

Legal Professional Privilege for In-house Counsel

What is the Legal Professional Privilege?

- The Legal Professional Privilege (“LPP”) protects communication of legal advice between a lawyer and his or her client from disclosure to a third party. The LPP allows a client to disclose information, without reservations, towards a trusted legal advisor in order to obtain better legal advice.
- LPP is widely recognized for outside counsel in private practice. However, the extent to which such protection is granted to in-house counsel differs among EU Member States and between the EU and third countries

Why is LPP important for companies?

- The lack of legal professional privilege (LPP) for in-house counsel also causes severe disadvantages for businesses that operate in jurisdictions where LPP is granted to in-house counsel. Communications that LPP would protect from disclosure in the course of investigations, litigation or other proceedings are subject to discovery.
- Swiss companies have already seen this disadvantage at work in international disputes. For example, a large Swiss company involved in U.S. patent litigation was forced to disclose communications with its in-house counsel in U.S. court because such communications were not protected under Swiss law. Ten out of the 28 EU member states, as well as the United States extend the LPP to in-house counsel admitted to the bar.
- The lack of LPP for in-house counsel interferes with effective legal advice and weakens corporate compliance efforts. In-house counsel occupy a unique preventative and compliance role within businesses. Given that the purpose of the LPP is to encourage a trusted exchange of information, a lack of LPP can have a chilling effect on corporate compliance efforts, because company management will avoid disclosing sensitive information to in-house counsel.

Window of Opportunity for LPP in Switzerland is now

Last year, Swiss President to the National Council Christa Markwalder put forward a legislative proposal (Curia Vista 15.409) to extend the legal professional privilege to in-house counsel in Switzerland in matters under the Swiss Code of Civil Procedure. The proposal was endorsed by the National Council on 21 September 2016. The National Council has accepted the argument that Swiss businesses are currently put in competitive disadvantage in foreign proceedings. Outstanding is the acceptance by the second chamber, the Council of States. Its committee was not in favor of endorsing the proposal, and that poses a large threat to the success of the proposal.