CENTRE DE DROIT
BANCAIRE ET FINANCIER

Sealing of evidence

Banking secrecy is no longer enough

Par Katia Villard le 5 November 2024

Since the revision of the Code of Criminal Procedure, which came into force on January 1, 2024, banking secrecy no longer constitutes a ground for sealing documents when invoked by a third party, i.e. a person not involved in the criminal proceedings. The Swiss Federal Supreme Court ruled to this effect in its ruling 7B_313/2024 of September 24, 2024, intended for publication.

The Office of the Attorney General of Switzerland was conducting criminal proceedings for fraud and money laundering against various individuals.

In this context, on April 12, 2021, it sent deposit orders to two banks in connection with accounts held by a company. The financial institutions provided him with the relevant documents.

On October 27, 2023, the criminal authority sent new deposit orders to the same two banks, again concerning accounts held by the company.

On October 31, 2023, it notified the company of the decisions of October 27, 2023, with a copy of the decisions of April 12, 2021.

On November 6, 2023, the Company requested that the documents which had been the subject of the deposit orders be placed under seal. The Federal Prosecutor's Office rejected the request on November 14, 2023. The Complaints Court of the Federal Criminal Court upheld the company's appeal of December 28, 2023, and requested the Public Prosecutor's Office to seal the documents, which it did on January 5, 2024.

On January 17, 2024, the Federal Prosecutor's Office asked the Canton of Berne Court of Enforcement to declare that the sealing request of November 6, 2023 was invalid. In the alternative, it requests that the seals be lifted. On February 13, 2024, the Court accepted the request for unsealing (obviously without ruling on the validity of the request for unsealing).

The company appealed to the Swiss Federal Supreme Court.

The High Court first ruled that, in accordance with the principle of immediate applicability, the new sealing law applied, as the contested decision had been handed down after January 1, 2024 (art. 448 para. 1 and 453 para. 1 CPP *a contrario*).

The Federal Court went on to point out that the new law defines the grounds for sealing more restrictively than the old law. Only secrets that can (simultaneously) oppose sequestration within the meaning of art. 264 para. 1 of the Swiss Code of Criminal Procedure can now be invoked. Business and banking secrets are not included, and such a limitation was expressly intended by the legislator. Thus, while the Federal Council's draft expressly listed manufacturing and commercial secrets among the protected secrets, the mention has disappeared from the text voted by the Chambers.

The company, which was not warned in the proceedings, did not therefore allege any secrets worthy of protection within the meaning of art. 264 of the Swiss Criminal Code.

The Federal Court therefore dismissed the company's appeal.

In our view, the reasoning lacks clarity and would have benefited from further elaboration.

First of all, the fact that, contrary to the Federal Council's draft, the revised law does not mention commercial secrecy – which obviously includes banking secrecy – as a reason for sealing is not in itself decisive. Indeed, this type of secrecy was not expressly mentioned in the CPC in force until December 31, 2023. However, it was nonetheless accepted, in principle, as a reason for sealing.

Secondly, it is not true that banking secrecy is not one of the grounds for restricting sequestration. Indeed, art. 264 al. 1 let. c CCP mentions documents concerning contacts between the accused and a person who has the right to refuse to testify under art. 170 to 173 CCP. However, the holder of information covered by banking secrecy has the right to refuse to testify under the conditions of art. 173 para. 2 CCP.

That said, it is true that under art. 264 para. 1 let. c CCP, only documents protected by secrecy of which the accused is the holder may be withdrawn from sequestration. This "personal" limitation of the scope of art. 264 al. 1 let. c CPP is rightly criticized by some legal writers (cf. e.g. BSK StPO-Bommer/Goldschmid,3rd ed. 2023, art. 264 N 24). The secrets mentioned in art. 264 CPP are protected because they are considered worthy of protection. However, a secret is (obviously) no less worthy of protection because a third party, and not the accused, is its master (!). The provision also contradicts articles 170 to 173 of the Code of Criminal Procedure concerning the right to refuse to testify, which make no distinction between information protected by secrecy concerning the accused or a third party.

We therefore regret that the Federal Court did not take the opportunity to rule on this issue.

It should also be noted that, from a factual point of view, the first deposit orders of 2021 were obviously not notified to the company holding the account. In our view, this is a dubious procedure, since it prevents the beneficiary – who is therefore unaware that the bank has forwarded the documents to the Public Prosecutor's Office – from requesting that the documents be placed under seal before the criminal authorities take cognizance of them. In fact, since 2024, art. 248 para. 2 of the Code of Criminal Procedure has expressly provided that if the holder of the sequestered documents is not the entitled party, the latter must be informed within three days of the possibility of requesting that the documents be placed under seal.