CENTRE DE DROIT
BANCAIRE ET FINANCIER

Administrative criminal proceedings

Inadmissibility of statements obtained by FINMA

Par Katia Villard le 14 August 2025

Statements obtained under an obligation to cooperate with FINMA are inadmissible in administrative criminal proceedings brought against an individual for engaging in financial intermediary activities without authorization. This conclusion, reached by the Federal Supreme Court in its judgment 7B_45/2022 of July 21, 2025 (not intended for publication), results in the case being referred back to the Appeals Chamber of the Federal Criminal Court, which will have to re-examine the case without this evidence.

The case dates back to 2014, when Albert asked FINMA to confirm that his company, which was active in sugar trading, did not need to join a self-regulatory organization. In response, FINMA sent the company two separate letters setting a deadline for completing two questionnaires, one relating to the AMLA and the other to FINMA. At the same time, it drew the company's attention to its obligation to provide the information and enclosed the relevant provisions, in particular Art. 29 FINMASA (obligation to provide information and report), Art. 44 FINMASA (criminal consequences of operating without authorization) and Art. 45 FINMASA (criminal consequences of providing false information).

In the absence of a response, FINMA sent a third letter to the company, reiterating its obligation to cooperate and stating that, in the event of non-compliance with this obligation, it would issue its decision on the basis of the file in its possession and could take the refusal to cooperate into account in its assessment of the evidence.

The authority also indicates that it is considering appointing an investigator at the company's expense and reserves the right to place the company on the list of unauthorized institutions.

Albert finally returns the two forms to FINMA.

Several months later, the regulator reported the case to the Federal Department of Finance (FDF), which found Albert guilty of operating as a financial intermediary without authorization for the period from April 26, 2012, to December 31, 2014. Both courts of the Federal Criminal Court upheld this conviction in broad terms.

Before the Federal Court, Albert contested the admissibility of the two questionnaires sent to FINMA and used by the lower courts to justify his conviction.

The Federal Court judges ruled in his favor.

In its reasoning, the Federal Court recalled the three rules underlying the issue in question. The first is the principle of non-incrimination enshrined in Art. 113 para. 1 CCP and Art. 6 ECHR, applicable in the context of the administrative criminal proceedings against Albert. The second is the obligation to cooperate with FINMA within the meaning of Art. 29 FINMASA, on the basis of which Albert was required to complete the disputed forms. The third is that of mutual assistance between authorities (Art. 38 FINMASA) : FINMA must in principle provide all relevant information to the criminal authority.

However, in Albert's case, the combined application of these three rules conjures up the image of magnets repelling each other : the obligation to cooperate, coupled with mutual assistance between authorities, would allow the principle of non-incrimination to be circumvented.

According to the Federal Court, the problem can be resolved by granting the person subject to FINMA supervision the right to refuse to cooperate with FINMA if such cooperation could lead to criminal consequences for that person (following a report by the regulator). In this context, FINMA must inform the person subject to supervision of this right. Statements made to the regulator by a duly informed person subject to the obligation to provide information are admissible in criminal proceedings.

In this case, FINMA knew that Albert's conduct could give rise to criminal proceedings. It should therefore have informed him that he was not obliged to make statements in the administrative proceedings that could incriminate him criminally. It did not do so.

The Federal Supreme Court held that this omission did not render the forms completed by Albert inadmissible. Rather, the decisive factor – and one that weighed in favor of the admissibility of the documents – was the fact that the three letters from FINMA did not contain any threat of criminal sanctions in the event of non-compliance by the data subject within the meaning of Art. 48 LFINMA or 292 CP.

Three comments come to mind upon reading this decision. Firstly, to our knowledge, this is the first time that the Federal Supreme Court – even if it does not say so explicitly – has not made the usability of information dependent on whether it was obtained under a duty to cooperate accompanied by the threat of criminal sanctions in the event of non-compliance.

Second, to our knowledge, this is also the first time that the Federal Supreme Court has confirmed FINMA's duty to inform the party subject to supervision of its right to refuse to cooperate in administrative proceedings with regard to statements that could incriminate it, on pain of such statements being inadmissible in criminal (administrative) proceedings. The approach appears reasonable at first glance, but it raises a number of questions, particularly regarding the degree of precision of the information to be provided and the obstacles this may pose for establishing the facts in enforcement proceedings.

Thirdly, the content of the judgment appears somewhat unclear regarding the links between the company's right not to incriminate itself and Albert's right (see para. 2.4, subpara. 3 and 2.4 para. 4), and on the fact that FINMA's omission is not problematic from an administrative procedure perspective but from a criminal procedure perspective (see para. 2.4). Clarification on these points would have been welcome, and the decision would then have been worthy of publication.