

Briefing September 2018

Legal Professional Privilege in Switzerland: Overview, Recent Developments and Trends

The contours of legal professional privilege vary from one jurisdiction to another. In transnational internal investigations or in multi-jurisdictional criminal proceedings, it is not rare that lawyers need to coordinate their actions and deal with this issue. This paper is thus mainly addressed to foreign lawyers who wish to know more about the scope and the limitations of Swiss legal professional privilege.

1 Introduction¹

After briefly setting out the basis of legal professional privilege (see below 2), this contribution will first distinguish the activities that are protected by privilege from those that are not and discuss *de lege ferenda* limitations that may be imposed by the Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (Anti-Money Laundering Act, ("**AMLA**") (see below 2.3.2). It will then focus on the circumstances under which the legal professional privilege can be lifted (see below 2.4). Finally, it will mention some interesting recent decisions rendered by the Federal Supreme Court ("**FSC**") in the area of internal investigations (see below 3).

2 The legal professional privilege

2.1 Legal provisions

The legal professional privilege is based on various legal sources:

- Even if the Federal Constitution of the Swiss Confederation of 18 April 1999 ("**CST**") does not expressly mention it, the legal professional privilege still benefits from certain safeguards². Indeed, it is first of all derived from the right to personal liberty (Article 10 CST)³, as well as from the right to benefit from the protection of the private sphere for both the lawyer and the client (Article 13 CST)⁴.
- Any breach of the legal professional privilege is covered by Article 321 of the Swiss Criminal Code of 21 December 1937 ("**SCC**"), which provides that it is criminally punishable for a lawyer to disclose a secret, although the latter is not defined in the SCC⁵. Article 321 SCC is an offence prosecuted only on complaint and only the secret's master has the right to file a complaint⁶. As a result, the lawyer who breaches his/her legal professional privilege is liable to a custodial sentence not exceeding three years or to a monetary penalty.

¹ The author thanks Rémy Papinot for his contribution in the preparation of this article

² CR LLCA-MAURER/GROSS, art. 13 N 14.

³ TF 1P.249/2002, consid. 3.1.

⁴ CR LLCA-MAURER/GROSS, art. 13 N 17.

⁵ CR CP-II, CHAPPUIS, art. 321 N 1.

⁶ BSK StGB II-OBERHOLZER, Art. 321 N 34.

- Moreover, the legal professional privilege is subject to a particular ruling in Article 13 of the Swiss Federal Law on Lawyers' Free Circulation of 23 June 2000 ("**LLCA**"). According to this provision, the lawyer is subject to legal professional privilege for all matters entrusted by his/her client.
- Furthermore, when entering into a contractual relationship with a client, the lawyer commits to carry out any work for his/her client with complete independence⁷. Indeed, the lawyer undertakes to implement all the diligence required by the circumstances to reach the expected result⁸. Consequently, under Swiss law, the contract with the lawyer is, in principle, submitted to the rules of the agency contract, because this contract corresponds to the contract of all the services provided on an independent basis⁹. Agency law includes a duty of allegiance, which implies a duty of discretion (Article 398 para. 2 of the Swiss Code of Obligations of 30 March 1911 "**SCO**"). This duty applies as well even if the lawyer did not specifically promise to do so¹⁰.

2.2 Protected interests

According to the FSC, the interests of the lawyer's client as well as the interests of justice benefit from the protection granted by legal professional privilege. Clients entrusting secrets to their lawyer must not fear that the latter discloses them. In addition to that, the legal order must remain protected¹¹. So that the lawyer can practise his/her profession in the most optimal conditions possible, a relationship of mutual trust must exist between the client and his/her lawyer¹². The client will obviously confide more easily in a lawyer if he/she knows that the unauthorised disclosure of secrets can be criminally sanctioned.

2.3 Protected activities and unprotected activities

It is important to make a distinction between the activities that are protected by legal professional privilege and those that do not benefit from such protection.

2.3.1 Activities protected by legal professional privilege

Only lawyers' "typical activities" benefit from the protection granted by legal professional privilege pursuant to Article 321 SCC and Article 13 LLCA¹³. The lawyer's "typical activities" traditionally consist of representing their clients before jurisdictional and administrative authorities as well as in providing legal advice¹⁴. In the scope of the lawyer's typical activities, the protection of facts and documents entrusted to the lawyer derives from the particular relationship of trust between the client and the lawyer¹⁵. Indeed, the client must have the confidence of being able to trust the lawyer completely¹⁶. The FSC ruled that what was said during a public hearing is not considered confidential, irrespective of whether an audience was present or not¹⁷.

2.3.2 Activities not protected by legal professional privilege

Whilst it is unanimously accepted that representation in court proceedings is an activity covered by legal professional privilege, the assessment is more delicate when the activities of the lawyer are of an advisory nature (i.e. corporate or contractual advice).

All of the activities that are not linked to the lawyer's mandate *stricto sensu*, such as private, political, commercial or social activities, are not covered by legal professional privilege¹⁸. Therefore, activities

⁷ BOHNET / MARTENET, *Droit de la profession d'avocat*, N 2525.

⁸ BOHNET / MARTENET, *Droit de la profession d'avocat*, N 2527.

⁹ CR CO I-WERRO, art. 394-406h N 6; BOHNET / MARTENET, *Droit de la profession d'avocat*, N 2528.

¹⁰ ATF 135 III 597 consid. 3.3.

¹¹ ATF 117 Ia 341 consid. 6a; CHAPPUIS, *La profession d'avocat*, Tome I, p. 165; CR CP II-CHAPPUIS, art. 321 N 7 ss.

¹² ATF 117 Ia 341 consid. 6a.

¹³ ATF 135 III 597 consid. 3.3; CHAPPUIS, *La profession d'avocat*, Tome I, p. 190.

¹⁴ CHAPPUIS, *La profession d'avocat*, Tome I, p. 184.

¹⁵ ATF 143 IV 462 consid. 2.2.

¹⁶ *Ibidem*.

¹⁷ ATF 127 IV 122 consid. 3b/aa.

¹⁸ ATF 112 Ib 606 consid. c = JdT 1987 IV 150.

and services that do not represent a lawyer's "typical activities" (for example purely commercial activities) are not covered by legal professional privilege¹⁹.

Some activities often practised by lawyers require additional clarifications:

- If the lawyer is a board member of a company, then legal professional privilege does not apply to his/her activity²⁰.
- If the lawyer acts as the company's lawyer and simultaneously as a member of the board of directors, it may be problematic²¹. Data and information obtained by the lawyer benefit from legal professional privilege. However, this is not the case if they are obtained by a board member²². If information and documents "in the hands" of the lawyer are seized, the authority has to sort and separate them according to the kind of activities undertaken by the lawyer²³. It is important to separate the two mandates clearly. If such a separation is not possible, all the necessary measures and qualifications to prevent the revelation of facts being covered by the legal professional privilege will have to be taken²⁴.
- If a lawyer manages assets belonging to the client, his/her activities are in principle not covered by legal professional privilege, as they do not represent a "typical" activity²⁵. However, activities linked with a liquidation or an allocation of assets between heirs remain reserved²⁶.
- If the lawyer acts as a testamentary executor, the rules of the LLCA are applied to him/her²⁷. It is

relevant to note that Article 13 LLCA can present a conflict with the obligation imposed on the executor to report his/her activities²⁸.

- It also happens that a lawyer acts as a trustee. These activities do not benefit from legal professional privilege²⁹.
- The FSC decided that a lawyer instructed by a bank to conduct a civil process is required to respect banking secrecy pursuant to Article 47 of the Federal Act on Banks of 8 November 1934 ("LB"), in addition to the lawyer's legal professional privilege of the Article 321 SCC in respect of any information obtained³⁰.

It is worth noting that if the lawyer provides financial services not covered by legal professional privilege, he/she is submitted to the AMLA. As a result, the lawyer is not only obliged to answer any possible authorities' enquiry, but also has to file a Suspicion Activity Report ("**SAR**") with the Money Laundering Reporting Office of Switzerland ("**MROS**") if grounded suspicions of money laundering arise³¹.

In the area of the prevention of money laundering, Switzerland is a member of the Financial Action Task Force ("**FATF**"). Pursuant to FATF's recommendations, legal professional privilege should not prevail and should be limited when the lawyer is advising the client in other matters than representation in court proceedings (i.e. transactions of assets/real estate belonging to the client, creation of companies/trusts, etc.).

In June 2018, the AMLA's project of modification was published. This project takes into account the FATF's

¹⁹ ATF 132 II 103 consid. 2.1; ATF 120 Ib 112 consid. 4 = JdT 1996 IV 92; ATF 115 Ia 197 consid. 3d/bb).

²⁰ ATF 115 Ia 197, consid. 3d/bb.

²¹ CHAPPUIS, *La profession d'avocat*, Tome I, p. 189.

²² CHAPPUIS, *La profession d'avocat*, Tome I, p. 190.

²³ *Ibidem*.

²⁴ ATF 114 III 105, consid. 3d = JdT 1990 II p. 98 ; CHAPPUIS, *La profession d'avocat*, Tome I, p. 190.

²⁵ ATF 112 Ib 606 consid. 2c = JdT 1987 IV 150.

²⁶ *Ibidem*.

²⁷ BOHNET / MARTENET, *Droit de la profession d'avocat*, N 1119; CHAPPUIS, *La profession d'avocat*, Tome I, p. 188; CR LLCA-MAURER/GROSS, art. 13 N 199.

²⁸ CHAPPUIS, *La profession d'avocat*, Tome I, p. 188.

²⁹ CHAPPUIS, *La profession d'avocat*, Tome I, p. 189; CR LLCA-MAURER/GROSS, art. 13 N 200.

³⁰ ATF 121 IV 45 consid. 2b = JdT 1997 IV 19.

³¹ CHAPPUIS, *La profession d'avocat*, Tome I, p. 191.

recommendations and introduces some new provisions. In particular, this project foresees that the AMLA applies to persons or legal entities, who, in a professional capacity, are preparing or carrying out one or more of the following activities on behalf of third parties ("**Advisors**"):

1. create, manage or administer:
 - companies with their registered office abroad
 - domiciliary companies having their registered office in Switzerland or
 - trusts within the meaning of Article 2 of the Convention of 1 July 1985 on the law applicable to the trust and its recognition,
2. organise the funding of the activities listed in par. 1.
3. buy or sell entities described in par. 1.
4. provide an address or premises to be used as headquarters of an entity described in par. 1.
5. operate as a shareholder acting on behalf of another person or assist another person in performing that function with companies headquartered abroad.

If adopted by the Swiss legislator, this new requirement will have the consequence that, in certain situations, lawyers will be regarded as Advisors and therefore be submitted to AMLA. Indeed, Swiss lawyers often do not only represent their clients before authorities or courts, but are also frequently required to carry out other non-judicial activities³². New due diligence obligations will be imposed on lawyers. In addition to that, should a grounded suspicion of money-laundering arise, they will have to

terminate their relationship with the client. Finally, lawyers will have to submit their activities to a special auditor. These new obligations imposed by the revised AMLA will obviously affect the legal professional privilege.

2.4 Lifting of the legal professional privilege and justifying reasons

Many justifications (amongst others Article 14 ss SCC) can make legal the revelation of facts covered by privilege and consequently remove any illegality from such a revelation³³.

- The **agreement of the interested party**, which is indicated at Article 321 par. 2 SCC, represents one of the exceptions to the obligation of keeping the secret. If the revelation was made with the agreement of the "secret's master", *i.e.* the one who has the secret and entrusted it to the lawyer, it is not punishable³⁴. The right to "free" the lawyer of a secret is a strictly personal right³⁵. Consequently, if the secret is a common secret (for example a case where there are many creditors), all the persons having an interest to keep the secret have to agree for the secret to be disclosed³⁶. No specific forms are requested for the agreement, which can thus be given expressly, implicitly³⁷ or can even occur through conclusive acts³⁸.
- The **authorisation of the Lawyers' Supervisory Authority** (the competent authority supervising the lawyers according to cantonal law, in Geneva the *Commission du barreau*) makes the secret's revelation not punishable³⁹. Only the "secret's holder", *i.e.* the lawyer has capacity to require the authorisation to lift the legal professional privilege⁴⁰. This avenue can be taken when the secret's master refuses the disclosure of the secret and acts in an unjustified hostile manner⁴¹. Besides,

³² GOOSSENS, *Avant-projet de LBA: les avocats sacrifiés sur le bûcher du GAFI?*, p. 18, AGEFI, Juin 2018.

³³ CR CP II-CHAPPUIS, art. 321 N 116.

³⁴ BSK StGB II-OBERHOLZER, Art. 321 N 22.

³⁵ CHAPPUIS, *La profession d'avocat, Tome I*, p. 232; PC CP-DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGIARI, art. 321 N 40.

³⁶ CHAPPUIS, *La profession d'avocat, Tome I*, p. 232; CORBOZ, *Les infractions en droit suisse, vol II*, art. 321 N 46.

³⁷ ATF 98 IV 217 consid. 2.

³⁸ CHAPPUIS, *La profession d'avocat, Tome I*, p. 232; CORBOZ, *Les infractions en droit suisse, vol II*, art. 321 N 48.

³⁹ CR CP II-CHAPPUIS, art. 321 N 148.

⁴⁰ *Idem*, N 149.

⁴¹ BSK StGB II-OBERHOLZER, Art. 321 N 23; PC CP-DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGIARI, art. 321 N 45 s.

the possibility to invoke legal professional privilege is limited by the abuse of right⁴². Various requirements must be met for the competent authority to lift the legal professional privilege:

- A request to lift the legal professional privilege by the lawyer: nevertheless, the lawyer is not obliged to disclose the facts that were entrusted to him/her, even if he/she is released from the obligation to keep the secret (Article 13 LLCA)⁴³;
- The respect of the right to be heard of the lawyer as well as the client's right to be heard⁴⁴;
- The necessity of a protection of predominant interests: it is necessary for the competent authority to carefully weigh up the different interests concerned⁴⁵. However, the lawyer's secret should not be lifted too easily, because it has an important institutional function. The secret can be lifted only in the presence of clear and compelling public or private interests⁴⁶. A lawyer might be allowed to request the lifting of legal professional privilege in order to protect his/her own interests, for instance when the lawyer wishes to recover unpaid fees. In such a case, the judge will have to weigh up on one side the lawyer's private interest and, on the other side, the public interest to the confidentiality of a proceeding and the client's private interest in preventing the disclosure of the secret⁴⁷. Moreover, when the lawyer wants his/her fees to be recovered by means of the debt collection process, he/she will need to divulge to some third parties secret facts/information. Where a secret has to be lifted so that such revelations

can be made, the lawyer will have to apply the principle of proportionality and only disclose the necessary facts for the recovery⁴⁸.

- **Legitimate self-defence and situations of necessity** can justify the lifting of legal professional privilege⁴⁹. In those situations, legal scholars consider that the competent authority must give its agreement to the lawyer so that he/she can disclose the information covered by legal professional privilege, provided that the authority can decide in due time what action, if any, to take⁵⁰. A breach of legal professional privilege while invoking the situation of necessity can be justified only in situations where the necessary proceedings to obtain the lifting of the legal professional privilege cannot be achieved in due time⁵¹. The danger has to be imminent⁵². Moreover, the interests that are supposed to be protected by the breach of legal professional privilege must be clearly evident; it means that the importance of the disclosed fact must be higher than the importance of any benefit deriving from the secret⁵³.

2.5 Aspects of criminal proceedings

In the Swiss Criminal Proceedings Code of 5 October 2007 ("**SCPC**"), a particularly important place is kept for the legal professional privilege:

- Article 171 SCPC provides that lawyers as well as their assistants may refuse to testify in relation to confidential matters that have been confided to them or have come to their knowledge in the course of their professional work. Para. 4 introduces a special dispensation for lawyers. Also, Article 13 para. 1 LLCA foresees that, even if the client

⁴² TF 1P.32/2005 consid. 3.2; CR CP II-CHAPPUIS, art. 321 N 137.

⁴³ CR CP II-CHAPPUIS, art. 321 N 149.

⁴⁴ CORBOZ, *Les infractions en droit suisse, vol II*, art. 321 N 54; CR CP II-CHAPPUIS, art. 321 N 151.

⁴⁵ BSK StGB II-OBERHOLZER, Art. 321 N 23; CORBOZ, *Les infractions en droit suisse, vol II*, art. 321 N 55.

⁴⁶ CR CP II-CHAPPUIS, art. 321 N 153.

⁴⁷ *Idem*, N 155.

⁴⁸ *Idem*, N 156.

⁴⁹ BSK StGB II-OBERHOLZER, Art. 321 N 33.

⁵⁰ CORBOZ, *Les infractions en droit suisse, vol II*, art. 321 N 93; CR CP II-CHAPPUIS, art. 321 N 119.

⁵¹ CR CP II-CHAPPUIS, art. 321 N 120.

⁵² *Idem*, N 121.

⁵³ CR CP II-CHAPPUIS, art. 321 N 122.

lifted the legal professional privilege, the lawyer is not obliged to testify⁵⁴. As a result, the latter is the one who decides eventually if he/she wants to do so. It is interesting to note that lawyers are the only professionals to benefit from an absolute right to refuse to testify⁵⁵.

- Article 264 SCPC provides that, irrespective of their location and when they were created, documents used in communications between the accused and his/her lawyer may not be seized (lit. a). This provision covers: personal records and correspondence belonging to the accused if the interest in protecting his/her privacy outweighs the interest in prosecution (lit. b), items and documents used in communications between the accused and persons who may refuse to testify in accordance with Articles 170–173 SCPC and who are not accused of an offence relating to the same case (lit. c) and items and documents used in communications between another person and his/her lawyer provided the lawyer is entitled to represent clients before Swiss courts in accordance with the LLCA and is not accused of an offence relating to the same case (lit. d).

The scope of protection given by legal professional privilege does not have any geographical limits. As a consequence, the secret is granted regardless of the location of the documents⁵⁶.

Last but not least, if the lawyer is suspected or accused of having committed an infraction, he/she obviously cannot benefit from the protection granted by legal professional privilege and cannot invoke it in front of the criminal authority⁵⁷. As a result, the lawyer does not benefit from any kind of favours/privileges⁵⁸.

3 Recent jurisprudence

3.1 TF 1B_85/2016

In this judgment, the FSC decided that, in the event of a bank delegating its compliance and controlling tasks as well as other obligations deriving from the AMLA to a law firm, the bank may not, in the event of a criminal investigation, avail itself of legal professional privilege⁵⁹. If the lawyer's mandate bears on the obligations imposed by the AMLA to a financial intermediary, he/she does not carry out a "typical activity", but rather an "atypical" one. Therefore, internal investigation documents produced by a firm within the framework of the mandate are not covered by legal professional privilege⁶⁰.

3.2 TF 1B_437/2017

This judgment was delivered by the FSC on the basis of an appeal against a decision of the Federal Criminal Court of Switzerland ("FCCS"). It also deals with the limitations of the legal professional privilege in respect of internal investigative reports relating to suspicions of money laundering. In the first judgment, the FCCS decided that the examination of the conformity/compliance with banking regulations and the issuing of recommendations relating to possible violations of legal and regulatory requirements represented classic legal advice⁶¹. The FCCS thus concluded that legal professional secrecy covered the reports produced by the law firm on the basis of a mandate of a bank where those benefited from the protection against any confiscations, because they were included in the "typical activity" of a lawyer⁶². The FSC came to another conclusion. It considered that in the context of certain activities (e.g. a "mixed mandate" that includes both "typical activities" of a lawyer and "atypical activities" (for the distinction

⁵⁴ CHAPPUIS, *La profession d'avocat*, Tome I, p. 204.

⁵⁵ *Ibidem*.

⁵⁶ TF 1B_167/2015 consid. 3.1; ATF 138 IV 225 consid. 6.1 = JdT 2014 IV 24.

⁵⁷ ATF 106 IV 413 consid. 7c ; CORBOZ, *Les infractions en droit suisse*, vol II, art. 321 N 65.

⁵⁸ CR LLCA-MAURER/GROSS, art. 13 N 255.

⁵⁹ TF 1B.285/2016, consid. 6.6.

⁶⁰ TF 1B.285/2016, consid. 7.2.

⁶¹ BE. 2017.2, consid. 6.5.

⁶² *Ibidem*.

between the two types of activities, see above 2.3.1), the lawyer may not globally invoke legal professional privilege⁶³. Indeed, if a bank delegates its own controlling and compliance tasks to a law firm, it would not be able to rely entirely on legal professional privilege in criminal investigations⁶⁴. So, if the lawyer's activities do not represent "typical activities" of a lawyer in the context of a mixed mandate, these activities must be understood and qualified as secondary legal "commercial activities"⁶⁵.

4 Synthesis

The legal professional privilege is a notion that is subject to change over time⁶⁶, in particular when it relates to combating money laundering or terrorism. In this respect, there is a clear trend on the international scene to narrow down the scope of legal professional privilege, at least for the activities that do not concern pure representation in court⁶⁷.

EU countries have already adopted important changes. The EU directive 2015/849 of 20 May 2015 completely follows the FATF's approach. Each and every EU country had to transpose this directive into its domestic law. All major European countries,

including Germany, France, the United Kingdom, Italy and Spain, integrated the FATF's standards and thus limited the scope of lawyer's activities enjoying the legal professional privilege⁶⁸. Switzerland is currently working on a revision of its AMLA in order to comply with FATF's recommendations. However, to date, Switzerland still remains an exception in the European landscape⁶⁹. This being said, the issues raised by the modifications contained in the project caused significant concern in the legal community and have been criticised⁷⁰. The notion of the "atypical activity" non-protected by legal professional privilege is narrower under Swiss law than it is under FATF's recommendations⁷¹. In other words, lawyers' advisory activities listed in the project of modification of AMLA are still considered under Swiss law as "typical activities" and therefore protected by legal professional privilege.

It will be interesting to see to what extent the Swiss parliament will align with the FATF recommendations. Switzerland is obliged to undergo periodic reviews by the FATF. The latter expects Switzerland to have its domestic law amended, according to the last FATF review⁷², in effect as of February 2020. The next FATF review will take place in 2021.

⁶³ TF 1B.433/2017, consid. 4.13.

⁶⁴ *Ibidem*.

⁶⁵ TF 1B.433/2017, consid. 4.16.

⁶⁶ CR CP II-CHAPPUIS, art. 321 N 4.

⁶⁷ CR CP II-CHAPPUIS, art. 321 N 4.

⁶⁸ Swiss Explanatory report on the modification project of the AMLA, 1st June 2018, p. 33.

⁶⁹ VILLARD, *Révision de la LBA, Obligations de diligence étendues aux avocats*, 12 June 2018, CDBF.

⁷⁰ GOOSSENS, *Avant-projet de LBA: les avocats sacrifiés sur le bûcher du GAFI?*, p. 18, AGEFI, Juin 2018; This development has already been criticized back when the last revision that diminished the legal professional privilege came into force, see BÉGUIN, *L'avocat face à la révision GAFI 2012*, in *Revue de l'avocat* 6/7/2015, p. 263; DE PREUX FRAGNIÈRE GAFNER, *La modification de la loi fédérale concernant la lutte contre le blanchiment d'argent et le financement du terrorisme (Avant-projet)*, 11 June 2018, p. 2 and 5; CROCE, *Les avocats seront-ils eux aussi bientôt soumis à la LBA?*, 4 July 2018.

⁷¹ CHAPPUIS, *Le secret de l'avocat face aux exigences de la lutte contre le blanchiment d'argent: l'avis de la Cour européenne des droits de l'homme*, *forum-poenale* 2/2013, p. 120; CR CP II-CHAPPUIS, art. 321 N 5.

⁷² Measures to combat money laundering and the financing of terrorism and proliferation in Switzerland, Mutual Evaluation Report of Switzerland 2016, p. 196 ff.

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