the communication is made for the purpose of seeking or receiving legal advice and not purely business advice. The treatment of "dual-purpose" communications remains unsettled across federal circuits: in In re Grand Jury (2023), the US Supreme Court dismissed the appeal as improvidently granted, leaving unresolved the applicable test for communications containing both legal and non-legal advice. Under English law, in-house lawyers are generally treated in the same way as external counsel for privilege purposes, provided they are consulted in their legal professional capacity. However, in the corporate context, this does not remove the separate issue of identifying the "client" for legal advice privilege purposes, which remains governed by the narrow approach in Three Rivers (No. 5).

Romanian law is not clear when it comes to communications with in-house legal counsel. In-house lawyers who are not Bar members, and their employers, do not benefit from the same legal professional secrecy framework as external lawyers. The position may be more complex where a person is also a Bar member, but the decisive issue should not be formal status alone: the relevant question is whether the person is acting in an independent professional capacity as a lawyer, or as an employee providing internal legal, commercial or business advice. This uncertainty is particularly relevant because in-house legal teams are often involved in both legal and business functions.

In France, the 2026 reform is a genuine but limited change: it does not turn in-house lawyers into avocats, and it does not create protection in criminal or tax proceedings or against EU investigative powers. For white-collar, anti-corruption, tax, sanctions, market-abuse or EU competition matters, the involvement of an external avocat therefore remains essential.

IV. Limited disclosure and selective waiver

Selective waiver consists in sharing a copy of a privileged document or communication with a third party without

losing privilege. The concept is familiar in common-law systems but should not be transposed mechanically into Romanian law.

In the United States, the overarching view is that disclosing a single copy of a privileged document to a third party, including a regulatory body, may waive privilege over the entire subject matter of the privileged documents. Protective measures - such as a non-waiver agreement, or a tightly limited disclosure - can reduce, though not eliminate, that risk. At the other end of the spectrum lies English law, which allows for the possibility of limited or 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 providing it to a regulatory body.

In France, the new in-house regime expressly allows the company to waive confidentiality; however, the protection is not opposable in criminal or tax proceedings, remains subject to the powers of EU authorities, and may be challenged or lifted in administrative proceedings where the consultation is alleged to have facilitated or encouraged sanctionable breaches. Careful document triage is therefore needed before any production to authorities.

In Romania, the concept of selective waiver is not legally regulated and should not be transposed mechanically from common-law systems. Legal professional secrecy has a public-order and professional-duty dimension: it binds the lawyer independently and cannot be treated simply as a private right that the client may freely waive. While a company may decide to disclose documents in its own possession, any such disclosure should be carefully limited, made on a confidential and specific-purpose basis, and should expressly avoid any suggestion of a broader waiver of legal professional secrecy.

V. Joint representation and common interest

Joint representation may arise where the same lawyer is retained by more than one client in relation to a common legal matter, for example under a joint retainer. It should be distinguished from common-interest arrangements, which typically concern the sharing of already privileged or confidential legal material between separately represented parties who have a common legal interest.

In corporate investigations, joint-representation and common-interest issues may arise between a company and its directors, officers, group companies or other persons whose interests are sufficiently aligned in relation to the matter. The position of shareholders should be treated more cautiously: a shareholder relationship alone should not be assumed to create a joint privilege or a right of access to the company's privileged legal advice.

In both the United States and England and Wales, communications made in the course of a genuine joint representation may generally be protected against third parties. However, the consequences of waiver and later adversity between the jointly represented clients are fact-sensitive and should be addressed expressly in the retainer or investigation protocol. In the United States, a co-client may generally waive privilege over its own communications with the common lawyer, but not over another co-client's communications or joint communications that cannot be separated. As between former co-clients who later become adverse, communications made during the joint representation may generally be available between them unless a different arrangement was agreed.

A significant recent development concerns the so-called "shareholder rule". In Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd and others (No 2) [2025] UKPC 34, the Privy Council held that the shareholder rule - under which a company was traditionally unable to assert legal advice privilege against its own shareholders in certain shareholder-company litigation - forms no part of Bermudian law and should no longer be recognised in England and Wales. Although the decision arose from a Bermudian appeal, the Board expressly declared that

courts in England and Wales should treat it as abrogating the shareholder rule for the purposes of litigation before those courts.

In France, common-interest arrangements should be approached contractually and with caution. The secret professionnel of the avocat is not a common-law privilege that can simply be shared among aligned parties; it is a professional secrecy obligation attached to the lawyer-client relationship. Separately, the new in-house confidentiality regime is limited to qualifying legal consultations and to the categories of permitted recipients identified by statute, including certain corporate bodies within the company and its group. Sharing advice with other parties, or beyond the statutory recipient circle, may therefore put the protection at risk.

In Romania, joint representation does not diminish the rights that each client would normally have as a result of the attorney-client relationship. Each jointly represented client remains entitled to loyal and diligent representation, and the confidentiality rule does not apply as between the jointly represented clients.

However, joint representation should be approached with caution, particularly in internal investigations or criminal matters involving both a company and its directors or officers. The same external counsel may act for multiple clients only where their interests are sufficiently aligned, the clients are properly informed, and there is no actual conflict of interest or real risk of such a conflict. The mandate should also make clear how information will be shared among the jointly represented clients and what will happen if their interests later diverge.

If a conflict of interest arises, or if the lawyer can no longer protect the rights and legitimate interests of each client, preserve professional secrecy or maintain independence, the lawyer may be required to withdraw from acting for one or more of the clients, depending on the circumstances and the applicable professional rules. Information obtained during the joint representation must not be used or disclosed inconsistently with the lawyer's professional secrecy obligations and duties of loyalty.

Alexandru Ambrozie
Managing Partner - **AMBROZIE | Legal & Strategic Counsel**