Switzerland: Privileged Or Not Privileged? Privilege Of Communications With Non-Swiss Lawyers In Criminal Investigations

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It is probably fitting that we begin our series of articles for Mondaq's White-Collar Crime Newsfeed with the discussion of a ruling that concerns the privilege of communications with foreign lawyers in criminal proceedings.

This is indeed a topic that illustrates Switzerland's unique position as a crossroad in transnational criminal investigations.

Switzerland is one of the countries which economy is the most exposed to the world, with 40% of its GDP earned abroad.

Swiss companies not only export and import goods and services, but they also invest heavily abroad, with more than US$1,2 trillion of foreign direct investment per annum, making Switzerland the world's ninth biggest foreign direct investor. Switzerland is also home to the largest number of international and European headquarters of large multinational companies in Europe.

In addition, Switzerland is the main offshore banking centre in the world, with more than one quarter, or US$2.3 trillion, of the world's foreign assets under management by 290 banks. Switzerland is also the world's number one commodity trading, shipping and trade finance hub, with 550 commodity trading and shipping companies, which global market share is estimated at respectively 60% for metals, 50% for sugar and cereals, and 35% for crude oil and products, while shipping through Swiss companies represents 22% of global movements of commodities.

It is therefore not surprising that a great number of transnational white-collar criminal investigations involve Swiss companies and individuals, or target assets or evidence in Switzerland.

In this context, Swiss law enforcement authorities receive numerous requests for mutual assistance and often open parallel domestic criminal investigations into money laundering and other white-collar crime offences, in the context of which they also send requests for mutual assistance to other countries.

Swiss companies and individuals, whether they are themselves the target of a criminal investigation or a third party holding assets or evidence for a person under investigation, therefore frequently need to retain foreign counsels.

The legal issues at stake

Several hundreds of lawyers admitted to foreign bars are established in Switzerland.

Under the Federal Act on the Free Circulation of Lawyers of 23 June 2000 (**Lawyers Act**), in addition to lawyers admitted in Switzerland, Swiss, EU and EFTA nationals admitted in the European Union or in the European Free Trade Association, may, under certain conditions, be admitted to the bar in Switzerland or provide professional services in Switzerland while being based abroad.

Since the end of the Brexit transition period, UK nationals admitted in the United Kingdom, within the limits of the 25 February 2019 Citizens' Rights Agreement between Switzerland and the United Kingdom, may represent clients before Swiss courts until 2022.

While the protection of attorney-client privilege is one of the fundamental tenets of a democratic society, it is often forgotten that not all communications with lawyers are privileged.

In Switzerland, attorney-client privilege is not only a right of the client, but professional secrecy is also a professional duty of the lawyer, on the basis of Article 13 of Lawyers Act, and of Article 321 of the Swiss Penal Code (**PC**).

Whereas a breach of Article 13 of the Lawyers Act may lead to disciplinary sanctions only for lawyers who are registered as lawyers in Switzerland (whether they are from the Swiss Bar or registered in Switzerland, hailing originally from a EU/EFTA bar), Article 321 of the Penal Code has a different scope. Personally, it applies to Swiss and non-Swiss lawyers, wherever they are registered to practice, to other persons who are authorized to represent parties before judicial authorities, as well as their auxiliaries (employees and contractors, such as private investigators and experts hired by a lawyer). Materially, it only applies to confidential information obtained in the exercise of the typical activities of a lawyer, namely the drafting of legal documents, assistance or representation before an administrative or judicial authority, or legal advice, and not to atypical activities, such as purely commercial activities, asset management, directorships and trusteeships.

In terms of evidence in the context of criminal proceedings, the law as it stands created a distinction between the obligation for lawyers to testify and the seizing by law enforcement authorities of communications with lawyers.

According to Article 171 of the Swiss Code of Penal Procedure (**CPP**), lawyers may refuse to testify in relation to confidential matters that have been confided to them or come to their knowledge in the course of their professional activity. It should be noted that according to Article 171 para. 4 CPP, lawyers may refuse to testify even if they are released from secrecy by their client. The scope of Article 171 CPP is the same as that of Article 321 PC, namely it applies to both Swiss and non-Swiss lawyers, but only to the extent that the confidential information was obtained in the context of the lawyer's typical activities.

Article 264 CPP lists documents that cannot be seized by law enforcement authorities, irrespective of their location and of when they were created, because notably of attorney-client privilege. If protected documents are seized, interested parties may object, which leads to the sealing of such documents and requires the filing by the law enforcement authorities to apply for a lifting of the sealing with the competent court (Art. 248 CPP).

Article 264 CPP para. 1 makes a distinction between communications of the suspects with their defence lawyers (let. a), communications of the suspect with persons who may refuse to testify

under Articles 170 to 173 SCPP, including lawyers (let. c), and communications of third parties with their lawyers (let. d), the latter being, however, limited to a "*lawyer who is entitled to represent clients before Swiss courts in accordance with the Lawyers Act of 23 June 2000*".

While lawyers mentioned at Article 264 CPP para. 1 let. a must be lawyers admitted to practice in Switzerland under the Lawyers Act, so as to be admitted as a defence lawyers in Swiss criminal proceedings (Art. 127 para. 5 CPP), lawyers mentioned at let. c may be lawyers admitted to practice anywhere in the world, and lawyers mentioned at let. d must be lawyers entitled to represent clients under the Lawyers Act.

In all cases, communications with a lawyer who is considered as a suspect in the same matter are not privileged.

The current provisions of Article 264 CPP para. 1 were amended in 2012 (with an entry into force on 1 May 2013) in the context of the harmonisation of privilege rules in civil, criminal and administrative proceedings, which led to a fierce debate in Parliament.

As a result, the Swiss government's bill was amended regarding Article 264 CPP, notably to establish a distinction between communications of suspects with their lawyer and communication of third parties with their lawyer, the latter being only protected if the lawyer was admitted in Switzerland, the EU and EFTA (also the UK after 2020). It appears, however, that this distinction was inadvertently made, as there were no published debates regarding that specific amendment. Furthermore, this amendment contradicts the general purpose of harmonization, since this distinction was not added in the civil and administrative proceedings provisions. Lastly, this amendment creates a contradiction with Article 171 CPP, which will allow non-European lawyers to refuse to testify irrespective of whether they are the suspect lawyer or not.

There was therefore a current of scholars who deemed that despite the clear text of the law, courts should disregard the restriction of Article 264 CPP para. 1 let. d to Swiss, EU/EFTA lawyers, and should extend privilege to communications of third parties with all lawyers, wherever they were admitted and whatever their nationality.

Surprisingly, for over eight years, there was no published case law regarding this essential issue until the ruling discussed in this article.

It is true that in our experience, Swiss federal and cantonal prosecutors in practice did not seek to obtain the unsealing of communications of a non-suspect with their non-EU/EFTA lawyers, notably because they did not deem those communications to be relevant to their investigation.

Federal Court Ruling 1B_333/2020 of 22 June 2021

The Swiss Federal Court, Switzerland's highest court, clarified the contours of the protection of the attorney-client privilege in criminal proceedings in Switzerland in a decision 1B_333/2020 dated 22 June 2021 published on 14 July 2021.

The case involved a criminal investigation against an individual and other unknown person for aggravated money laundering (Art. 305bis PC) and bribery of foreign public officials (Art. 322septies PC), including the former Prime Minister of an undisclosed country.

In May 2017, the Office of the Attorney General of Switzerland (**OAGS**) raided a company involved (but not considered as a suspect) in the purported money laundering scheme and seized documents and electronic data.

The company, as a third party to the investigation, requested that part of the seized documentation be sealed and invoked attorney-client privilege pursuant to Article 264 para. 1 lit. d CPP.

The OAGS filed with the Vaud Court of coercive measures a request that the documents be unsealed, arguing that attorney-client privilege could not be raised for non-Swiss or non-EU/EFTA lawyers according to the wording of Article 264 para. 1 lit. d CPP.

On 28 May 2020, the Vaud Court of coercive measures decided notably to lift the sealing regarding the company's communications with its non-EU/EFTA lawyers, a decision against which the company appealed to the Federal Court.

The Federal Court had to decide whether the protection granted by Article 264 para. 1 lit. d CPP could be extended to non-Swiss or non-EU/EFTA lawyers even if the wording of the article limited the protection to Swiss or EU/EFTA practitioners.

As a first step, the Federal Court started the analysis by reminding the private and public interests behind the concept of attorney-client privilege: not only does it guarantee a trustful and complete assessment of the case, but also the protection of the judicial order and the access to justice. The Federal Court also underlined that only "typical" activities of lawyers are covered by attorney-client privilege such as drafting of legal documents, assistance or representation of a person before an administrative or judicial authority, as well as legal advice.

The Federal Court stated furthermore that communications between suspects and their lawyers benefit from an absolute protection and cannot be seized, provided that the lawyers are not themselves suspected and that the documents are considered as deriving from "typical" activities. The Federal Court therefore confirms, for the first time, that the generally admitted principle that the country where the lawyer is registered to practice is irrelevant to determine the scope of protection of attorney-client privilege when such privilege is invoked by a suspect.

Then, the Federal Court examined the contested question of the communication between non-suspects and their lawyers.

The Federal Court considered, in a lengthy analysis, that even if the historical background in relation to Article 264 para. 1 lit. d CPP pleaded against a difference of protection between suspect and a non-suspect and that the provision was not coherent with the corresponding provision of the Swiss Code of Civil Proceedings, the wording of the law was clear, and that therefore, it could not extend the protection of attorney-client privilege to non-EU/EFTA lawyers of third parties to the proceedings.

Conclusion

Consequently, the Federal Court confirms that a non-suspect can only invoke attorney-client privilege for communications with either: (i) a Swiss qualified lawyer, (ii) a Swiss national authorised to practice law in a EU/EFTA country or (iii) a EU/EFTA qualified lawyer national of a EU/EFTA country. It is worthwhile underlining that following the 25 February 2019 bilateral agreement between Switzerland and the United Kingdom, UK lawyers are still considered as EU/EFTA qualified lawyers notwithstanding Brexit.

This decision bestows an inequality not only between suspect and a non-suspect, but also in relation to the type of evidence that the law enforcement authorities can collect during an investigation. Indeed, while they can seize documents from non-EU/EFTA lawyers of third parties and use them as evidence, such lawyers are still entitled to refuse to testify pursuant to Article 171 CPP.

Finally, one can wonder if this decision might not lead to abuses of defence rights, as law enforcement authorities could be tempted to delay the moment when they consider a person as a suspect in order to have access to documentation that they would otherwise not have access to. Courts will have to decide whether such documentation should be eliminated from evidence if that person should later be considered as a suspect, which is likely.

The advice for clients who are concerned that communications with non-EU/EFTA lawyers could be seized is to involve from the beginning their Swiss or EU/EFTA lawyers in their correspondence, so as to extend the privilege they enjoy under Swiss law to those communications.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.