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BRIEFING JULY 2021

SWISS FEDERAL TRIBUNAL DENIES LEGAL PRIVILEGE PROTECTION FOR CORRESPONDENCE BETWEEN NON-ACCUSED PERSONS AND NON-SWISS/EU/EFTA LAWYERS

The Swiss Federal Tribunal ruled in a recent milestone decision that, in criminal proceedings, communications between a non-accused person and their lawyer are protected from seizure by the prosecuting authorities only if such lawyer is a Swiss/EU/EFTA practitioner. Therefore, unless the person is the target of the investigation, their communications with a non-Swiss/EU/EFTA lawyer do not benefit from the attorney-client privilege protection and may be seized and used as evidence by the prosecuting authorities.

This could have a noticeable impact on communications with US lawyers, among others.

FACTS

On or around 2 July 2013, the Office of the Attorney General of Switzerland (OAG) opened a criminal investigation against an individual and other unknown persons for aggravated money laundering (art. 305bis Swiss Criminal Code) and bribery of foreign public officials (art. 322^{septies} Swiss Criminal Code). In the course of the investigation, the OAG ordered a dawn raid of the premises of a Geneva-based company, *third-party to the proceedings*. Several documents and electronic data were seized by the OAG. The company requested the sealing of some of these documents/data and opposed their seizure based on the argument that they were covered by the attorney-client privilege pursuant to art. 264 para. 1 lit. d Swiss Criminal Procedure Code (CrimPC). Part of the seized material concerned communications with non-Swiss/EU/EFTA lawyers. The OAG requested the lifting of the seals on all the material seized, arguing, in particular, that the attorney-client privilege protection applies only to communications with Swiss/EU/EFTA lawyers.

RULING

In a milestone decision released on 14 July 2021 (*1B_333/2020_22.06.2021 - Schweizerisches Bundesgericht (bger.ch)*), the Swiss Federal Tribunal had to decide whether the protection afforded by art. 264 para. 1 lit. d CrimPC is limited to communications between a non-accused person and Swiss/EU/EFTA lawyers or if it must also be extended to non-Swiss/EU/EFTA lawyers.

https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://22-06-2021-1B_333-2020&lang=de&zoom=&type=show_document

First of all, the Swiss Federal Tribunal stated that communications between the accused in Swiss criminal proceedings and their lawyers are absolutely protected by attorney-client privilege and cannot be seized by the Swiss prosecuting authorities. This applies regardless of whether the lawyer in question is assisting the accused in the Swiss criminal proceedings, and irrespective of the country of origin of the lawyer, *provided that:* (i) such lawyer is not themselves accused in the criminal proceedings, and (ii) the communications relate to the so-called typical lawyer activity (i.e. legal advice or representation before authorities, as opposed to asset management activities).

Turning to communications between „another person" and their lawyer, art. 264 para. 1 lit. d CrimPC affords protection against the seizure of such communications, provided that the lawyer: *„is authorized to represent clients before Swiss courts in accordance with the Lawyers Act of 23 June 2000 and is not accused of an offence relating to the same case"*. By „another person", it is understood that this relates to someone who is neither accused nor entitled to refuse testimony in the proceedings according to art. 170 – 173 CrimPC.

The Swiss Federal Tribunal has analysed the history of this provision, which originates from the need to harmonise the Civil Procedure Code with the Criminal Procedure Code, as the latter did not contain a provision protecting the correspondence between third parties and their lawyers until 2013. The Swiss Federal Tribunal then considers, and in fact gives decisive weight to, the fact that art. 264 para. 1 lit. d CrimPC is, according to its wording, applicable only to lawyers who are authorised to practise pursuant to the Swiss Lawyers Act.

As a result, art. 264 para. 1 lit. d CrimPC can only be invoked with regard to communications with:

> Lawyers qualified in Switzerland;
> Swiss nationals authorised to practise as lawyers in an EU/EFTA State under a title listed in the annex of the Swiss Lawyers Act;
> EU/EFTA lawyers, i.e. (i) nationals of these States, (ii) authorised to practise in their State of origin under a title listed in the annex of the Swiss Lawyers Act and (iii) who carry out an activity recognised by art. 21 ff (provision of services) or art. 27 ff (representation before courts) of the Swiss Lawyers Act.

In view of the above, non-Swiss/EU/EFTA lawyers of a non-accused person in Swiss criminal proceedings are entitled to refuse to give testimony as a witness based on attorney-client privilege; however, the written communications between such lawyers and their client are not protected and may therefore be seized and used by the Swiss prosecuting authorities.

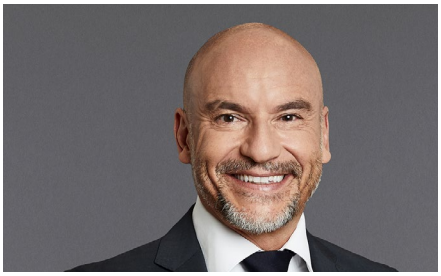
For the sake of completeness, it should be noted that in March 2021, Switzerland adapted its law in order to allow UK lawyers to enjoy the same level of protection as EU/EFTA lawyers despite the Brexit. Communications with UK lawyers should thus no be adversely impacted by this ruling of the Swiss Federal Tribunal.

CONCLUSION

Clients who are not accused in Swiss criminal proceedings (e.g. third parties holding information relevant to the investigation) may invoke attorney-client privilege only with regard to their communications with Swiss/EU/EFTA lawyers with a view to successfully opposing their seizure by the Swiss prosecuting authorities.

Consequently, this latest ruling of the Swiss Federal Tribunal raises the question as to how non-Swiss/EU/EFTA lawyers should best be instructed from now on, to avoid losing the protection afforded by client-attorney privilege. Depending on the circumstances, the location of data storage should certainly also be reassessed, in order to mitigate the adverse impact of the ruling.

AUTHORS



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