

Insight

Attorney-client privilege: Further supreme court clarification on obligations for law firms conducting internal investigations

In its decision 1B_509/2022 dated 2 March 2023 the Swiss Federal Supreme Court (“**SFSC**”) once again ruled on the extent of the applicability of the attorney-client privilege in relation to documents produced in the course of an internal investigation.

As in previous decisions the SFSC holds that only work typical of a lawyer is covered by attorney-client privilege. In the case at hand, various law firms were acting for a bank in relation to suspicions of anti-money laundering violations within the bank. The SFSC confirmed its previous case law according to which the attorney-client privilege is not applicable if the attorney assists the bank in the performance of its mandatory obligations in relation to anti-money laundering regulations. Should the lawyer’s mandate combine work covered by the attorney-client privilege and work possibly falling out of such scope – according to the SFSC – the lawyer should strictly separate these two different activities. Appropriate measures a law firm must take in such cases are the separation of communication, memoranda, interview reports and any other documents. The SFSC goes as far as to say that a law firm should even consider working with two separate teams. Should a document nonetheless concern both categories, it remains the bank’s duty to demonstrate the existence of legal privilege.

In conclusion, the SFSC introduced new guidelines for law firms conducting internal investigation regarding the separation of privileged and non-privileged work, without clearly stating the consequences if there is no such clear separation. Finally, it remains unclear, if and to what extent such administratively burdensome rules for law firms apply in internal investigations conducted for non-financial / non-regulated institutions.

For further questions or comments about this topic, please contact the authors.

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