SAV FSA

Schweizerischer Anwaltsverband
Fédération Suisse des Avocats
Federazione Svizzera degli Avvocati
Swiss Bar Association

Unhindered access to justice and fair legal procedures for all must be upheld

Money laundering again and again, "tax havens" again and again, then "Panama Papers or "Pandora Papers", now "Ukraine sanctions": with such headlines, the attorneys' secrecy regularly comes under pressure, sometimes in the media, sometimes in politics, usually in an interlocking combination.

In a hectic rush caused by individual cases, the abolition of the attorneys' secrecy is then periodically demanded. Or, at the very least, a socially established profession is to be downright transformed by separating attorneys' representation in litigation from advising, much less from a preliminary advisory meeting. The question is ultimately whether knowledge gained from legal advice must be disclosed even without the client's consent or whether professional and attorneys' secrecy applies, as has actually always been undisputed in classic advisory cases, for example when advising on an inheritance succession of a family business, when handling the recovery of a rent deposit or with regard to the conclusion of a contract and the out-of-court enforcement of contractual agreements.

Demands for abolition or restriction fail to recognize the importance of professional secrecy to those seeking justice. They are dangerous because they begin to fundamentally call into question a traditional and well-balanced system of enforcing law and legal peace under the rule of law. They are also unnecessary, as the abusive invocation of professional secrecy is ruled out in any event by the strict obligations to which lawyers are subject in the exercise of their profession and the severe penalties they incur if they fail to do so.

With this Vademecum, the SBA would like to convey to politicians, authorities, the media and the people of Switzerland that the professional secrecy of attorneys only applies to the protection of those seeking justice and therefore ultimately to the rule of law and must therefore not be endangered.

The SBA will continue to fight to guarantee undisturbed access to justice and fair trials for all, in order to demonstrate the importance of defending professional secrecy as an instrument of our system of values. It will defend itself against the unjust and painful basic suspicion that attorneys could or want to operate outside the legal framework.

Professional secrecy in the Swiss legal system

I. General Information ...

A. What the SBA is not about when defending professional secrecy

The SBA does not advocate the comprehensive protection of professional secrecy as a service to its members and to give them a "competitive advantage." Rather, the SBA is convinced that the professional secrecy of the independent lawyer is necessary for the functioning of the rule of law. Professional secrecy does not protect the attorney, but the client, precisely for the benefit of the rule of law that guarantees access to justice with the assistance of a lawyer and which is worthy of its name.

B. Historical information

Even the Roman advocatus had to face severe punishment if he violated professional secrecy. The legal guide of the early and high Middle Ages and the legal advisor in the late Middle Ages were different, but they could not be compared to the trained advocatus and served more the general public in the enforcement of security and expiation. In Switzerland, the development back to the educated advocate in the interest of his client only began with the gradual scientization of the law in the late Ancien Regime. This was accompanied by the recognition of the educated advocate, above all independent of the authorities, whose professional secrecy was an indispensable part of his function in the state under the rule of law. The ideas of the Enlightenment facilitated the development of the independent and trained attorney, in whom the citizen could unreservedly entrust himself because of his independence and professional secrecy.

Professional secrecy has thus always been closely linked to his or her independence (definition of independence according to the Federal Court: The independence of an attorney should guarantee "*the greatest possible freedom and objectivity in the protection of interests towards the client as well as towards the judge. It is the prerequisite for trust in the attorney and in justice. Anyone who consults an attorney should be able to be certain that the attorney is in no way bound to a third party whose interests may in any way conflict with his or her own*" - see decision of the Federal Court of 8th of January 2001, E.4a - 2P.187/2000).

C. Professional secrecy: a moral duty elevated to a legal obligation (Article 321 Criminal Code, StGB)

The fact that one does not divulge what someone entrusts to one under the seal of secrecy is a "commandment of decency". But not every moral duty - at least not in a rule of law based on the concept of *freedom* - necessarily has also to be shaped as a legal duty. Basically, each person is responsible for choosing a confidential bearer of secrets. However, in Article 321 of the Criminal Code (StGB), the legislator has made secrecy a legal obligation subject to punishment for a select group of professionals, including attorneys, in the service of their clientele. And here, again, the following applies: Only persons who "by virtue of their profession come to know secrets" are bound by the legal system to maintain secrecy about such secrets. This has to be discussed subsequently.

Professional secrecy is thus morally (I go to the attorney I trust) and legally (I go to the attorney because I know he must remain silent) owed, it is "solidified morality" (Wilfried Härle/Bernhard Vogel - ed., "Vom Rechte, das mit uns geboren ist". Aktuelle Probleme des Naturrechts,

Freiburg/Br. 2007, p. 146. Violation of professional secrecy is punishable by imprisonment of up to 3 years or a fine according to Article 321 StGB.

D. Professional secrecy is an integral part of Swiss law and absolute

Professional secrecy has been repeatedly "confirmed" by the legislator. It is firmly anchored not only in criminal law (Swiss Criminal Code, Criminal Procedure Code, Youth Criminal Procedure Code), but also in other laws (including Swiss Code of obligations (CO), Federal Act on the Free Movement of Lawyers (AFML), Civil Procedure Code,) from various perspectives and has absolute validity. The attorney must not only remain silent until he is released by the client or by the supervisory authority; he or she may (and must, according to due diligence owed under the law governing mandates) also remain silent even if he or she is released from the secret.

According to the applicable civil and criminal procedure codes, secrecy extends to all documents prepared by the attorney as well as to the advice given by him or her, regardless of the place where documents are located and where advice is given or documents are drafted and regardless of the time at which the attorney acts.

E. Individual and social significance of professional secrecy

Due to its fundamental legal aspects, professional secrecy itself is a fundamental right that can be invoked by each individual. "The focus here is not on the attorney, but on the client or the person involved in the proceedings." (Bernhard Ehrenzeller / Reto Patrick Müller in Festgabe für Walter Straumann, Solothurn 2013, p. 27). Professional secrecy does not protect the attorney, but the client. The Federal Court, in its constant case-law, has held and confirmed on several occasions that each individual can avail himself of professional secrecy (instead of many, a decision from recent case-law: BGer of 9.5.2016, 2C_586/2015 E. 2.2 and 2.3). Entitled, if anyone, is the secrecy owner, which is usually the client, not the bearer of secrets. However, professional secrecy also has an **institutional character**. It is this **unique aspect** that sets it apart from other professional secrets which only protect the entitled person (the secrecy owner) individually. The Federal Court paraphrases the institutional significance as follows: " *The professional secrecy of attorneys as an institute created in the public interest and indispensable for a functioning rule of law that ensures access to justice [...] guarantees the confidentiality of all insights that the client has granted the attorney into his or her circumstances within the scope of a profession-specific activity [...]. Only confidentiality enables the person seeking justice to disclose to the attorney without reservation the bases necessary for accurate advice and effective legal representation, which is why it constitutes an indispensable basis for the exercise of their profession and, therefore, for justice that satisfies the requirements of the rule of law*." (BGer of 9.5.2016, 2C_586/2015, E. 2.2 and 2.3); see also BGE of 22th of June 2021, 1B_333/2020, E.2.2). There is no better way to paraphrase it.

In a state governed by the rule of law, any person seeking justice who becomes involved in a conflict with the state or with other persons must be able to communicate with his or her lawyer in complete openness **without fear that such communication or any part thereof will later be disclosed or used for extraneous unrelated purposes**. This confidentiality is necessary to enable unimpeded **access to justice.**

F. Professional secrecy according to Article 321 StGB and attorneys' secrecy according to Article 13 AFML

The professional secrecy protected by criminal law according to Article 321 StGB and the attorneys' secrecy according to Article 13 AFML are not identical or congruent. In addition to

attorneys, professional secrecy also covers defense lawyers, notaries and patent lawyers, and beyond legal professions also medical personnel, psychologists, auditors and clergy.

The secrets to be kept are also different: In contrast to the attorneys' secrecy, which only covers secrets disclosed to the attorney by his client, professional secrecy protected by criminal law covers everything that has been entrusted to the professional, but also everything else not already known that he or she has learned in the course of practicing his or her profession.

G. No dichotomy of the independent legal profession - professional secrecy applies to legal representation and legal advice

One thing, however, is common to the professional secrecy of attorneys under and professional law: they may not be used in order to have an attorney perform a particular activity not typically performed by attorneys, merely so that what is disclosed and the advice derived therefrom is protected by secrecy and need not be disclosed to third parties, e.g., regulators or criminal authorities. This is important. The Federal Supreme Court has referred to attorney activities that are no longer protected by secrecy, i.e., activities of attorneys that are typically performed by non-attorneys, as "accessory" or "business activities of attorneys." The professional secrecy and attorneys' secrecy does not apply to what is entrusted in the context of such merely accessory activity (see from recent case law the unpublished judgments BGE of 6.2.2019, 1B_453/2018, E.2; BGE of 21th of March 2018, 1B_433/2017, E.4, and BGE of 20th of September 2016, 1B_85/2016, E.6, with references to the earlier published case law and to the practically unanimous doctrine).

However, the Federal Supreme Court has also always recognized that what is entrusted in the context of the purely advisory and not only in the litigating (monopoly) activity of attorneys is in principle also subject to professional secrecy. Therefore, it must be determined in each individual case whether the attorney is acting for his or her client in a manner typical of an attorney or merely in a business or accessory capacity. If one and the other applies, the integral invocation of professional secrecy is ruled out, and the attorney's work products and confidences are to be assigned to one and the other activity of the attorney commissioned. Only that is protected by professional secrecy which has been entrusted to the attorney because he or she has performed a for attorneys typical activity in favor of the client (see BGE of 21st of March 21, 2018, 1B_433/2017, E.4.3, and with regard to the fundamental validity of professional secrecy also for advisory activity of attorneys BGE of 20th of September 2016, 1B_85/2016, E.6.1).

This practice can lead to difficult questions of delimitation in individual cases, e.g. when the attorney acts for a bank in the context of its compliance tasks (in this regard again BGE of 20th of September 2016, 1B_85/2016). In contrast, cases in which the attorney acts for his clientele as a financial intermediary or asset advisor or assumes tasks of the management of companies are clear. Such activities of attorneys do not enjoy the protection of professional secrecy (BGE of 21st of March 2018, 1B_433/2017, E.4.2 and 4.3).

H. No dichotomy of the independent legal profession

However, political and governmental attempts to counter the difficulty of distinguishing between typical and merely accessory activities of attorneys by only subjecting to professional secrecy what has been entrusted to them in the context of litigation, criminal defense and representation of clients in official proceedings, i.e. forensic legal work, are extremely dangerous and have effectively been fought by the Swiss Bar Association ever since and cannot be reconciled with the case law of the highest courts. This is nonsensical, testifies to misunderstandings about the profession of attorneys and would, in the final analysis, turn the advising profession of attorneys into mere assistants in the investigation of facts by criminal authorities, regulators and counterparties in civil, criminal and administrative proceedings. This is not compatible with

professional and attorney-client secrecy as the guarantor that every person seeking justice in a state governed by the rule of law is entitled to support in accessing justice and can (and must) entrust everything to his attorney, who acts independently and free of conflicts of interest, in order to obtain justice.

A look at the practice of attorneys shows how nonsensical it is to distinguish the (protected) forensic activity from the (supposedly unprotected) advisory activity of attorneys. Almost every litigation mandate begins before a lawsuit is filed. The facts of the case are established, the client is informed of his or her rights and risks, a course of action is recommended, an attempt is made to settle the dispute out of court (which is mandatory for attorneys under the law governing the profession), and a lawsuit is filed only if courts have to be involved in order to achieve legal peace. Conversely, pure advisory mandates such as negotiating and documentation of contracts, clarification of whether or not conduct is permissible under the applicable law, founding and documentation of a company, etc. are always also designed to protect the advised client in the best possible way, also in the event that disputes or official interventions arise later, which then in turn have to be settled in litigation or administrative proceedings if no reasonable settlement is reached. How is it to be explained that everything that was done and entrusted during the consulting phase remains unprotected by professional secrecy and that the protection only takes effect when it comes to the (ultimately always avoidable) legal dispute before courts or authorities?

All political attempts to limit the professional secrecy to forensic legal work in order to subject the advisory activity of attorneys to other regulatory norms have failed in the past. Such attempts were made particularly in the context of the revision of the AMLA (and now again thereafter), essentially in obedience to international pressure that built up after the "Panama Papers revelations". Most recently, the discussion has reignited in the context of reporting obligations of attorneys for assets subject to the Ukraine sanctions regime against Russians. Initially, the attempts were based on the claim that attorneys acting as advisors to trusts are not subject to sufficient supervision in Switzerland, which is simply wrong:

- The very idea that an attorney can act in an advisory capacity without being subject to the law is wrong. Like the litigator, the advising lawyer is also bound by the law. If he or she advises the client for the purpose of evasion and thus in violation of the law and in disregard of his or her professional duties, he or she is liable to prosecution and, of course, cannot invoke professional secrecy.

- All attorneys - unlike other consultants - are subject to a strict professional code of conduct. Compliance with the laws governing the profession is monitored by state supervisory authorities. The laws governing the profession obligate the attorney to conduct his or her business in accordance with the applicable laws. If the attorney violates professional duties, he or she is sanctioned by the state supervisory authorities. Sanctions range up to prohibition of practicing as an attorney.

- In addition to the aforementioned laws and the corresponding sanctions, Article 305bis StGB also applies to the attorney - just as it does to any other person subject to the law. This provision covers complicity and thus an area that is also governed by Recommendation 22 lit. d of the FATF/GAFI. The fact that the Swiss legislator does not want to provide for such a level of detail in its Criminal Code is quite fundamentally in line with legislative tradition.

- Furthermore, the attorney, insofar as he professionally advises clients in financial transactions outside of his regular activity, is then subject to the duty to establish the identity of the beneficial owner on the basis of Article 305ter StGB. This applies even if he or she is unlawfully not affiliated with an AMLA Self-Regulatory Organization (SRO). With this provision, the duty of identification is automatic.

- It should be noted that since 1st of January 2016, qualified tax offenses are also considered as predicate offenses from which "prohibited" assets may originate.

I. An advisory mandate requires as much discretion as a procedural mandate

The rigorously implemented Swiss solution thus allows hardly any loopholes. This may also have prompted the Swiss legislator to rigorously follow its path and to forgo a dichotomy from this point of view as well and not to subject every advisory activity of attorneys to the AMLA. **Every attorney's activity requires professional secrecy.** The profession of attorneys must be viewed as a whole and regulated as a whole. A holistic coverage of the attorney's activity is necessary for reasons of legal certainty. The Federal Court has stated that, in addition to representing parties in court, legal advice is typically part of the attorney's activity (see in addition to the decisions cited above, also BGE of 26th of March 2002, 1A.182/2001; BGE 114 III 105, E.3a; BGE 132 II 103). "Honorable activities" are both, legal advice and representation in court! As already mentioned, this is because non-litigators are also important and decisively involved in ensuring that future legal disputes can be avoided or that legal peace can be restored "out of court".

Advising activities require confidentiality just as much as litigation activities. The client, who expects his attorney to act in an advisory capacity, also seeks access to the law and must be protected from disclosure of the information entrusted to the attorney. According to the Federal Court, "entrusted" means everything that the client directly or indirectly communicates to the attorney in the course of the attorney-client relationship and files that are brought to his or her knowledge personally or electronically. However, the information must always be related to the attorney-client relationship. According to the Federal Court, "as a result of their profession" means the assignment of the information to the professional activity. Not every piece of information perceived by the attorney, **but only the information originating from the attorney's typical professional activity** is subject to professional secrecy. According to the Federal Court, typical activities of an attorney include, for example, representing and defending clients before judicial authorities, advising clients on legal matters, negotiating and concluding legal transactions, drafting legal documents, preparing legal opinions, and giving legal advice. The decisive criterion for distinguishing the advising activity of attorneys from the accessory activity is ultimately the question of whether, in the case of the attorney service in question, the commercial-operational or the service content typically provided by the attorney objectively predominates (thus the Federal Supreme Court in BGE of 20th of September 2016, 1B_85/2017, E. 4.2). As a guideline, the question whether the activity under discussion ensures or promotes the client's access to justice may serve. However, the purpose of professional secrecy clearly requires that any activity typical of an attorney is subject to the duty of confidentiality and thus any person who turns to the attorney in his or her need for access to justice is entitled to the guarantee that entrusted information will only be used for the intended purpose and with the consent of the client and will under no circumstances be disclosed to third parties.

For the reasons stated above, there cannot and should ***not be a demarcation line between litigating and advising activities, nor between forensically active and purely advising attorneys***. A dichotomy would make it more difficult to understand and even impossible to make an appropriate decision as to which professional rules apply in which case constellation and when (already before or only after the initiation of a lawsuit) and whether the information entrusted by the client is protected by professional secrecy or not.

Professional secrecy is a partial institutional component of access to justice and does not tolerate ***any relativization*** or ***"parcelling" of the typical activities of attorneys***.

J. Only the activity typical for an attorney is covered by professional secrecy

However, it also remains clear: Professional secrecy only applies to activities typical for attorneys; hence activities which are not typical are not covered. If the attorney acts purely as an asset manager or procures, transfers or places money, these activities are not subject to professional secrecy. There is no need for legislative action in this regard; professional secrecy is already protected *de lege lata* against "misappropriation". Attorneys may also engage in activities that are only marginally or not at all related to the provision of legal services (e.g. acting as a member of a board of directors, asset manager, etc.). The laws governing the profession and state supervision do not extend to such activities. Therefore, they are not subject to professional secrecy. Synonyms for activities that are typical for attorneys are terms such as attorney-specific, classic, actual or core activity or also genuine attorney's activity. For activities that are not subject to the laws governing the profession, there are designations such as improper, atypical, other miscellaneous or peripheral, accessory attorney activity or non-attorney-specific, non-attorney-typical professional activity, etc.

The doctrine (e.g. Kaspar Schiller, Schweizerisches Anwaltsrecht, Zurich 2009, N 326 ff.) has developed a handy demarcation criterion: The legitimacy of the professional rules of attorneys, including the professional secrecy, is to **guarantee access to justice**. Those seeking access to justice must be able to consult an attorney who is bound by the rules of professional conduct. This is not required for other services. The client who requests legal advice seeks access to justice. With the practicable criterion of access to law, the typical activity of attorneys can be distinguished from the non-typical activity (e.g. pure asset manager, member of a board of directors, trustee, etc.) in most cases without great difficulty.

K. Attorneys' secrecy does not protect the attorney from legal prosecution if he or she does not comply with the law

Attorneys, like everyone else, must abide by the law. This applies to their advising activities, providing fiduciary services or representing a client in court. This includes not only the Criminal Code, but also all tax laws. It is often misunderstood that, for example, Article 305bis of the Criminal Code - to return to the ≪Panama Papers≫ context - is also applicable to attorneys; regardless of whether they act as financial intermediaries or in an advisory capacity. According to this provision, it is prohibited to perform an act that is likely to frustrate the determination of the origin, the tracing or the confiscation of assets that the attorney knows or must assume result from a crime or a qualified tax offense. It should be reminded that since 1.1.2016, qualified tax offenses are also considered as predicate offenses to money laundering. From this point of view, too, the aforementioned parliamentary initiatives, which are driven by everyday politics and disregard the overall framework, and which seek to place the advising attorney under general suspicion, are unnecessary.

L. Attorneys are subject to disciplinary supervision: They are sanctioned effectively in case of misconduct

The attorney registered in the bar register is subject to a rigid professional code. If she or he violates this, she or he risks disciplinary action - whether or not a criminal offense has been committed (and she or he has been convicted) - which may extend to a permanent ban from practicing her or his profession. Article 12 lit. a AMLF, which requires the attorney to exercise his or her profession with due care and diligence, is extremely far-reaching: "The attorney shall not attempt to evade or counteract the existing legal system, but shall scrupulously respect it, abide by law and justice. He or she shall defend the interests of his or her client not with lies and deception, but according to law and equity. [...] The attorney must not deliberately promote injustice [...]. He or she shall not represent reprehensible, improper, prohibited, immoral or unlawful requests." (Fellmann, in: Fellmann/Zindel, Kommentar zum Anwaltsgesetz, Zürich, 2011,

Art. 12 N 37, with reference to das Handbuch über die Berufspflichten des Rechtsanwaltes im Kanton Zürich, Zurich 1988.) There is no need to treat "litigators" and "business lawyers" differently with regard to professional secrecy, as parliamentary initiatives demanded without any success. "Business lawyers" registered in the bar register are also subject to the laws governing the profession. They are sanctioned equally as the "litigators" if they deliberately promote injustice. That one can assign professional secrecy according to the distinction between "litigators" and "business lawyers" is a chimera (a perception that is only imaginary) anyway. On one hand, these terms defy clear and comprehensible definition and mutual delimitation. On the other hand, the "litigator" (whatever one may understand by this term) should also be primarily concerned with avoiding litigation by advising his or her client. Should advice in the context of avoiding litigation be exempt from protection of professional secrecy?

M. U.S. attorney-client privilege and the professional secrecy of the independent Swiss attorney: two totally different duties of confidentiality

The professional secrecy and the attorneys' secrecy of the independent attorney is anchored in various laws in Switzerland (Criminal Code (StGB), Federal Act on the Free Movement of Lawyers (AFML), Civil Procedure Code, Criminal Procedure Code). As far as the rights of defense in criminal proceedings are concerned, professional secrecy even enjoys the status of an (indirectly protected) constitutional right (Article 32 para. 2 Federal Constitution). The attorneys' secrecy is an absolute one: Even in the case of release by the client, the attorney may remain silent. The attorney may not disclose what has been entrusted to him even if he could thereby prevent a crime. All that remains is for him or her to give up the mandate. Because of the public interest in the activities of the independent attorney as a functionary of the rule of law, their professional secrecy is accorded an institutional function. Only if an immediate danger to third parties is to be prevented and no less drastic possibility is available, should a state of necessity be applied as a subsidiary measure according to part of the doctrine (Kaspar Schiller, Schweizerisches Anwaltsrecht, Zurich 2009, N 566 ff.). If necessary, the interest of the third party would have to be of higher value than the client's interest in confidentiality. Accordingly, disclosure is only affirmed if an imminent serious crime against life and limb can be prevented. The high constitutional status of the professional secrecy must be taken into account. In such a situation, however, the disclosure of confidential information could at most be based on a state of necessity if a release from the supervisory authority cannot be obtained for reasons of time.

In contrast, the (U.S.) attorney-client privilege is much less comprehensive and far-reaching. The legal basis is common law. The privilege is not embodied in a state decree, much less in the Constitution. The (U.S.) attorney-client privilege is also anything but comprehensive. It is limited to mere legal advice. As soon as the client relationship also contains business information, the (U.S.) attorney-client privilege no longer applies. Moreover, the courts in the U.S. are already quick to assume that a waiver exists, and that the attorney can no longer invoke privilege. For example, a waiver of privilege is already assumed if the attorney involves a third party in a communication to the client via "cc". The rather weak protection afforded by (U.S.) attorney-client privilege compared to our professional secrecy becomes even more apparent in the context of the crime-fraud exception: As soon as there is indicative evidence suggesting that the client has sought out the attorney only to explore how best to evade the law, the attorney must disclose the client information when requested to do so (Sergio Giacomini, im Fokus des Vorstands SAV, Anwaltsrevue 1/2017 p. 3 et seq.).

N. Conclusion

1. Attorneys' secrecy has always been an indispensable component of the activities of the legal profession, which is independent of the authorities. It has an institutional character: without a comprehensive professional secrecy, there can be no functioning rule of law that

guarantees access to justice. Legal advice and the forensic activity that the independent attorney performs for the benefit of an indefinite number of clients is in the public interest.

2. The (U.S.) attorney-client privilege does not protect the client to the same extent as the professional secrecy of the independent continental European legal profession does.

3. Attorneys' secrecy protects the client, not the attorney.

4. The independent bar does not have a "two-class society" of litigators and business lawyers. The professional secrecy covers legal representation before courts and authorities as well as pure legal advice.

5. The existing legal system provides adequate protection against "misappropriation" of professional secrecy: Only the typical activity of an attorney fall within the scope of professional secrecy. If the attorney does not comply with the law, he cannot evade prosecution by invoking professional secrecy. The laws governing the profession with their disciplinary measures also ensure that the attorney cannot evade the existing legal system "unpunished". The parliamentary activism that has developed in the follow-up to the "Panama Papers revelations" does not take these considerations into account. There is no need for additional legal regulations to counteract possible abuses in connection with the attorneys' secrecy. The existing instruments are finely balanced and take into account the paramount importance of the attorneys' secrecy for the functioning of the rule of law.

II. On to the specific part : Fight against money laundering

A. First of all

The Bar and the SBA are firmly committed to the fight against money laundering and the financing of terrorism.

With the current Anti-Money Laundering Act (AMLA), the control mechanisms that go hand in hand with the regulated reporting system and the money laundering provisions in the Criminal Code, Switzerland has adopted a **comprehensive and effective pioneering role** in the fight against money laundering and terrorist financing that is unparalleled in the rest of Europe in terms of the scope and density of regulation.

In addition, Switzerland has closed a remaining loophole with regard to companies by strengthening transparency rules and abolishing bearer shares in the meantime.

The Swiss system differs from other systems that focus less on the specific (money laundering-relevant) activity and more on the affiliation to a profession. This applies in particular to the first EC and later EU directives. However, the focus on the financial intermediary in the current AMLA makes it possible to "cast a very wide net", although it is not the profession but the concrete activity that is the connecting factor.

Not only does the list of criteria for financial transactions in the current AMLA correspond to that of the FATF, but the current regulation is also exemplary in comparison to other countries.

The abandonment of a well-established system must not be at the detriment of **principles inherent in Swiss law**, such as legal clarity and certainty as well as the prohibition of the reversal of the burden of proof. This should also not result in the practical undermining of professional

secrecy, which has constitutional force in our state under the rule of law. Professional secrecy is one of the fundamental principles of a functioning state under the rule of law.

Switzerland must stick by its dense regulation and not allow any external system to be imposed on it that aims for exactly the same results but takes a different approach.

During the last revision of the AMLA, it was right to prevent legal advisory activities from being generally subject to the AMLA. This is how it should remain. Attorneys who act as financial intermediaries are subject to the law. In their other advisory activities, they make themselves co-offenders liable to prosecution and will be severely sanctioned if they actively support money laundering or other criminal acts.

B. The existing Swiss 3-pillar system

The current AMLA focuses on the **contact with assets**, i.e. on specific activities and not on professional categories. All attorneys who perform a financial transaction for their clients are thus subject to this law. As an activity not typical for attorneys, this activity is not subject to the protection of professional secrecy (cf. on the distinction between typical and non-typical above). The **scope of application of the AMLA is clear and the consequences for the financial intermediary are concrete**, as the financial intermediary must not only comply with the principles of the AMLA, but also with the detailed regulations of FINMA and the Self-Regulatory Organization SRO (which for their part are subject to FINMA supervision). There is no truly comparable system anywhere else in the world. As far as **attorneys** are concerned, they are **fully subject to the regulation** just mentioned. The reason is that, as financial intermediaries, attorneys are not subject to professional secrecy and do not have any special status.

On the other hand, it is important that they strictly distinguish their typical activity as an attorney, which is subject to professional secrecy, from their secondary activity as a financial intermediary, which is not subject to professional secrecy. For this, it is necessary that the "dividing line" is absolutely clear, which is currently the case after about 20 years of practice development. For example, if an attorney acts as a director of a domiciliary company - whose exclusive purpose is to hold assets - and/or has signing authority for an account held by the domiciliary company with a bank in Switzerland or abroad, he or she is acting as a financial intermediary and is fully subject to the AMLA. The same applies when the attorney acts as trustee.

In addition, the **attorney is also subject to the provisions of the Criminal Code (StGB)** in his profession-specific activity like anyone else, whether as a perpetrator (Article 305bis StGB) or an accomplice (Article 25 StGB). This also covers his or her advising activities. With Article 305bis StGB, there is effective protection, since any person, including attorneys, is covered by it. The basic concept of checking funds with criminal origins as they enter the clean asset cycle is sufficient if this work is done correctly by all "gate-keepers" worldwide. It goes without saying that the standard of due diligence here is much higher for attorneys (you have to know your client) than for others. Due to his or her professional training and his professional duty to exercise special diligence, this obligation takes effect earlier and particularly effectively in the case of the attorney, since he or her is and must be in a position to recognize suspicious structures and transactions. The origin of the funds, the identity of the contracting party and the beneficial owner and the related transactions have to be clarified. If necessary, assets have to be frozen and reported. It is not acceptable that Swiss legislation closes loopholes in the money laundering legislation of foreign states, e.g. Panama.

C. Comparability of approaches CH - EU

A look across the borders reveals that very few European countries have the regulatory standard of Switzerland. It is incomprehensible why our quite dense and proven regulatory model should be abandoned and "disimproved" at the detriment of our principles of the rule of law.

The reasons for the adoption of the **EU Directive state explicitly that legal professionals should only be subject to the law if they "participate in financial or corporate transactions", but not if they analyze a legal situation for a client.** This is stipulated in Art. 2 of the EU Directive. A look across the borders shows that no EU state subjects legal advice without reference to a financial or corporate transaction to the money laundering legislation. The abandonment of our well-established concept of the AMLA, which requires direct or indirect participation in a financial transaction in order to be subject to the AMLA, cannot be justified in view of the EU.

The FATF has also recognized the value of the Swiss system, with evaluation reports - most recently in December 2016 - acknowledging the overall good quality of the Swiss system for fighting money laundering and terrorist financing. Indeed, the **level of effectiveness** in the 11 areas defined by the FATF is considered "significant" in 7 areas and "moderate" in 4 areas. For the state in question to be placed under "enhanced follow-up", the level of effectiveness must be rated "low or moderate" in at least 7 areas or "low" in at least 4 areas. As for the **degree of technical compliance** with each of the 40 recommendations, it is rated as "compliant or largely compliant" in 31 cases and "partially compliant" in 9 cases. No "non-compliant" cases were determined.

For a state to be qualified for "enhanced follow-up", there must at least be 8 recommendations for which the qualification is "partially fulfilled" or "not fulfilled".

The measures that Switzerland has already taken - *in particular regarding rules for non-profit organizations (R.8), lowering the threshold for cash transactions to CHF 15,000, the obligation to verify the identity of the beneficial owner and the obligation to periodically review the customer profile (R.10), high-risk states (R.19), statistics (R.34) and sanctions (R.35)* - already allow our country to remain at risk under enhanced follow-up or to exclude sanctions by the FATF. Furthermore, bearer shares were abolished and companies were required to identify the beneficial owner who ultimately holds the company shares and to keep a corresponding list. In addition, the offense of tax money laundering was introduced. Therefore, the qualification "partially compliant" for Recommendations R.22 (designated non-financial businesses and professions - customer due diligence and record-keeping) and R.23 (designated non-financial businesses and professions - other measures) should not lead to a deviation from the well-established Swiss concept of financial intermediation / treatment of assets. This is in no way necessary to maintain Switzerland's international position or to avoid sanctions. The violation of principles under the rule of law would be disproportionate and could certainly be avoided by implementing the other recommendations. It should also be noted that compliance with Recommendation R.40 (other forms of international cooperation), which is considered to be partially applicable, raises other problems identified by the SBA at the hearing of the Council of States Committee on Security Policy on 10 January 2019, which must be avoided at all costs.

D. The current system complies with the EU approach

It could be argued that some countries of the EU have introduced or are about to introduce a system of control in law firms which concerns in particular or exclusively the fight against money laundering, and that there is no reason why Switzerland should not follow this trend.

However, the information collected by the SBA from their foreign colleagues shows large differences between the individual European countries. Not to mention the actual implementation of controls, which is usually very weak and random (by a simple draw). It should therefore be noted that the controls in the EU will be less far-reaching and also less effective than the systematic controls under the Swiss system. In our country, all attorneys acting as financial intermediaries are strictly controlled every year, every 2 years or at least every 3 years (according to a risk-based approach), and not merely those whom are arbitrarily selected by a lot.

In summary, the current MLA system works well and is recognized by the FATF. The main loopholes according to the FATF Country Report 2016 have been closed in the meantime. It was rightly avoided in the completed AMLA revision to distort and weaken the effect of the law by an unfortunate extension of the scope of the AMLA to "advisors".

The well-established concept of the AMLA that only persons who professionally act as financial intermediaries or who accept cash as traders, i.e. who accept and dispose of third-party assets ("gatekeepers"), are covered by the scope of application was rightly not abandoned on the occasion of the AMLA revision. Indeed, the pertinent reporting on Recommendation No. 22 in the 2016 FATF Country Report reads as follows (emphasis added): *"Lawyers, notaries other legal professionals and accountants, and also trust and company service providers **are not subject** to the LBA when their work is limited to preparing or executing non-financial aspects of the transactions concerned, even though these situations are expressly included in the criterion. This means in particular that acts related to the creation of companies, legal persons and legal arrangements, in which they may be involved without being parties to transactions such as transfers, are outside the scope of the LBA."*

This shows that the FATF by no means requires Switzerland to make advisory services that have no connection to a financial or corporate transaction subject to the AMLA.

The core element for the question of whether a service is subject to the AMLA is (still) that the service is related to a financial transaction ("aspects of the transactions concerned"), which, if considered correctly, is the case only for the very few advisory services provided by attorneys. The general inclusion of advisory services in the AMLA would have resulted in all services provided by advising attorneys in connection with domiciliary companies being covered by the AMLA, even if no financial transaction is involved or the attorney is not involved in such a transaction, for example: Handing out a checklist for the foundation of a company; drafting/checking lease agreements or employment contracts; providing legal advice on labor law, tenancy law or social security law issues; advising on matrimonial or succession law matters with a domiciliary company in the matrimonial property; examination of articles of association and shareholders agreements; advice on the preparation of board meetings and general meetings; advice to the board of directors in disputes of any kind; information on intellectual property law; assistance in succession planning; assistance in due diligence; drafting/examination of sale and purchase agreements; information on warranty issues and prescriptive periods; tax rulings and much more.

These explanations also apply to fiduciaries, tax advisors, consultants, banks or insurance companies, etc., if they provide such kind of services. Each of the aforementioned services would have triggered the entire **cascade of due diligence obligations** under the AMLA, even if the legal advice was completed in a short time and no financial transaction was involved. In practice, this would have meant that the internal effort and external costs (audit requirement by an external auditor) would not infrequently have been higher than the revenue from chargeable hours, especially since small and medium-sized law firms have considerably fewer human and financial resources to carry out internal compliance under the AMLA compared to banks and professional financial intermediaries.

E. The general extension of the AMLA to the advising activities of the legal profession would have a blurring with devastating consequences for the professional secrecy of attorneys

The rejected revision project had wanted to introduce vague terms, such as "*commercial*" or "*prepare*", while at the applicable level of ordinances the term "professional", which has been precisely defined by practice over the last 20 years, is used. It was thus unclear whether, for example, only the sale of all participation rights would be covered by the term "*purchase or sale*

of domiciliary companies" or also contracts relating to the acquisition or sale of a majority or even minority participation. What would have happened to legal transactions that are economically equivalent to a sale, such as a transfer under the Merger Act, a donation, the creation of a usufruct, etc.? The elementary principles of certainty and clarity applicable to laws were suddenly no longer fulfilled.

A - partial and imprecise - extension of the scope of the AMLA to certain advisory activities (in all cases where there is a domiciliary company or trust) would have **fundamentally put into question the professional secrecy** without strengthening the prevention of money laundering. The uncertainty that would have resulted from the **deviation from the well-established concept of financial intermediary** to include "advisors" in the new law had to be avoided, as it is unnecessary and would have led to an undermining of professional and professional secrecy: thus, audit firms would now have had to control attorney-client files. The auditor would have had to be provided with all the information required for the audit and the necessary documents would have had to be handed over (duty of disclosure). As a result, the auditing company would inevitably have gained knowledge of confidential information that is subject to professional secrecy and the attorneys' secrecy. In follow-up to an audit, information protected in the sense of Article 321 StGB would after all have been held by a third party, who cannot invoke the protection and is ultimately obliged to provide information, even if there is no active duty to report. This would not have changed if the inspection was carried out by a person subject to professional secrecy. Professional secrecy is also violated by the disclosure of the first offender to professional colleagues who are not involved in the client's mandate work. The duty to audit in the area of the profession-specific activity of attorneys would thus have lifted the professional secrecy with the intended regulation. This is a completely different starting point than the current situation, in which attorneys already have a duty to audit, but only if they are subject to the AMLA as financial intermediaries, which, on the other hand, is only the case for financial transactions in the accessory area and thus not in the area protected by professional secrecy.

F. Conclusion

1. The current defense system consisting of the AMLA, the Criminal Code (StGB), the abolition of bearer shares, the introduction of qualified tax offenses as predicate offenses to money laundering, and the transparency rules in the Code of Obligations is sufficient. It is the effect of the disposition that is decisive, not the methodological approach, even if it is not exactly the same as that of our neighboring countries.

2. The **level of effectiveness of the defense system decreases with increasing expansion.** More regulation does not necessarily lead to more impact.

3. If there were deficits compared to international standards and loopholes in internal law that affect actual risks, these would have to be eliminated. The draft revision went beyond this goal, wanted to regulate further than the EU does and FATF stipulated, and would have represented an abandonment from a well-established and recognized concept.

4. **Consistent implementation** and the provision of the necessary resources are much **more crucial**. This is the place to start.

III. On the specific part: reporting obligation under the Ukraine sanctions

A. Classification of the obligation to report in the light of professional secrecy and the attorneys' secrecy

Switzerland has adopted the EU sanctions that were issued due to Russia's war of aggression against Ukraine. The Ordinance on Measures in Connection with the Situation in Ukraine of 4 March 2022 (SR 946.231.176.72; hereinafter also the "Ukraine Ordinance") implements this. The Ukraine Ordinance was issued based on Federal Act on the Implementation of International Sanctions of 22 March 2002 (SR 946.231; hereinafter the "EmbA"). According to Article 1 EmbA, the Confederation may enact compulsory measures in order to implement sanctions. The Federal Council is responsible in enacting those measures in the form of ordinance according to Article 2 EmbA. This is what the Federal Council has done with the Ukraine Ordinance. Its Article 16 para. 1 stipulates:

> *"Persons and institutions that hold or manage funds or know of economic resources that may be presumed to fall under the freeze pursuant to Article 15 paragraph 1 must report this to SECO without delay."*

Pursuant to Article 15 paragraph 1 of the Ukraine Ordinance, "*funds and economic resources owned or controlled by natural persons, companies and entities listed in Annex 8*" are frozen. According to Article 10 of the Federal Act on the Implementation of International Sanctions of 22 March 2002 (SR 946.231; hereinafter the " EmbA"), anyone who violates willfully the reporting obligation is punished with imprisonment and a fine of up to CHF 100,000 and with a fine of up to CHF 40,000 in the case of negligence. It is an offence prosecuted ex officio as soon as the investigating authorities become aware of a violation.

It was foreseeable that pressure would be built up in politics, by foreign, especially American, authorities and by the media to enforce an unrestricted reporting obligation also against attorneys. This led the SBA to communicate its position to the media at an early stage. In addition, it commissioned a legal opinion from the renowned penologist Prof. Marcel Niggli on the question of how attorneys should behave in the light of the professional secrecy under penal law and the attorneys' secrecy under professional law in the context of the reporting obligation.

How the attorney behaves in view of the obligation to report is, of course, his or her own responsibility. In the event of a report in violation of professional secrecy pursuant to Article 321 Criminal Code (StGB), the attorney runs the risk of being punished at the request of the client. Likewise, and even without a criminal complaint by the client, he or she will be severely sanctioned under professional law if he or she violates the attorney-client privilege pursuant to Article 13 AFML by making a report. This raises the question of whether the obligation to report pursuant to Article 16 of the Ukraine Ordinance provides a justification, so that criminal and professional sanctions do not apply to reports made without a release by the client. And if this were the case, then the subsequent question is unavoidable whether the non-reporting as a violation of the EmbA and the Ukraine Ordinance is in turn sanctioned under criminal law.

B. Legal situation in the EU

In the EU, Council Regulation (EU) No. 269/2014 of 17. 3. 2014 (OJ L 78, 17.3.2014, 6 et seq.), adopted as a result of Russia's annexation of Crimea, applies. Its Article 8, similar to Article 16 of the Ukraine Ordinance, regulates the obligation of natural and legal persons, entities and bodies to report immediately information known to them concerning the enforcement of sanctions, in particular information on frozen assets. On the other hand, paragraph 1 of Article 8 explicitly

reserves provisions on the obligation to report, confidentiality and professional secrecy. The conclusion is that in the EU, the obligation of attorneys to report information takes precedence over professional secrecy, i.e., the failure to report information protected by professional secrecy in favor of the client does not constitute a violation of sanctions law in the EU.

C. Discussion and solution in Switzerland

Whether Switzerland wanted to go further in this regard and tie back professional secrecy and the attorneys' secrecy through the reporting obligation is anything but clear. There are no indications of this either in the text of the ordinance or in the materials. On the other hand, there is also no explicit reservation of professional secrecy and the attorneys' secrecy, as provided for in EU sanctions law.

Given the lack of an explicit provision in the Ukraine Ordinance, the question of whether attorneys can invoke professional secrecy with respect to the reporting obligation has been the subject of controversy in Switzerland. The SECO had initially given contradictory information in this regard, but then, following the doctrine-based intervention by the the Swiss Bar Association and certain lawyers, made the following statement in an email from Ambassador Erwin A. Bollinger, Delegate of the Federal Council for Trade Agreements, State Secretariat for Economic Affairs (SECO) to the SBA of 12.5.2022 as follows: *"After internal clarifications involving various expert bodies and expert opinions - including the one [expert opinion Niggli] you (SBA) had sent us - we have come to the conclusion that, from our point of view, attorneys are not obliged to report frozen assets in the context of so-called "core activities of attorneys". Particularly in the case of representation in court, professional secrecy prevails over the reporting obligation under the Embargo Act. The situation is different for activities outside the attorney's monopoly, such as asset management or fiduciary activities. Within that framework, in our opinion, attorneys have an obligation to report."* - It is unclear what the SECO understands by "core activities of attorneys" and to what extent legal advisory activities are included. In any case, the general reference to legal activities outside the monopoly of attorneys is erroneous, since legal advisory activities are also core legal activities (see above).

The expert opinion of Professor Niggli is clear: *"An attorney is not required to report to the extent he or she does not hold or manage questionable assets. Nor does he have to refuse a corresponding mandate insofar as it does not involve the holding or management of corresponding assets. However, the attorney must, by virtue of his professional duties, advise an existing or future client on the relevant requirements of the Ukraine Ordinance."*

D. Restriction of professional secrecy according to para. 3 of Article 321 StGB?

The new provision in para. 3 of Article 321 of the Criminal Code (StGB), introduced on the 1st of January 2019, stipulates:

> "*The federal and cantonal provisions on the duties to report and cooperate, the duty to testify and on the obligation to provide information to an authority are reserved*."

Although the wording of this reservation of a reporting obligation is broad, the historical interpretation of this still young regulation yields a clearly different result. The corresponding amendment to the law had put forward exclusively the best interests of the child as a possible reason for the right or obligation to report (cf. BBL 2015 , 3431). Given this narrow purpose of the law, Article 321 para. 3 StGB cannot serve as a basis for further reporting rights and obligations. At the time of the introduction of para. 3 in Article 321 StGB, the EmbA already existed; therefore, reference could and should have been made to it if it had been intended to restrict professional secrecy also with regard to embargo measures.

Prof. Niggli states in his expert opinion: "*With regard to the restrictions in Article 321 para. 3 StGB, it should be noted that it already seems extremely strange that a federal criminal provision that concerns a bearer of secrets and his duties and that directly protects the interests of the secret owner, who is also the only one entitled to file a criminal complaint, should be restricted by cantonal regulations regarding reporting and cooperation rights or duties to provide information, or that its scope can be determined by cantonal law. Insofar as this is considered admissible under the rule of law at all, it must in any case be limited to the area of child protection cited in the legislation and can under no circumstances constitute a general competence regulation for all secrets of all secrecy bearers covered by Article 321 StGB. In accordance with the rule of law, Art. 321 para. 3 StGB can due to the criminal law principle of certainty actually only refer to legally defined obligations that are already defined and described at the time of the entry into force of this para. 3*."

E. Person subject to reporting?

Under criminal law, it is not sufficiently determined either who is covered by the reporting obligations under Article 16 of the Ukraine Ordinance and what kind of information they would have to report. Prof. Niggli also commented on this in his expert opinion:

"*The provision in question (Article 16 Ukraine Ordinance) speaks, on the one hand, of persons "holding or managing funds" [...] and, on the other hand, of "persons ... who know of economic resources that may be presumed to be subject to freezing under Article 15 paragraph 1". The term "economic resources" "that may be presumed" appears in any case insufficiently defined in terms of criminal law, because there are simply no known or recognizable criteria in this regard. Furthermore, the wording "know of economic resources" seems to be quite obviously oriented towards professional secrecy under Article 321 StGB ("secret, ... which has come to his knowledge in the practice of his profession"). Professional secrecy under Article 13 AFML is more restrictive and covers only what has been "entrusted" to the attorney by the client. This indicates that Article 16 Ukraine Ordinance refers to the professional secrecy under Article 321 StGB, but not to the (more restrictive) professional secrecy under Article 13 AFML, which, moreover, does not know any "exceptions" or restrictions and reservations according to Article 321 para. 3 StGB, which is why such restrictions cannot apply.*

Finally, it should be noted that the criminal provision of Article 321 StGB must also appear to be insufficiently determined if the list of persons to whom the corresponding restriction in its para. 3 refers is to be restricted by Article 16 of the Ukraine Ordinance, but the restriction refers to Article 15 of the same Ordinance, and this provision, for its part, refers to persons, businesses and organizations in Annex 8 of the same Ordinance, but this Annex itself states the following: "The Annex is not published in the Official Compilation of Federal Legislation (AS) or in the Classified Compilation of Federal Legislation (SR). The text can be ordered at SECO, Ressort Sanktionen, Holzikofenweg 36, 3003 Bern or it can be found at www.seco.admin.ch > Aussenwirtschaft & Wirtschaftliche Zusammenarbeit > Wirtschaftsbeziehungen > Exportkontrollen und Sanktionen > Sanktionen/Embargos > Sanktionsmassnahmen.

Under any conceivable title, this seems to contradict the principle of certainty under criminal law in Article 1 StGB (which, it should be recalled, has constitutional status). Even if one were to consider a restriction of the professional secrecy of Article 321 StGB by the Ukraine Ordinance as generally admissible, this can at most refer to Article 321 StGB and at most to secrets to be entrusted in the future, but must in any case fail due to the indeterminacy of the requirements. In any case, professional secrecy under Article 13 AFML is not affected by it. "

F. Conclusion

This leads to a clear result. Article 16 of the Ukrainian Regulation does not provide for a sufficient restriction of professional secrecy and the attorneys' secrecy in accordance with the rule of law. In other words, this provision does not provide sufficient justification for an attorney to report, in violation of professional secrecy and the attorneys' secrecy, on the assets of sanctioned persons and companies of which knowledge has been acquired in the course of the execution of core activities as an attorney. This must apply without restriction as long as the attorney is not released by the client and reports with the client's consent. Advising on whether this is a sensible course of action that serves the interests of the client is part of the core duty of an attorney, which he or she must fulfill with the diligence and conscientiousness required by professional law.

In its statement of 29 June 2022 in response to interpellation no. 22.3492 by National Councillor Raphaël Mahaim (Swiss Green Party), the Federal Council states that, in its view, lawyers are not obligated to declare assets or economic resources that are subject to the freeze as set out in Art. 16 of the Ordinance of 4 March 2022 instituting measures in connection with the situation in Ukraine (RS 946.231.176.72). Simultaneously, it recalls the position of the Federal Tribunal, according to which the specific professional activity of the lawyer, i.e. the drafting of legal documents, the assistance or representation of a person before an administrative or judicial authority, as well as legal advice, is protected by professional secrecy (ATF 147 IV 385, recital 2.2).

G. What applies if an attorney is contacted by a SECO-listed person after the regulation enters into force?

Prof. Niggli also states in his expert opinion very clearly:

"*What the attorney is not entrusted with by the client, but learns only incidentally (from another party) in the course of his activity, is not covered by the professional secrecy pursuant to Article 13 AFML, but is covered by professional secrecy according to Article 321 StGB. Only in these cases restrictions according to Article 321 para. 3 StGB are possible or conceivable at all, which remains excluded in the case of professional secrecy. However, a restriction of professional secrecy would require an explicit legal basis, which currently does not exist. In addition, it is also true that professional secrecy primarily protects the interests of the secret owner (see his or her right to file a criminal complaint). If, on the other hand, the attorney learns about the existence of assets through his or her client, this information is entrusted to him or her and is subject to the professional secrecy pursuant to Art. 13 AFML. In this case restrictions are neither provided for nor admissible*."

Thus, information entrusted to the attorney by a sanctioned client after the enactment of the Ukraine Ordinance enjoys the absolute protection of the attorneys' secrecy. If information about the sanctioned client's assets comes to the attorney's knowledge in any other way, he or she will in practice discuss it with the client before considering reporting it under the Ukraine Ordinance. Then, however, the additionally verified information becomes entrusted information, and reporting without release is out of the question. Without such verification by the client, however, the legal situation is equally clear in the opinion of the SBA. Professional secrecy under criminal law remains applicable also to such derivative information, and a clear legal basis for the fact that the reporting obligation under the Ukraine Regulation could take precedence is missing.

H. Sanction freezes do not oblige to in-depth clarifications on the origin of frozen assets

Frozen assets under the Ukraine Ordinance are neither fully nor partially acquired in tort, but simply blocked or seized. The fact that, under money laundering law, further clarifications may be

necessary with regard to an individual transaction (pursuant to FINMASA and related ordinances) does not change anything. Therefore, the position that the mere fact of the sanction freeze would require further clarifications is certainly not correct. Article 6 para. 2 lit. b AMLA explicitly refers to the criminal origin of assets or their use to finance terrorism. However, none of this is prejudiced or presumed by the entry on a list in connection with the Ukraine Ordinance. It is not the character or origin of the assets in question that constitute obstacles to their use, but merely the fact that they are blocked under Article 15 of the Ukraine Ordinance. In line with this finding, Article 15 para. 5 of the Ukraine Ordinance also provides for exceptions under which the SECO may authorize their use, which would not be the case for assets of criminal origin.

A reference to the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons of 18 December 2015 (SR 196.1; hereinafter "FIAA") does not lead to a different result. According to its article 1, the subject matter of this law are assets of PEP "*where there is reason to assume that those assets were acquired through acts of corruption, criminal mismanagement or by other felonies*.". The Ukraine Regulation, on the other hand, does not make such a connection. It refers solely to the EmbA, which in itself stipulates in its Article 1 that the envisaged compulsory measures serve the purpose of enforcing sanctions to secure compliance with international law. This does not concern the origin of the assets in question. The Ukraine Ordinance and the corresponding sanctions and lists are *political*, not criminal in nature.

The fact that the name of a person is found on such a list can therefore never in itself justify further obligations to clarify.

I. May fees be funded from frozen assets?

It has just been explained that the freezing of assets under the Ukraine Ordinance does not indicate their connection with money laundering, nor does it prompt in-depth clarifications in this regard.

In addition, Article 15 para. 5 Ukraine Ordinance explicitly mentions as an exception to freezing the use for the fulfillment of existing contracts the fulfillment of claims that are the subject of an existing decision of a court, administrative body or arbitration court. If one did not want to allow financing of legal advice and representation in proceedings against imposed sanctions or about their use from the frozen assets, this would mean denying the affected client access to justice or making it more difficult. The recent case-law of the Federal Tribunal even requires lawyers to demand provisional fees, if possible. Failure to do so may result in a refusal to waive professional secrecy when it comes to asserting one's rights to fees before the courts. For state authorities to freeze an individual's assets and thereby also possibly deny him or her the means to finance his or her legal remedies can be neither logical nor right under the rule of law.

Prof. Niggli therefore concludes in his expert opinion: *"Accordingly, the question whether the fee for the mandate of an attorney to represent in proceedings for the legal examination of the freezing of these funds can be paid from frozen funds must be answered in the affirmative"*.

Berne, September 2022/SBA

Sources:

- Various sources according to direct references in the text
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