CONCEPT OF LEGAL PROFESSIONAL PRIVILEGE IN DENMARK

The Danish Administration of Justice Act and the Danish Penal Code set out provisions governing lawyer-client legal professional privilege obligating Danish lawyers to keep information confidential. The legislation applies to both civil and criminal litigation. The rules cover the relationship between a client and a lawyer, if the lawyer is qualified in Denmark, i.e., has obtained a formal practising certificate from the Ministry of Justice, which require that the criteria for this are fulfilled.

Legal professional privilege in the context of civil litigation

Legal professional privilege applies in the context of civil litigation.

Legal professional privilege in the context of criminal investigations

Legal professional privilege applies in connection with investigations if the investigation can lead to a criminal procedure.

Legal professional privilege in the context of investigations by the antitrust/competition authority

Legal professional privilege applies in connection with investigations conducted by the Danish antitrust/competition authority if the investigation can lead to a criminal procedure. This is not the case for any investigation by the Danish antitrust/competition authority, but in our experience the majority of the investigations involve matters, which can lead to a criminal procedure.

SCOPE OF LEGAL PROFESSIONAL PRIVILEGE IN DENMARK

What is protected by legal professional privilege?

Evidence cannot be demanded from lawyers if it involves matters communicated to them in the course of carrying out their profession against the will of the party that has a right to confidentiality (the client). This is in accordance with section 170 of the Danish Administration of Justice Act and applies in both civil and criminal cases. The Danish antitrust/competition authority is assumed to act in accordance with the legal professional privilege practice set out by the Court of Justice of the EU.

Are in-house counsel protected by legal professional privilege?

Communication between in-house counsel and officers, directors or employees of a company is not protected by the legal professional privilege in section 170 of the Danish Administration of Justice Act. The Danish antitrust/competition authority is assumed to act in accordance with the legal professional privilege practice set out by the Court of Justice of
the EU, and according to practice under the Danish Competition Act communication between in-house counsel and officers, directors or employees of the company is not covered by the legal professional privilege. However, this has never been tested in court.

**Does legal professional privilege apply to the correspondence of non-national qualified lawyers?**

There are no explicit legal provisions protecting communications between non-national qualified lawyers and Danish clients and there are to our knowledge no judgments concerning the question. However, there is the assumption that if the lawyer is established in the EU, legal professional privilege will apply.

**How is legal professional privilege waived?**

The court may order lawyers to give evidence when the evidence is deemed decisive for the outcome of the case, and the nature of the case and its importance to the party in question or society is considered to justify such evidence to be given. This does not apply to defence attorneys in criminal cases.

Furthermore, according to section 299 of the Danish Administration of Justice Act, a court may – upon request of a party – order a third party, including a lawyer, to present or surrender documents which are at his disposal and which are important to the case, unless this will result in the disclosure of matters on which he would otherwise be excluded or exempted from giving oral evidence.

Under the Danish Money Laundering Act, a lawyer who suspects a client of being involved in money laundering is obliged to report such activity to the Public Prosecutor for Serious Economic Crime.

In a search conducted by the police or the antitrust/competition authority, any written material from the lawyer is not subject to the search. This is in accordance with section 794, subsection 3 of the Danish Administration of Justice Act. The scope of the protection is limited to content from the lawyer. The client’s own notes from a meeting or a conversation with a lawyer are not covered by the protection.

**RECENT CASES AND/OR OTHER LEGAL DEVELOPMENTS IN DENMARK**

During the last year, the Danish antitrust/competition authority has rearmed on its IT forensic resources. The authority has updated both their forensic hard- and software as well as appointed new expert employees. However, securing compliance with the legal professional privilege is still a challenge in relation to the competition authorities’ review of electronic information obtained on dawn raids. According to section 18 (4) of the Danish Competition Act, the antitrust/competition authority has 40 workdays to review electronic information obtained on a dawn raid. In reality, it is necessary for the client or the client’s lawyer to be present during these 40 workdays in order to know and secure that the authority does not review information covered by the legal professional privilege.
KEY CONTACTS

Horten (DLA Piper Relationship Firm)
www.horten.dk/

Andreas Christensen
Partner
T +45 3334 4226
ac@horten.dk

Annelouise Dalgaard Pedersen
Partner
T +45 3334 4128
adp@horten.dk

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