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Switzerland: Trends and Developments

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Trends and Developments

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Bär & Karrer Ltd is a leading Swiss law firm with more than 200 lawyers. The firm's core business is advising its clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. The firm's white-collar crime practice encompasses advice and representation in all areas of business crime, including fraud, money-laundering, corruption, disloyal management, organised insolvency, corporate criminal liability, blocking statutes, economic espionage and all aspects relating to the Swiss anti-money laundering regulations. Bär & Karrer's white-collar team act for corporations or individuals, whether they face investigation by the prosecuting authorities or are the victims of a criminal conduct. In the latter case, where appropriate, it focuses its efforts on asset tracing/freezing and recovery steps in order to achieve reparation. It has extensive experience in advising clients in cross-border matters, including mutual legal assistance and extradition proceedings.

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Internal Investigation Reports

Introduction

This contribution outlines the role and relevancy of internal investigation reports in the financial sector and particularly in the context of parallel or subsequent criminal proceedings related to the same underlying matter. This topic has been the subject of significant case law in Switzerland.

Against this backdrop, certain limitations apply and need to be carefully considered at the outset of an internal investigation.

One of the key questions is whether it is possible to avoid or challenge the prosecution authorities' reliance on an internal investigation report by invoking (i) the right not to incriminate oneself (nemo tenetur principle), and/or (ii) attorney-client privilege, where outside legal counsel was instructed to conduct the internal investigation and issued a report.

Right not to incriminate oneself

In the financial sector, supervised entities are subject to a very broad duty to co-operate with the Swiss Financial Market Supervisory Authority (FINMA), which is responsible for monitoring the Swiss financial market and protecting its integrity. The key provision dealing with the co-operation duty is Article 29 of the Federal Act on the Swiss Financial Market Supervisory Authority.

As a result, supervised entities must provide FINMA, on their own initiative or upon request, with all documents and information which the regulator requires to carry out its supervision duties. In practical terms, the disclosure duties vis-à-vis FINMA often require the supervised entity to document its findings yielded during an internal investigation and to disclose the report (or at least the key findings) arising therefrom, which often identifies potential legal or regulatory shortcomings related to the underlying matter.

The duty to co-operate with the regulator, at times, however, conflicts with the nemo tenetur principle, pursuant to which no person may be required to incriminate himself or herself by his or her own testimony, by positively providing evidence or through any other form of co-operation in criminal proceedings. The conflict between these two principles becomes obvious where the information provided to FINMA (i) is incriminating for the supervised entity, and (ii) is subsequently shared by FINMA with the criminal prosecution authorities. Such sharing of information might typically occur in the context of mutual assistance proceedings and the exchange of information between authorities.

In Switzerland, companies such as banks are to a large extent denied the right to invoke the nemo tenetur principle to prevent the prosecution authorities from getting hold of internal investigation reports, whether this occurs by means of coercive measures (dawn raids, seizures, etc) or through mutual legal assistance with FINMA.

The reasoning behind this is that (i) if documents and evidence already existed before coercion was applied, and (ii) they were issued notably in the context of administrative proceedings, without the threat of criminal penalties, the nemo tenetur principle does not apply (Swiss Federal Supreme Court [FSC] 142 IV 207).

As a result of (i) the increasing appetite of prosecution authorities for internal investigation reports, and (ii) the very limited legal protection afforded to supervised entities and their employees, other avenues need to be considered by supervised entities concerning how the findings of internal investigations are documented and eventually shared with FINMA.

Attorney-client privilege: what is the scope of privilege protection?

While attorney-client privilege remains intact as a matter of Swiss criminal procedure law for lawyers defending the accused individual or a legal entity, the scope of protection is significantly more precarious for other participants (witnesses, informants, etc) or third parties to the proceedings. Indeed, for these other categories, recent case law held that only Swiss, EU and EFTA-admitted lawyers benefit from attorney-client privilege protection in Switzerland (FSC 1B_333/2020 of 22 June 2021).

As a result, written communications between a client (who is *not* the target of a criminal investigation) and a US law firm, for instance, are not protected by attorney-client privilege if the information is seized by a Swiss prosecution authority. As a result, such information may be accessed and exploited by the authority. This can be of particular relevance in the context of cross-border internal investigations in which non-Swiss/EU/EFTA lawyers are involved.

Moreover, where the purpose of an internal investigation is to assess a supervised entity's compliance with AML rules and regulations, attorney-client privilege might not afford an absolute protection, even for Swiss lawyers. Indeed, according to case law, whenever an external counsel is tasked with an internal investigation related to the AML compliance of a financial institution, these fact findings amount to a delegation of the supervised entity's core AML duties, and attorney-client privilege does not extend to this portion of the mandate (FSC 1B_85/2016 of 20 September 2016). This is particularly true where lawyers perform compliance tasks (including the monitoring/controlling and documenting thereof) that are typically the duty of the bank itself (and are therefore being carried out on behalf of the bank). Such work products are not deemed privileged (FSC 1B_433/2017 of 21 March 2018).

However, in two recent decisions (7B_158/2023 (intended for publication) and 7B_874/2023, both dated 6 August 2024, the FSC addressed critical issues regarding the applicability and scope of legal privilege in internal investigations. As set forth below, the FSC affirmed the applicability of attorney-client privilege to internal investigation reports and resolved some uncertainties arising from the earlier FSC-rulings mentioned above. The FSC 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 attorney-client privilege does not extend to a third party to whom documents have been voluntarily disclosed. In the cases at hand, this meant that the bank could successfully invoke privilege, but the Prosecutor's Office could, in turn, obtain the information it was seeking from FINMA.

Both FSC decisions originate from proceedings of the Public Prosecutor's Office of the canton of Zurich against an individual as well as unknown participants within a bank, regarding alleged violations of the Federal Act on Unfair Competition (UCA). The bank had mandated a law firm with conducting an internal investigation into the matter.

The first decision (7B_158/2023 of 6 August 2024) deals with the law firm's investigation report, which the Prosecutor's Office requested from the bank. The bank produced the report but requested that it be sealed on grounds of 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. In short, the FSC stated that:

- in order to be protected by privilege, an activity needs to fall within the typical activities of lawyers (not compliance tasks or business management etc.);
- 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;
- 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; and
- 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, the FSC went on to state that 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 that attorney-client privilege does not prevent the third party from being obliged to testify or produce such documents (see hereafter).

In the very same matter, the Prosecutor's Office also made a request to the bank's regulator, FINMA, for documents pertaining to its enforcement proceedings, namely the enforcement order and the report of the investigation agent appointed by FINMA. This led to the second decision (decision 7B_874/2023 of 6 August 2024). The bank had invoked 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 FSC ruled in favour of the Prosecutor's Office, allowing the use of the documents in the criminal investigation. The FSC stated that (i) 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 and, (ii) as the disclosure was not elicited by the threat of coercive measures by FINMA, the disclosure qualified as voluntary in the present case. The bank's argument that, while handing over the respective documents to FINMA, it had explicitly stated that their co-operation did not con-

stitute a waiver of the attorney-client privilege was not heard by the FSC which noted that the law allows FINMA to invoke supervisory privilege and that it can do so at its own discretion to take the disclosing party's interests into account.

Implications and outlook

The most recent FSC decisions outlined above provide a welcome clarification on the scope of the attorney-client privilege. The FSC has now made it clear that attorney-client privilege generally covers internal investigations, including the establishment of the underlying facts and the pre-existing documents that have been analysed 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 most recent SFC decisions emphasise and illustrate the risk connected to any voluntary disclosure, by clearly stating that the attorney-client privilege does not extend to third parties and that it is at the sole discretion of FINMA whether to invoke regulatory privilege to oppose the sharing of information and documents with prosecution authorities.

Conclusion

There are many cases in which financial institutions engage outside counsel to conduct internal investigations and prepare a report, frequently as part of their duty to co-operate with their regulator. Such reports are often ultimately forwarded to the prosecution authorities and are used as incriminating evidence in criminal proceedings. As a result, tensions may well arise regarding the fundamental right not to incriminate oneself, as well as in relation to attorney-client privilege.

The FSC has invoked 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 has been put into perspective by the second FSC-decision (7B_874/2023 of 6 August 2024), where the court prioritised the smooth collaboration between regulatory bodies and criminal authorities. In doing so, case law might further deter supervised entities from maintaining an 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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