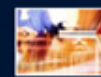


# Privilege for IP professionals in the Netherlands

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## Basis in Dutch law

- ▼ No specific provisions in intellectual property laws
- ▼ Privilege is governed by the general codes on procedure and by case law
- ▼ Only the right of refusal to testify in court is guaranteed by statutory law
- ▼ Privilege of correspondence, conversations and telephone conversations is inferred from the right of refusal to testify



# Statutory provisions

- ▼ Article 165 section 2 sub b Code of Civil Procedure
- ▼ Article 218 Code of Criminal Procedure

He who, by virtue of his appointment, profession or employment is bound by confidentiality can be excused from the obligation to testify with regard to information that he has been entrusted with in that quality.

- ▼ No specific professions are mentioned



## Dutch Supreme Court: traditional approach

- ▼ Traditionally privilege was awarded to priests, physicians, civil law notaries and lawyers admitted to the bar
- ▼ Employees of such persons are also covered
- ▼ The Supreme Court was forced by a judgment of the European Court of Human Rights to award a limited privilege to journalists, only regarding disclosure of their sources
- ▼ The Supreme Court has never specifically awarded privilege to any other professionals, but denied many



# Dutch Supreme Court: open system

- ▼ Supreme Court 22-12-1989, NJ 1990/779, *International Tin Council*
  - ▼ No closed system
  - ▼ Requirements
    - ▼ A legal obligation of confidentiality
    - ▼ It must be clear that the legislator was aware that privilege would be the consequence; if not, it is up to the court to decide on a case-by-case basis whether the witness has to answer to a question
    - ▼ The general interest that the truth is disclosed has to be balanced against the interest of confidentiality
  - ▼ If privilege is awarded under these criteria outside the traditional professions, the scope may be more limited
- ▼ Supreme Court 6-5-1986, NJ 1986/814, *Tax adviser*
  - ▼ Does the person invoking privilege have a legal position that requires people who want their legal interests represented to hire his services



# Legal obligation of confidentiality

- ▼ Lawyers admitted to the bar:
  - ▼ Article 28 *Advocatenwet* is basis for Code of Conduct
  - ▼ Rule 6 of the Code of Conduct imposes confidentiality
  - ▼ Rule 20 a lawyer cannot call another lawyer as witness without first conferring with the Dean of the Bar Association
- ▼ In-house lawyers (not admitted): no legal provisions
- ▼ Patent attorneys:
  - ▼ Article 23h Dutch Patent Act is basis for Code of Conduct
  - ▼ Rule 4 section a of the Code of Conduct: absolute confidentiality
- ▼ Trademark attorneys, design right attorneys, other IP professionals: no legal provisions



# Privilege for IP professionals

- ▼ No legal privilege
  - ▼ In-house lawyers
  - ▼ Trademark attorneys
  - ▼ Design right attorneys
- ▼ Guaranteed privilege
  - ▼ Lawyers admitted to the bar
    - ▼ Outside counsel
    - ▼ In-house lawyers who are admitted to the bar
- ▼ Possible privilege
  - ▼ Patent attorneys
- ▼ Specifically denied by Supreme Court
  - ▼ Tax advisors, accountants, etc (sometimes relevant for IP)



# Patent attorney

- ▼ No specific Supreme Court case law
- ▼ One district court case: District Court Zutphen 5-1-1988, NJ 1989/563
  - ▼ Privilege would be available, but only for patent prosecution
  - ▼ This was not the District Court The Hague, which has exclusive jurisdiction in patent cases
- ▼ *Tax adviser-criterion: assistance required?*
  - ▼ District Court The Hague 21-5-2001 (unpublished)
  - ▼ Professional liability case (prosecution of Argentina patent)
  - ▼ Client needed to hire a patent attorney because of his specialist knowledge
  - ▼ But: the same could apply to a tax adviser





# Scope of privilege

- ▼ Privilege only relates to information obtained or given in the course of professional services
  - ▼ Does not relate to friendly non-business conversations
  - ▼ Lawyer admitted to the bar determines whether it applies
  - ▼ In case of doubt, court should not press



# Background and need for improvement (1)

- ▼ Dutch procedural law had
  - ▼ No disclosure or discovery, nor “saisie descriptive”
  - ▼ No cross-examination of experts (only written submissions)
  - ▼ Limited options for witness hearings and IP professionals were never called as witnesses
- ▼ New law: EU Enforcement Directive
  - ▼ Evidential seizures (“saisie”-type)
  - ▼ Somewhat broader orders for disclosure of information
  - ▼ But taking into account confidentiality of information
- ▼ Predictability required whether communications with an IP professional would be privileged



## Background and need for improvement (2)

- ▼ New perspective: multi-jurisdictional litigation
  - ▼ This was not considered by the legislator
  - ▼ No treaties on privilege for foreign advisers
- ▼ International position
  - ▼ Providing Dutch privileged advice abroad would not destroy privilege in the Dutch courts
  - ▼ No case law on acceptance of foreign privilege



## The future perspective

- ▼ Privilege currently is not a hot topic among Dutch IP professionals
- ▼ Expanding privilege is not on the national political agenda
- ▼ On the other hand, there would be no resistance against an international solution
  - ▼ compare introduction of Journalist source privilege
- ▼ International treaties have direct effect under Dutch constitutional law after ratification
  - ▼ A privilege provided by a treaty would be applied by the courts
  - ▼ It would fit in with the Supreme Court criteria

