LEGAL PRIVILEGE IN INTERNAL INVESTIGATIONS - RECENT SWISS FSC RULINGS

In two recent rulings[1], both dated 6 August 2024, the Swiss Federal Supreme Court (FSC) addressed critical issues regarding the applicability and scope of legal privilege in internal investigations. The FSC affirmed the applicability of attorney-client privilege for internal investigation reports and clears doubts that had existed based on earlier FSC-rulings. The court also found that a voluntary disclosure of such findings to a regulator does not constitute a waiver of client-attorney privilege. However, the FSC further held that client-attorney privilege does not extend to the third party to whom documents were disclosed. In the cases at hand, this meant that the bank concerned could successfully invoke privilege, but the Prosecutor's Office could obtain the information it was seeking from FINMA.

BACKGROUND

Both decisions originate from proceedings of the Public Prosecutor's Office of the canton of Zurich against an individual as well as unknown parties within a bank regarding alleged violations of the Federal Act of Unfair Competition (UCA). The bank had mandated a law firm to conduct an internal investigation into the matter. Subsequently, the bank shared the law firm's investigation report with its supervisory authority FINMA, which was conducting enforcement proceedings against the bank in this context.

Case 1: Decision 7B_158/2023 dated 6 August 2024

The first case concerns the law firm's investigation report, which the Prosecutor's Office requested **from the bank**. The bank complied but requested that the documents be sealed invoking legal privilege. The ensuing unsealing request was denied by the District Court. Upon appeal by the Prosecutor, the FSC upheld the lower court's decision, confirming the applicability of attorney-client privilege to internal investigation reports. The court based its ruling on the following considerations:

- **Legal privilege applies to internal investigations:** Attorney-client privilege is designed to protect the trust between a client and its lawyer, which is essential for effective legal representation. In order to be protected by privilege, an activity needs to fall within the typical activities of lawyers. It does not extend to services that go beyond this scope, such as business management or compliance tasks.

[1] 7B_158/2023 (intended for publication) and 7B_874/2023.

The court determined that the fact-finding contained in the internal investigation report was directly related to legal representation in ongoing or impending litigation, and as such constituted a typical activity of a lawyer and a vital part of any effective representation. The court rejected the appellant's position that complex fact-finding can also be performed by non-lawyers and therefore generally should not be privileged. The court stated that the deciding factor is rather whether the activities were conducted in the context of the legal representation of a client, or whether legally prescribed documentation and retention obligations are circumvented by delegating them to a law firm.

- **Pre-existing documents**: The FSC ruled that while the raw data pool of original internal bank documents is not protected by attorney-client privilege, the process of review, analysis and selection of documents by lawyers qualifies them as a work product that warrants legal privilege. While this may complicate the establishment of the facts by the Prosecutor, it does not constitute a risk of loss of the underlying information when lawyers work with copies of the original data, which is the norm.
- **Disclosure to third parties**: Sharing confidential information with selected third parties does not make the information public or indicate that the person sharing it intends to make it generally accessible. However, whether a third party can be compelled to testify or hand over documents is a distinct issue. Generally, if confidential information is voluntarily shared with a third party, it leaves the scope of the protected attorney-client relationship, meaning the attorney-client privilege does not prevent the third party from being obligated to testify or produce such documents.

Case 2: Decision 7B_874/2023 dated 6 August 2024

The Prosecutor's Office also made a request to FINMA for documents pertaining to its enforcement proceedings, namely the enforcement order and the report of the investigation agent appointed by FINMA. In this second case, the bank tried to invoke the attorney-client privilege because FINMA's documents were in part based on the internal investigation report and supporting documents which the bank had voluntarily provided to FINMA. The court ruled in favor of the Prosecutor's Office, allowing the use of the documents in the criminal investigation. The court's principal considerations were:

- **Voluntary disclosure**: The FSC notes that attorney-client correspondence, that is protected under attorney-client privilege, includes communications during the course of legal representation between the lawyer and its client, irrespective of where it is located. This also extends to any pre-existing documents that the client provided to the lawyer or information obtained by the lawyer from third parties for the purpose of the mandate. However, legal privilege does not extend to a third party to whom information was voluntarily and deliberately disclosed as it has left the attorney-client relationship. As the disclosure was not elicited by the threat of coercive measures by FINMA, the disclosure qualifies as voluntary in the present case.
- **No "remote effect" of attorney-client privilege:** The bank's argument that, while handing over the respective documents to FINMA, it had explicitly stated that their cooperation did not constitute a waiver of the attorney-client privilege was not accepted by the FSC. Instead, the FSC stated that there was no basis in the law for what could be described as a remote effect of the attorney-client privilege applying to third parties. The court noted that the law allows FINMA to invoke supervisory privilege. It can do so at its own discretion to take the disclosing party's interests into account.

IMPLICATIONS AND OUTLOOK

The rulings provide a welcome clarification on the scope of the attorney-client privilege: In the previous FSC decision BGE 142 IV 207 the FSC had ruled that the attorney-client privilege did not apply to a law firm's internal investigation where it exercises compliance functions that a company is legally obligated to perform, such as due diligence obligations under the anti-money laundering act. This caused concerns as to whether the decision would call into question the applicability of legal privilege in internal investigations more broadly. The FSC has now made it clear, that its prior decision constitutes an exception to the rule and that the attorney-client privilege generally covers internal investigations, including the establishment of the facts as well of the underlying pre-existing documents that have been analyzed and selected by lawyers. Legal privilege certainly applies when the investigation is linked to ongoing or potential future legal dispute.

Where interactions with regulatory authorities such as FINMA are concerned, the decisions emphasize the risk connected to any voluntary disclosure by stating clearly that the attorney-client privilege does not apply to third parties and that it is in the sole discretion of FINMA whether to invoke regulatory privilege.

In practice it is therefore advisable to:

1. Carefully consider how any internal investigation is set up and where possible, link it to an ongoing or potential future legal dispute.
2. Account for the fact that any voluntary disclosure to a third party undermines the effective protection by attorney-client privilege. Assess whether foregoing any disclosures until compelled to do so is a viable option. In particular, consider the implications of a more limited cooperation with authorities/regulators.
3. If the benefits of a voluntary disclosure outweigh the associated risks, opt for oral instead of written communication where possible and grant third parties only restricted access to documents (e.g. remote read-only IT-access).

4. If the regulator, particularly FINMA, insists on the unrestricted handover of documents, consider the option of making the voluntary disclosure contingent upon an assurance that the regulator makes use of supervisory privilege. Keep in mind that this approach bears considerable risk since it is in FINMA's sole discretion whether to invoke its supervisory privilege.

The FSC invokes the principle of the rule of law in explaining that upholding attorney-client privilege outweighs the prosecution's interest in unhindered access to evidence (7B_158/2023 of 6 August 2024). This is put into perspective by the second FSC-decision (7B_874/2023 of 6. August 2024), where the court prioritized the obstacle free collaboration between regulatory bodies and the criminal authorities. In doing so, it might further deter supervised entities from maintaining open discourse and collaboration with the regulatory authorities with regard to privileged documents. It remains to be seen whether this case law will increase the importance and frequency of supervisory privilege invoked by FINMA.

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