

Questionnaire Q199

Remedies to protect the right of clients against forcible disclosure of their IP professional advice

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National Group: Portugal
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- 1.1. Portuguese law does not provide for any duty of confidentiality in which refers to relations between IP professionals and clients. In the specific case of lawyers, there are rules which expressly govern the duty of confidentiality.
- 1.2. Communications between clients and third parties are not protected by any duty of confidentiality. Cases where third parties are bound by such duty by virtue of the rules applying to their profession are excepted.
- 1.3. Communications between IP professionals and third parties are not protected. Cases where the IP professional is a lawyer or the third parties are bound by the duty of confidentiality are excepted.
- 1.4. A) Communications between local professionals and other IP professionals throughout the world are not protected (except where the local professional is a lawyer).

B) The duty of confidentiality binding foreign IP professionals depends on the rules applying to the profession in the country of origin.
- 1.5. i) Only in which refers to the IP professionals who are lawyers.
ii) Only where the third parties are bound by the duty of confidentiality.
iii) Communications are only protected with regard to the IP professionals who are lawyers.
iv) a) Communications are only protected where the local IP professional is a lawyer.

b) Communications are only protected if the domestic law of the foreign IP advisers provides for the duty of confidentiality.

- 1.6. i) In force majeure cases and where ordered by the Courts or the Bar Association, lawyers may be exempted from the duty of confidentiality.
ii) There is no protection.
iii) The same reply as under i).
iv) a) The same reply as under i).
b) Communications are not protected.

- 1.7. i) Inappropriate quality. Privilege should be extended to IP professionals. In addition to improving the system in terms of guarantees for clients, this measure would constitute an important factor in avoiding “discrimination” against these professionals with reference to lawyers.
ii) Appropriate quality. Although, in some cases, privilege would be justified (and, in some situations, communications are in fact covered by privilege) it would be extremely difficult, from a legal point of view, to specify in detail which situations deserved protection and which should not be subject to that regime.
iii) Inappropriate quality. The same reply as under i).
iv) a) Inappropriate quality.
b) Appropriate quality.

1.8. Appropriate quality. Domestic law should not pronounce itself on duties concerning IP professionals from other countries.

2.

2.1. Domestic law should establish limits to the duty of confidentiality binding IP professionals, thereby adapting the scope and limits of the privilege to the regime already applying to other professionals, such as lawyers.

2.2. It would be justified to impose limits with the purpose of harmonising the concept of confidentiality with the professions already subject to that duty.

2.3. Judicial discretion is justified, not in an absolute sense, but only in harmony with the common practice of the Courts in which regards other professions subject to privilege.

2.4. -----

2.5. Further to the aspect mentioned in 2.3., limitation as a function of legal or constitutional imperatives may be justified.

2.6. Yes. The IP adviser should be seen as a qualified professional, duly authorised in accordance with domestic law, contrary to other professionals who, occasionally, practise the activity without the due qualifications.

2.7. -----

2.8. The category of Industrial Property Agent in Portugal is conditional on qualification. Only Industrial Property Agents and lawyers are qualified as IP advisers.

i) Non-existent.

ii) In cases where the IP adviser is not an Industrial Property Agent or a lawyer, the confidentiality regime of communications is not justified.

iii) The guarantees and safeguards derived from the duty of confidentiality should be inherent to qualified professionals and not extended to other professionals who practise IP advising acts in a sporadic and unqualified manner.

2.9. States should have the power to limit the protection granted to communications as a function of certain categories of privilege. This mechanism is justified with the aim of achieving uniformity at national level in which concerns confidentiality in the different professions bound by that duty.

2.10. Not applicable.

2.11. In practical terms, it shall be very difficult to implement a system which prevents States from varying or abolishing the limits of confidentiality. This is a reserved sovereignty which the States can hardly renounce to.

2.12. Not applicable.

2.13. Yes.

2.14. Yes. If there are variations to the regime of confidentiality applying to other professions, such variations should also affect the limits of privilege in the case of IP professionals.

2.15. It might be established that States may only vary the limits when the general regime applying to the duty of confidentiality is altered, thereby maintaining the consistency between the communications of the IP professionals and, for instance, the duties of confidentiality which bind lawyers.

2.16. No.

2.17. The Portuguese Group prefers the AIPPI proposal in the sense that each country should specify which legal advisers would benefit from the treaty.

2.18. Not applicable.

2.19. No new proposals.

2.20. No relevant negative effects derived from the introduction in our country of the measures discussed above are foreseeable.