



Member of the Federal Council  
Simonetta Sommaruga  
Eidgenössisches Justiz- und Polizeidepartement EJPD  
Bundeshaus West  
3003 Bern

Per E-Mail to: [zz@bj.admin.ch](mailto:zz@bj.admin.ch)

**Re: Response to Public Consultation on the proposed Changes to Swiss Code of Civil Procedure**

Dear Mrs Sommeruga, Member of the Swiss Federal Council,

The Association of Corporate Counsel (ACC) and ACC Europe write in support of the proposed provision in Article 160a that limits the duty of in-house counsel to cooperate in evidentiary proceedings, thereby allowing in-house counsel to exercise professional secrecy or legal professional privilege (LPP)<sup>1</sup> with respect to civil matters in Switzerland.

ACC is a global bar association that promotes the professional and business interests of in-house counsel who work for corporations, associations and other organizations through information, education, networking opportunities and advocacy initiatives. We have more than 43,000 members representing over 10,000 organizations in more than 85 countries. The ACC Europe chapter has more than 2,400 members throughout Europe.

ACC and ACC Europe have been following the progress of Parliamentary Initiative 15.409 advanced by Christa Markwalder, member of the National Council, and are encouraged to see its inclusion in Article 160a of the proposed changes to the Swiss Code of Civil Procedure. ACC endorses the approach of Article 160a. We agree with the requirements the new article imposes on the exercise of the privilege – that the privilege only apply to attorney-client related communication and that the legal department in question be supervised by a person qualified to practice law as an attorney. We are also pleased to see that the privilege will extend to documentary evidence as well.

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<sup>1</sup> We use the term legal professional privilege to refer broadly to the rights given lawyers and their clients to maintain the confidentiality of their communications in the context of requests by adversarial parties and the government to disclose such communications. It encompasses attorney-client privilege in common law jurisdictions as well as professional secrecy in civil code jurisdictions.

Overall, we believe the provisions of Article 160a will bring two primary benefits to Swiss businesses. *First*, extension of LPP will put Swiss firms on a more level playing field against companies in jurisdictions where the privilege is respected for in-house counsel. *Second*, allowing privilege for communications with in-house counsel promotes strong corporate compliance functions.

As noted in the justification of Parliamentary Initiative 15.409, providing LPP to Swiss in-house lawyers will eliminate the current procedural disadvantages that Swiss companies experience in foreign legal proceedings where documentary evidence might be required to be disclosed because in-house lawyers do not have a right to LPP in Switzerland. This is an important problem to rectify for Swiss companies to remain on equal footing in international disputes.

The present legal situation leads to unequal standards especially in legal disputes of Swiss firms that are dealt with by U.S. courts. U.S. courts will order disclosure of communications between company employees and in-house lawyers in countries where there is no grant of LPP to in-house lawyers.<sup>2</sup> We are aware of several U.S. cases involving European firms or subsidiaries where documents containing legal advice from in-house counsel in Europe had to be disclosed during litigation because U.S. courts are following the relevant country's practice of denying LPP to its in-house counsel. Because the United States allows attorney-client privilege for in-house communications, U.S. companies involved in the same disputes have a higher level of protection from compelled disclosure of evidence.

The lack of LPP for Swiss firms causes burdens for Swiss business even when they are not involved in international litigation. The current lack of certainty regarding LPP for Swiss in-house lawyers means that Swiss firms facing sensitive legal issues are forced to rely on outside counsel for legal advice, even when they have adequate internal lawyers to address the issue. This increases costs and decreases efficiency. For multinational enterprises with operations in jurisdictions such as Switzerland where in-house lawyers lack LPP, this lack presents logistical and organizational difficulties in collecting information to render legal advice, and raises costs for Swiss, European, American, and other multinational firms alike.

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<sup>2</sup> See, e.g., *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 72 (S.D.N.Y. 2006) (ordering disclosure of communications of Swiss in-house counsel); *Anwar v. Fairfield Greenwich Ltd.*, 982 F. Supp. 2d 260 (S.D.N.Y. 2010) (ordering disclosure of communications of Dutch in-house counsel who was not licensed); *Astrazeneca LP v. Breath Ltd.*, Civil No. 08-1512, (D.N.J. March 21, 2011) (ordering disclosure of communications of Swedish in-house counsel); *Veleron Holding, B.V. v. BNP Paribas SA*, 12-CV-5966, (S.D.N.Y. 2014) (ordering disclosure of communications of Russian and unlicensed Dutch in-house counsel).

Clearly, the lack of LPP for Swiss firms causes burdens for Swiss business even when they are not involved in US litigation.

The second way the proposed Article 160a will benefit the Swiss business community, as well as society as a whole is to strengthen the unique preventative and compliance role that in-house counsel occupy within businesses. In-house counsel provide companies with expert guidance on a wide variety of legal matters and they are drivers for corporate compliance and integrity. LPP strengthens this function of in-house counsel by allowing for full and frank discussion of legal issues between in-house counsel and company employees, without the concern that communications will later be used against the company by an adversary. A lack of LPP can have a chilling effect on corporate compliance efforts, because company management will avoid disclosing sensitive information to in-house lawyers.

Additionally, when in-house counsel have LPP, companies are more likely to uncover compliance and legal violations. In our members' experience in jurisdictions where in-house lawyers have LPP, legal and compliance violations are often discovered in the first place almost accidentally, as a result of the trusted relationship between key business people and in-house counsel. In large corporations with a deep commitment to compliance, it is still possible that employees will violate the law notwithstanding that corporate commitment. When corporate personnel discover such cases and feel secure to involve in-house lawyers, companies can address the violation appropriately, or determine that it should be disclosed to authorities. While Article 160a only applies to civil matters, it is a step toward creating a legal system that is supportive of corporate internal compliance systems.

ACC and ACC Europe think the benefits of in-house LPP to the Swiss legal and business communities are clear. We are hopeful that Article 160a is enacted as part of the larger reform of the Swiss Code of Civil Procedure.

Sincerely,



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Associate General Counsel and Director  
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