



## In-House Counsel Privilege – Soon to Arrive in Switzerland

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Legal privilege for in-house counsel in court proceedings, that is, the right to refuse to testify and to disclose documents in connection with their activities as in-house legal counsel, is widespread. Not only the entire Anglo-American legal circle knows such a privilege but also the Spanish/Portuguese circle of countries (Spain, Portugal, South America). Germany and Belgium, on the other hand, still clearly distinguish between self-employed attorneys and in-house counsel with regard to their rights under civil procedural law.

For a long time, foreign court cases have shown that Swiss companies suffer procedural disadvantages because in Switzerland, members of an in-house legal service have no right to refuse to testify or to disclose. Notably in proceedings in the U.S., Swiss companies have been obliged to disclose the correspondence of their in-house counsel, if they were employed in Switzerland, because Swiss law does not contain anything corresponding to the U.S. legal privilege for in-house counsel. On the basis of a “choice of law” analysis, U.S. courts found that Swiss law should be applied to assess the question of legal privilege for in-house counsel. Thus, the protection of Swiss companies and their in-house counsel is regularly rejected. The absence of a corresponding provision in Switzerland has led to a considerable competitive disadvantage for them in comparison to companies from countries whose law contains a legal privilege for in-house counsel.

On June 18, 2007, to remedy this unsatisfying state of affairs, the Swiss National Council, in a [motion](#) titled “*Duties and rights of employees providing legal advice or forensic services. Equality with self-employed attorneys*,” requested that the Swiss Federal Council submit to the Parliament an “*amendment to federal law in such a way that persons who act as employees of a company in a legal advisory or forensic capacity are treated in the same way as self-employed lawyers with regard to their duties and rights*.”

Eight years later, in 2015, a member of the Swiss National Council followed up by submitting a [parliamentary initiative](#) requesting that the professional secrecy for in-house lawyers be protected.

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In 2020, the Swiss Federal Council finally submitted its dispatch to Parliament containing a [draft amendment](#) of the Swiss Civil Procedure Code ([CPC](#)) and an [explanatory report](#).

On March 17, 2023, the Swiss Parliament adopted the CPC revision. The new provision it contains regarding the in-house counsel privilege is quite different from the draft submitted by the Federal Council and reads as follows (unofficial translation; original text adopted by Parliament to be found [here](#)):

*Art. 167a*

*1 A party may refuse to cooperate and to hand over documents relating to the activities of its in-house legal service if:*

*a. it is registered as a legal entity in the Swiss Commercial Register or in a comparable foreign register;*

*b. the legal service is headed by a person who is admitted to the bar of a canton or who meets the professional requirements to practice law in his or her country of origin; and*

*c. the activity in question would be considered professionally specific in the case of a lawyer.*

*2 A third person may request the cooperation and the release of documents in connection with his or her activity in an in-house legal service under the conditions set out in paragraph 1.*

*3 The parties and third persons may appeal against decisions on refusal to cooperate in accordance with paragraphs 1 and 2.*

*4 The costs of disputes concerning the right of refusal in accordance with paragraphs 1 and 2 shall be imposed on the party or third person invoking them.*

A referendum against the revision of the CPC can still be filed until July 6, 2023. If this should not be the case, the Federal Office of Justice expects the new Article 167a CPC to be put into force on January 1, 2025. From this point in time, Swiss in-house counsel will have the same procedural privileges as their self-employed colleagues, always provided they fulfill the conditions according to Art. 167a (1) CPC.

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