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1. DEFINITION – PRESENTATION

What legal privilege is and what it is not

Claims of privilege may arise in Switzerland if a party is ordered by a judicial or administrative body – under the threat of sanctions – to produce evidence (orally or through documents), or if documents are seized in the context of criminal or anti-trust investigations. Privilege rights protect a person in such cases from testifying as a witness and/or from disclosing confidential documents or other pieces of evidence. As regards Swiss civil procedure, unlike in common law jurisdictions, the taking of evidence is left to the judiciary. Accordingly, witness examinations are conducted by the court and it is for the court to order a party or a third party possessor of documents to produce them to the court. There is no concept similar to that of discovery or disclosure where parties must disclose "all relevant documents" (even those detrimental to one's case). Privilege issues in Swiss civil proceedings therefore arise less frequently than in common law jurisdictions.

Under Swiss law, the privilege available to lawyers is based on the lawyer's secrecy obligations owed to the client. The privilege grants the lawyer an absolute right of refusal to give evidence in a procedural context. Unlike in common law jurisdictions, the privilege is that of the lawyer not the client. It is widely said that the cloak of protection is over the lawyer rather than the attorney-client relationship or the client. The privilege available to lawyers in Switzerland is legal privilege and not "attorney-client privilege".

The scope of a lawyer's secrecy obligations under Swiss law and the corresponding legal privilege is very broad and includes everything that is confined to a lawyer in connection with an existing (or prospective) mandate, regardless of the nature or content of the information, whether it is accurate, its source or timing. The privilege rule is mitigated by the fact that a lawyer may not aid a client to commit a felony and the privilege does not extend to cases where the communications sought to be protected were intended to further criminal or fraudulent purposes. Obviously, a lawyer cannot rely on the privilege if criminal charges are brought against him or her.² Finally, legal privilege cannot be relied on as a blanket defence to disclosure nor does it prevent the lawyer from appearing as a witness before court. Objections must be raised before the court and considered on a case-by-case basis, and the privilege must be claimed with respect to each specific communication at issue.

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DFT 125 I 46.

2. SOURCES

From which sources is the legal privilege derived?

2.1 Relevant statutes

In Switzerland, the lawyer's secrecy obligations and the corresponding legal privilege is based on a variety of provisions:

- i) The attorney-client relationship is governed by the provisions of the Swiss Code of Obligations (CO) regarding the mandate agreement, imposing on lawyers a comprehensive duty of loyalty and faithfulness towards the client, which includes the obligation to treat the client's affairs as confidential.³
- ii) Legal Privilege in Switzerland is also protected by criminal law. According to article 321 of the Swiss Penal Code (PC), a violation of the lawyer's secrecy duties constitutes a severe criminal offence and is punishable with imprisonment or an income related monetary penalty. Only persons who qualify as attorneys in the sense of article 321 PC may rely on the privilege. While lawyers practising abroad are subject to their domestic statutes with regard to professional secrecy, they are also under the threat of criminal sanctions as set out in article 321 PC when acting on Swiss territory.
- iii) Lawyers licensed to practise law and acting as counsel in court in Switzerland – which requires that the lawyer is registered in one of the cantonal professional registers – also face severe disciplinary sanctions by the supervisory authorities at the place of the lawyer's business in case of a violation of their professional secrecy duties (see e.g. article 13 and 17 of the Federal Act on the Freedom of Movement for Lawyers of 23 June 2000; Lawyer's Act⁴).
- iv) Both the Federal Code of Civil Procedure (see articles 160, 163, 166) and the Federal Code of Criminal Procedure (see articles 171, 264), which came into force on 1 January 2011, recognize the privilege of certain professionals who through their function are depositories for the confidential information of others such as auditors, medical doctors, or lawyers.
- v) Before the entry into force of the Federal Code of Civil Procedure and the Federal Code of Criminal Procedure, all former cantonal civil and criminal procedural rules expressly recognized the privilege of certain professionals, including lawyers. The

³ Article 398 CO.

⁴ SR 935.61. The Lawyer's Act governs the inter-cantonal as well as the European freedom of movement for the legal profession in Switzerland and defines the rules for professional conduct, disciplinary measures and disciplinary proceedings on a national level.

former cantonal rules are still relevant where proceedings were initiated before the entry into force of the new Federal provisions.

Unlike in common law jurisdictions, in the context of (civil) proceedings, the issue of privilege is considered to be a matter of procedure in Switzerland. Accordingly, Swiss courts will usually apply their *lex fori* rather than the *lex causae* when determining whether information is privileged. Where the Swiss courts grant legal assistance in connection with civil proceedings pending abroad, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 (article 11) will often apply, which allows to invoke both the privilege available under Swiss law and under the law of the requesting state.

2.2 Case Law

In a heavily criticized decision of the Swiss Federal Tribunal dated 13 August 2004⁵, which addressed issues of Swiss legal privilege in the context of criminal proceedings, the court held that documents containing legal advice located at the client's premises are only protected from seizure if related to the client's defence⁶.

The same approach was formerly applied by the Swiss competition law authority (WEKO)⁷ in the context of its search and seizure operations⁸.

In a decision dated 14 January 2010⁹ the Swiss Federal Criminal Tribunal announced that this practice shall be overruled after the entry into force of the Federal Code of Criminal Procedure on 1 January 2011. The Tribunal held that, according to the new article 264 of the Federal Code of Criminal Procedure, documents produced by independent lawyers may no longer be seized, regardless of their location and the date of their production.

WEKO has adjusted its guidelines for search and seizure operations accordingly. The recent guidelines of the Secretariat of the WEKO provide that documentation produced by independent lawyers may not be seized but only be reviewed briefly on site.

⁵ *X v. Untersuchungsamt Kanton Aargau*, 1P.133/2004.

⁶ This approach is in line with article 263(1) lit. a Draft Federal Code of Criminal Procedure.

⁷ Wettbewerbskommission (WEKO).

⁸ Article 42 of the Federal Act on Cartels of 6 October 1995, as amended per 1 April 2004.

⁹ DFCT 2009.21.

3. SCOPE /LIMITS

3.1 General observations

Can the legal privilege be waived? If yes, how?

The client may waive the lawyer's secrecy obligations with the result that the lawyer is free to disclose the information within the limits of the waiver obtained. As discussed below, a waiver does not oblige a lawyer to disclose. A waiver by the client may be explicit, implicit, in writing, or oral but must be made *before* any disclosure and in full awareness of the relevant circumstances and its legal consequences. Inadvertent disclosure of privileged information is not considered to be a waiver of the privilege, unless the information becomes publicly known as a result thereof. An attorney is, for example, entitled to invoke the privilege in relation to documents which have been stolen from his or her premises¹⁰.

A lawyer may be released from his or her secrecy obligations by the competent supervisory authority at the lawyer's place of business, provided the client refuses to waive the privilege or the client's approval cannot be obtained and there is a prevailing interest justifying the disclosure sought¹¹. Typical cases of such discharge are disputes over attorney's fees.

According to article 166 paragraph 1 letter b of the Swiss Federal Code of Civil Procedure, the lawyer has no duty to testify even if he or she has been authorized by the client or the supervisory authority to do so. Before the entry into force of the Swiss Federal Code of Civil Procedure, the lawyer's obligation to testify under such circumstances varied from canton to canton. Furthermore, article 13 of the Lawyer's Act grants the attorney an absolute right of refusal to give evidence.

Is the privilege limited? Which information / documentation are involved?

Only persons who qualify as lawyers in the sense of article 321 PC may invoke legal privilege. One should note that the term "lawyer" is not expressly defined by statute. According to the leading doctrine in Switzerland, an attorney or lawyer in the sense of article 321 PC is a person who is (i) qualified to practise law in Switzerland or abroad and (ii) works in an independent practice¹². The assistants of such independent attorney (e.g. associates, paralegals, secretaries etc.) are also bound by the secrecy obligations. The application of secrecy obligations and the availability of legal privilege do not depend on the nationality or place of business of the lawyer. To avoid the criminal

¹⁰ DFT 117 Ia 341.

¹¹ Article 321 para. 2 PC; see e.g. § 33 and § 34 of the Lawyer's Code of the Canton of Zurich dated 17 November 2003.

¹² Including also employed lawyers provided the employer is an independent lawyer or an independent law firm.

sanctions under article 321 PC, foreign lawyers must invoke any available privilege if requested to testify as a witness or to produce documents before a Swiss court.

As outlined above, the scope of what is protected by a lawyer's secrecy obligations is very wide under Swiss law and includes any information of whatever nature and content, whether accurate or false, sensitive or not and regardless of its source, which comes to a lawyer's attention in connection with an existing or prospective mandate, irrespective of whether in expectation of court proceedings or not. In order to be considered as a "secret" or sufficiently confidential in the sense of article 321 PC, the information must not be in the public domain and the client must have an interest in non-disclosure. Already the name of the client and the very existence of an attorney client relationship are considered a secret.

No distinction need be made as to facts learned from the client or a third party. On the other hand, information of which a lawyer became aware as a private person or in a non-legal capacity is not covered. Only information in a lawyer's possession which is part of his or her *core business* is protected (primarily representation of the client's interests and/or the rendering of legal advice). The legal privilege does not protect communications generated or received by a lawyer acting in some other capacity, or communications in which a lawyer is giving business advice rather than legal advice. The Swiss Federal Tribunal has held that no protection is available where the business rather than the legal aspects prevail, for example where the attorney is acting as a board member, asset manager¹³, administrator/receiver or executor of a will¹⁴. An arbitrator or mediator whose function can be described as judicial rather than legal does also not generally qualify as a lawyer for privilege purposes¹⁵. Mediators may, however, benefit from specific privilege rules (see article 166 paragraph 1 letter d of the Swiss Federal Code of Civil Procedure).

Documents, which are not otherwise privileged are not and do not become privileged merely because they pass between lawyer and client or because they are handed over by the client to the lawyer as a depository agent. A written or electronic communication does not have to be identified by being "privileged" or "confidential" for the legal privilege to attach. A party cannot, however, protect a communication simply by marking it "confidential" or "privileged" or "attorney-work product". The test is always whether a communication actually satisfies the elements necessary to establish the privilege, not how the communication identified is labeled.

¹³ DFT 112 Ib 606.

¹⁴ DFT 120 Ib 112; DFT 114 III 105.

¹⁵ An arbitrator may, however, be subject to a general duty of confidentiality.

3.2 Between lawyers

In some civil law systems professional secrecy may provide for the confidentiality of communications between lawyers. This is, however, not the case in Switzerland. On the contrary, a lawyer has an obligation to his or her client to pass on any such communication.

3.3 Third parties

Under Swiss privilege law, the source from which the lawyer learns about a fact does not matter nor does the timing when this happened have an impact. No distinction need be made between facts learned by the lawyer from the client and those learned from a third party to fall under privilege protection. However, communications between a party to litigation proceedings and a third party who is not an independent lawyer (e.g. patent agent or accountant) are not privileged. Party-appointed experts can in principle not invoke legal privilege under Swiss law (unless the expert is an independent lawyer). Third party communication is privileged provided it is considered as confidential and sent/received by a lawyer in the context and for the purpose of an existing or prospective mandate. In the context of civil proceedings, such information, however, only attracts privilege if in the possession of the lawyer and/or his or her assistants.

4. IN-HOUSE LAWYERS

It is debated under Swiss law whether in-house lawyers qualify as independent lawyers subject to secrecy obligations and privilege. No judgment has been rendered so far by the Swiss Federal Supreme Court which expressly recognizes or denies the privilege of in-house counsel. According to the prevailing doctrine, in-house counsel are not protected by legal privilege¹⁶. A decision of the Swiss Federal Supreme Court¹⁷ addressed the question whether in-house counsel are sufficiently "independent" in the sense of article 8(d) of the Lawyer's Act to be registered in a cantonal professional register. The court noted that an employment relationship with any person or company other than an "attorney" in principle excludes "independence".

As employees of a corporation, in-house lawyers are nevertheless subject to the general contractual duty to maintain secrecy. Under Swiss law, what an in-house lawyer knows about his or her employer will usually qualify as a business secret in the sense of article 162 PC.

¹⁶ This is also the approach of the Secretariat of the WEKO as regards anti-trust investigations; see FN 10 and 11.

¹⁷ DFT 130 II 87.

During the preparation of the Swiss Federal Code of Criminal Procedure, the fact that in-house lawyers are not subject to secrecy obligations and privilege was criticized and considered unsatisfactory by the Swiss Parliament. The Swiss Government therefore proposed new legislation (Federal Law on In-house Counsel, Bundesgesetz über die Unternehmensjuristinnen und –juristen) introducing professional rules and secrecy obligations for in-house counsel who are registered in a cantonal register. However, as several cantons and interest groups questioned the necessity of such legislation, the Swiss Government recently decided not to pursue this legislation project and made a corresponding motion to the Swiss Parliament.

5. PROSPECTIVE

Does professional secrecy tend to be more or less protected?

Information received by a lawyer in the context of a mandate is widely protected under Swiss law. Swiss legal privilege attaches to all information received by an independent lawyer in his or her function as legal adviser in connection with an existing or prospective mandate and includes any information of whatever nature and content, whether accurate or false, sensitive or not and regardless of its source. However, in the context of civil proceedings, only information and documents which are part of the lawyer's core business, i.e. the professional representation of parties, is protected. As regards criminal proceedings, the introduction of the Swiss Federal Code of Criminal Proceedings brought about an important change with regard to legal advice in the hands of a client. Whereas before the entry into force of the Swiss Federal Code of Criminal Proceedings lawyer's documents in the hand of a client did not attract protection¹⁸, any documentation produced by an independent lawyer is now privileged, regardless of its location.

As already stated, the prevailing view in Switzerland is that in-house-counsel may not avail themselves of legal privilege. There is, however, ongoing debate in Switzerland as to the privilege of in-house counsel. As the Swiss Government recently stopped a legislation project in this matter, the situation will remain unclear. For the time being there remains thus the risk that documents produced by in-house counsel or documents that are in their possession may have to be disclosed.

¹⁸ In criminal and anti-trust investigations, an exception applied in relation to correspondence related to the client's defence. This is was privileged.