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Internal investigations

The asymmetrical contours of attorney-client privilege

Par Katia Villard le 30 August 2024

Federal Court decisions 7B_158/2023 and 7B_874/2023 of 6 August 2024 were handed down in the same case, by the 2nd Criminal Court, in the context of a sealing procedure. The first, intended for publication, seems convincing to us, unlike the second.

For once – and this is important – the criminal proceedings were not opened for money laundering but for breach of the law against unfair competition. In short, the Zurich Public Prosecutor's Office suspects an individual, who is understood to be or to have been an employee of a company, as well as another unknown perpetrator within the company, of having provided misleading information about the company to investors.

By filing order dated 31 May 2022, the Public Prosecutor's Office asked the company to submit an internal investigation report, together with annexes, concerning the facts under investigation and drawn up by a law firm. The company handed over the documents and simultaneously requested that seals be affixed. On 24 November 2022, the Court of Enforcement rejected the prosecuting authority's request for the documents to be unsealed and ordered that they be returned to the company. The public prosecutor appealed to the Federal Supreme Court.

At the same time, in January 2023, the prosecuting authorities turned to FINMA, which had initiated *enforcement* proceedings in connection with the same events. As part of the enforcement proceedings, the company submitted to the regulator the internal investigation report that was the subject of the aforementioned sealing procedure. The Office of the Public Prosecutor is requesting from the administrative authority the report of the investigator who assisted FINMA, as well as the decision on serious violations of supervisory law issued at the end of the *enforcement* proceedings.

FINMA forwards the documents under seal to the public prosecutor following a precautionary request from the company. The Public Prosecutor refused to affix the seal. The company appealed to the Zurich Supreme Court, which recognised that the documents forwarded by FINMA could be sealed. The Court of Compulsory Measures, agreeing with the Public Prosecutor's position, did not rule on the Public Prosecutor's request to unseal the documents but ordered, by decision dated 5 October 2023, that the documents be "released" for use in the criminal proceedings.

The Federal Supreme Court dismissed both the Public Prosecutor's appeal against the decision to maintain the seal on the internal investigation report (7B_158/2023) and the

company's appeal against the unsealing of the documents requested from FINMA (7B_874/2023), without ruling on whether the documents could in principle be sealed.

In its first ruling, the Federal Supreme Court clearly states, for the first time to our knowledge, that the establishment of facts is a typical activity of a lawyer. The internal investigation report is therefore protected by professional secrecy. It should be noted that this statement probably cannot be transposed unchanged to money laundering proceedings, since factual clarifications, including those carried out by a law firm, may, depending on the circumstances, be considered as an – atypical – control and audit task in connection with compliance with anti-money laundering obligations. Thus, the case law – admittedly unpublished – handed down until then by the1st Court of Public Law (cf. 1B_509/2022 of 2 March 2023, commented on *in* Villard cdbf.ch/1279), which was relieved of this matter by the creation, with effect from1 July 2023, of the2nd Court of Criminal Law, seems to us to be *a priori* still relevant.

The Federal Court also ruled that the annexes to the investigation report, which consist of (copies of) pre-existing documents internal to the company but which have been selected and sorted by the lawyer, are also protected by professional secrecy. On the other hand, the Public Prosecutor may, of course, sequester the said documents within the company. The High Court added that a state governed by the rule of law must accept that professional secrecy may complicate the search for the truth.

Lastly, the ruling teaches us that the transmission of an internal investigation report to a third party – in this case FINMA – does not automatically render the document secret.

However, this last consideration is largely tempered by the second ruling of the Federal Supreme Court, which at the same time indicates that documents that have been consciously and voluntarily handed over to the third party – in this case FINMA – are no longer protected in the hands of the latter. In other words, according to the Federal Court, the public prosecutor could even have requested FINMA's internal investigation report… *A fortiori*, the results of the*enforcement* proceedings, even if they are based on the internal investigation report, can be used in the criminal proceedings.

As indicated in the introduction, this approach does not seem to us to be the right one. Firstly, to consider that the submission of the internal investigation by the reporting entity to the regulator, in the context of*enforcement* proceedings, was carried out (totally) voluntarily, since it was obviously not formally required by FINMA, seems to us to be a fiction. Secondly, to accept, on the one hand, that a document does not lose the protection of secrecy by being passed on to a third party, while at the same time accepting, on the other hand, the removal of the said document from the hands of this third party, seems contradictory. The question must be resolved in its entirety. In this respect, it should be remembered that, in accordance with art. 264 of the Criminal Procedure Code, documents are protected by professional secrecy : "[w]herever they may be found".

In the second judgment, the question that the Federal Court should have asked itself, in our view, was whether and to what extent the information contained in the investigator's report and FINMA's final decision originated from the internal investigation report and whether it could also have been obtained without that report.

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