August 2024

Newsletter No. 206

Better protection of attorney-client privilege in internal investigations:

In a landmark judgment of August 6, 2024 (**judgment 7B_158/2023 [intended for official publication]**), the Federal Supreme Court strengthened attorney-client privilege in internal investigations and clarified various questions in this context that are relevant beyond the individual case.

walderwyss attorneys at law

Better protection of attorney-client privilege in internal investigations

By Oliver Kunz
lic. iur., LL.M., Attorney at Law
Partner
Direct phone: +41 58 658 56 41
oliver.kunz@walderwyss.com

and Martin Klingler
Dr. iur., Attorney at Law
Senior Associate
Direct phone: +41 58 658 56 22
martin.klingler@walderwyss.com

The Federal Supreme Court clarifies important questions regarding attorney-client privilege in internal investigations and thus strengthens protection in internal investigations in connection with legal disputes.

In a landmark ruling of August 6, 2024 (**ruling 7B_158/2023**), the Federal Supreme Court clarifies that internal investigations (and investigation reports) by law firms in connection with legal disputes are subject to attorney-client privilege and has thus clarified or corrected (supposedly) contrary earlier rulings. In doing so, the highest court has created long-awaited legal certainty and made it easier for companies to have critical issues examined confidentially by a lawyer. Finally, the Federal Supreme Court clarified that the disclosure of corresponding investigation reports to authorities such as FINMA does not automatically constitute a waiver of the protection afforded by attorney-client privilege.

Background

In view of pending and threatened legal disputes, a bank entrusted a law firm with an internal investigation into a complex matter. This included the establishment of the legally relevant facts as well as the selection of the relevant documents and electronic data. In the same context, a public prosecutor's office conducted criminal proceedings against several individuals (including former bank employees). The public prosecutor's office subsequently requested the report of the internal investigation and the enclosures referenced therein from the bank by means of a disclosure order and wanted to use them as evidence in the criminal proceedings. The bank handed over the requested documents to the public prosecutor's office, but at the same time demanded that they be sealed.

Decision

In a decision dated November 24, 2022, the District Court of Zurich ruled that the produced documents were protected by attorney-client privilege and could not be used in the criminal proceedings. The public prosecutor appealed against this decision to the Federal Supreme Court. In its ruling **7B_158/2023** of August 6, 2024, the Federal Supreme Court dismissed the appeal in its entirety and confirmed the decision of the lower court. This means that the public prosecutor's office may neither inspect the investigation report nor use it in the criminal proceedings, but must return it to the bank. The decision is final.

The Federal Supreme Court essentially justified its ruling by stating that

1. the investigation of facts in connection with advice and representation with regard to existing and impending legal disputes is a typical activity of a lawyer,
2. the selection of pre-existing items of evidence with a view to a legal issue is also a typical legal activity, and
3. handing over the investigation report to FINMA does not necessarily constitute a waiver of attorney-client privilege.

Commentary

The ruling is groundbreaking for internal investigations (especially in the regulated area). With this ruling, the Federal Supreme Court clarifies that companies

benefit from the protection of attorney-client privilege if they entrust law firms with the conduct of internal investigations in relation to upcoming or already pending proceedings.

With this ruling, which is also convincing in its linguistic clarity, the Federal Supreme Court clarifies important questions regarding the protection of attorney-client privilege in internal investigations. This is to be welcomed, as it removes legal uncertainties and makes it easier to conduct internal investigations to protect legal interests in proceedings.

It is noteworthy that the Federal Supreme Court clearly states that legal advice also requires the establishment of the legally relevant facts (recital 3.1). The Federal Supreme Court thus rightly recognizes that the establishment of the facts forms part of the core area of a lawyer's work. The Federal Supreme Court has clarified that it is irrelevant whether this activity can only be carried out by a law firm (Rec. 3.3). Only if the commissioning of the law firm is intended to circumvent statutory documentation and retention obligations can protection cease to apply (Rec. 3.3).

With this judgment, the Federal Supreme Court indirectly clarifies and corrects the uncertainties created by BGE 142 IV 207 ("Bruno Manser Fund") and judgment 1B_85/2016 of 20.9.2016 ("Greek armaments affair") with regard to the applicability of attorney-client privilege in internal investigations. In particular, it clarified that these decisions concerned the obligations of financial intermediaries under anti-money laundering law to investigate and document (cf. Art. 2, Art. 3 et seq., Art. 7 AMLA), which constitute compliance tasks. The present case therefore provided the Federal Supreme Court with a welcome opportunity to distinguish from this the establishment of the legally relevant facts in connection with legal advice and representation in pending or imminent legal disputes. The Federal Supreme Court confirmed in clear terms that the classic legal activities of advice and legal representation (including the investigation of legally relevant facts) also fall under the protection of attorney-client privilege in the context of internal investigations.

The Federal Supreme Court then rightly recognized that the selection by an attorney of pre-existing evidence in internal investigations also constitutes an attorney's activity and consequently the compilation of documents relevant to the mandate is protected by attorney-client privilege, even if these are pre-existing documents (recital 4.2 f.). Of course, this presupposes that the documents are copies and that there is no risk of evidence being removed from access by the criminal authorities, which should generally not be a problem nowadays because electronic copies of data are usually analyzed in internal investigations.

With regard to a possible waiver of attorney-client privilege, the Federal Supreme Court has made it clear that, in view of the applicable duties to cooperate, handing over the investigation report to FINMA does not necessarily constitute a waiver of attorney-client privilege.

Implications for practice

The decision of the Federal Supreme Court once again confirms that the best possible protection of the interests of companies by attorney-client privilege depends crucially on how and in what context internal investigations are set up and conducted.

In particular, it is advisable to identify and document the link to (pending or imminent) legal disputes.

If companies need to share privileged information with a regulator, they should clearly document that they intend to maintain confidentiality. In addition, it is generally advisable to grant the authority read-only rights (at most) and not to hand over copies. This prevents law enforcement authorities from obtaining privileged documents from the authorities.

Disclosure of interests

Walder Wyss represented and advised the bank concerned in the aforementioned proceedings.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

© Walder Wyss Ltd., Zurich, 2024