CENTRE DE DROIT
BANCAIRE ET FINANCIER

Sealing of evidence

Business secrecy and banking secrecy are no longer enough (at all)

Par Katia Villard le 11 December 2024

In our last commentary on a Federal Court ruling on sealing (7B_313/2024, intended for publication), we stated that 'banking secrecy no longer constitutes a ground for sealing where it is invoked by a third party, i.e. a person not involved in the criminal proceedings' (Villard, cdbf.ch/1383). Following the publication of judgment 7B_976/2024, which is commented on here, the second part of the statement should be deleted : banking secrecy no longer constitutes a ground for sealing.

Ruling 7B_976/2024 was not concerned with banking, but the clarifications it contains apply generally to sealing procedures and all so-called 'soft' secrets (commercial secrecy, business secrecy, banking secrecy).

It also contains some interesting considerations on the links between appeals against sequestration orders and sealing proceedings.

The Geneva Public Prosecutor's Office is investigating a defendant for encouraging prostitution and serious drug offences. During a search of the home of the defendant's ex-wife and daughter, two mobile phones belonging to the defendant were seized. A sequestration order was issued on 9 July 2024.

On 11 July 2024, the accused requested that the phones be sealed, arguing that the data contained therein was of no potential use to the investigation, that the principle of proportionality had been violated, and that lawyer-client privilege, business secrecy and privacy were being protected. The Public Prosecutor's Office granted the request and applied to the Court of Enforcement to have the seals lifted.

At the same time, the accused lodged an appeal against the sequestration order. The Criminal Appeal Division ruled that the appeal was inadmissible in view of the pending sealing proceedings, in which the defendant could put forward all his arguments.

On 9 August 2024, the Court of Enforcement ordered the seals to be unsealed. It refused to hear the defendant's complaints regarding the violation of the principle of proportionality and the irrelevance of the documents seized. Since the revision of the Swiss Criminal Procedure Code came into force in January 2024, these are no longer grounds for sealing.

The accused is appealing to the Federal Supreme Court against the two aforementioned decisions. The High Court joined the cases.

It found that the appellant's right to be heard had been violated, and that his complaints regarding the principle of proportionality and the irrelevance of the data seized had not been addressed by any of the cantonal courts. The Federal Court stated that as soon as the accused puts forward grounds for sealing – in this case solicitor-client privilege and the protection of privacy – the complaints relating to the coercive measure as such may be raised as an accessory issue in the sealing proceedings. They must be dealt with even if the alleged grounds for sealing are (rightly) dismissed on the merits. On the other hand, in the absence of any grounds for sealing, a breach of the general conditions governing the imposition of a coercive measure must be raised as part of an appeal against the search and/or sequestration order.

In its ruling, the Federal Supreme Court excluded from the grounds for sealing so-called 'soft secrets' which, according toart. 173 para. 2 of the Code of Criminal Procedure, justify an exemption from testifying before a criminal authority only if the person in possession of the information makes it likely that the interest in maintaining secrecy outweighs *in casu* the interest in ascertaining the truth. This includes banking secrecy and business secrecy. The High Court clarifies its ruling 7B_313/2024 to the effect that, under the new law, these secrets no longer constitute grounds for sealing, regardless of the procedural status – defendant or not – of the person asserting them. The Federal Court justifies its position by noting that the legislature, in revising the Code of Criminal Procedure, intended to restrict both the grounds for opposing sequestration underArticle 264 para. 1 CCP and those for sealing. Moreover, the parliamentary debates did not show that a difference in treatment should be made between the accused and a third party subject to the coercive measure in terms of the protection of secrets.

We are not convinced by the Federal Court's reasoning. While it is correct that the legislature's intention in revising the CPC was to limit the grounds for sealing by bringing them into line with the grounds for opposing sequestration, there was no intention to restrict the latter. Moreover, art. 264 para. 1 of the Criminal Procedure Code has not been amended. The parliamentary debates did not expressly exclude business secrets from the grounds for sealing. Given the wording of the law, a limitation of the grounds for restricting sequestration or sealing in this sense would require legislative intervention. As for the argument based on equal treatment of the accused and the third party affected by the coercive measure, it argues above all in favour of the possibility for the third party to also assert the protection of secrecy.
