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Admissibility of Internal Investigation Interview Minutes as Evidence in Criminal Proceedings: New Swiss Federal Supreme Court Decision

In its recently released decision 6B_48/2020, 6B_49/2020 of 26 May 2020, the Swiss Federal Supreme Court ("FSC") held that art. 158 of the Swiss Criminal Procedure Code ("CPC") – which deals with the compulsory obligation to inform the charged person of his or her procedural rights during any criminal proceedings (commonly referred to as "Miranda Warnings") – is not applicable by analogy to interviews conducted in the course of an internal investigation. As a result, not making the Miranda Warnings under art. 158 CPC in the course of an internal investigation does not per se render the relevant interview notes or minutes as inadmissible evidence in criminal proceedings.

However, in order to increase the evidentiary weight beyond mere party allegations (*Parteibehauptung; allégation de partie*) in the criminal proceedings, the notes or minutes drafted in an internal investigation should meet a number of criteria. In particular, they should be submitted to and bear the signature of the interviewee, who should also expressly confirm their accuracy. Likewise, the drafter of the notes or minutes should confirm their accuracy by a formal testimony in the criminal proceedings.

Factual Background

In 2011, during a surgical operation, a medical doctor, by mistake, used a 98% concentrated acetic acid instead of the usual concentration (between 3% and 5%) causing severe injuries to his patient. In the course of the criminal proceedings, it was alleged that this incident had been caused by another employee of the clinic ("**Employee**") who had overlooked the bottle of acetic acid of 98% when performing the year-end inventory of the operating room pharmacy.

Shortly after the above incident, in an effort to establish the facts and identify potential dysfunctions, the clinic interviewed the Employee. However, the Employee had not been informed that minutes would be and were taken during this interview. The clinic also did not subsequently share the minutes with the Employee. The minutes therefore lacked any signature or other confirmation by the Employee. In addition, the drafter of the minutes was not deposed as a witness in the course of the subsequent criminal proceedings against the Employee.

Legal assessment of the FSC

One of the legal questions brought before the FSC was to assess, if and to what extent the interview minutes drafted in the course of the internal investigation could serve as evidence in the subsequent criminal proceedings against the Employee.

In its decision, the FSC recalled the principle against self-incrimination (*nemo tenetur se ipsum accusare*; art. 14(3) UN-Pact II; art. 6 para 1 ECHR; art. 113(1) CPC) pursuant to which no person is required to incriminate himself or herself by his or her own testimony, other evidence or any other way of cooperation in criminal proceedings. In addition, under art. 158 CPC, prosecutors must inform the accused at the outset of its first deposition about his or her procedural rights, failing which such deposition is deemed as inadmissible evidence.

With regard to the admissibility of the interview minutes as evidence in criminal proceedings, the Employee argued that the obligation to cooperate in an internal investigation was inconsistent with the right not to incriminate oneself. In this respect the FSC takes the position that, for various reasons, art. 158 CPC does not apply as a benchmark in the context of an internal investigation conducted by the employer. Hence, not making Miranda Warnings does not *per se* exclude the admissibility of the statements made by an employee in the course of the internal investigation in subsequent criminal proceedings.

Nevertheless, in order to avoid a situation where the procedural guarantees for any charged or indicted person – notably the *nemo tenetur* principle – are completely evaded by prosecutors, the assessment of the evidentiary weight of internal investigation minutes is now in focus. In the case at hand, the FSC qualified the interview minutes as mere party allegations (*Parteibehauptung; allégation de partie*) made by the interviewer on behalf of the employer and concluded that the document was of only extremely limited evidentiary weight.

In its reasoning, the FSC noted that: (i) the Employee had not been informed that minutes of his interview would be and were taken, (ii) such minutes had never been submitted to, nor signed by the Employee, (iii) the statements contained therein had never been confirmed by the Employee, (iv) the drafter of the minutes had never been formally deposed as a witness (art. 177 CPC) in the course of the criminal proceedings, and (v) further details as to how the information was collected had remained unclear.

Considering that the Employee had denied throughout the criminal proceedings the alleged statements set out in the interview minutes, the FSC held that these could not form the basis of the Employee's conviction. Altogether, the FSC concluded that the lower court's assessment of the evidence for the allegations against the Employee was arbitrary. Consequently, the FSC returned the matter to the lower court for a new decision.

Key takeaways

Miranda Warnings are not a prerequisite for interviews conducted in the course of an internal investigation. If the employer has a presumptive interest to: (i) submit interview notes to a prosecutor in subsequent or parallel criminal proceedings and (ii) give such internal investigation efforts maximum weight, then measures should be considered to increase the evidentiary weight of such notes beyond mere party allegations (*Parteibehauptung; allégation de partie*). For those purposes, the interviewee should be informed at the outset of the interview that notes will be taken and that the interviewee will receive a copy for review. In addition, it is advisable that the interview is conducted or attended by two representatives of the employer. Subsequent to the interview, the notes should be submitted to and signed by the interviewee with an express confirmation that the notes accurately reflect his or her statements. The drafter(s) of the notes and, if applicable, any observer of the interview should likewise confirm their accuracy in writing.

When designating the persons who will conduct the interview, it is important to bear in mind that the drafter(s) of the notes may be formally deposed as witness(es) in subsequent or parallel criminal proceedings.

In terms of the practical planning of internal investigations, the following issues, among others, should therefore be addressed from the outset between clients and their attorneys:

– In light of the subject matter of the internal investigation, is it likely that criminal proceedings may be opened as well?

– Does the client intend to make use of/introduce the underlying documents of the internal investigation in subsequent or parallel criminal proceedings?

– Is it likely that the client may eventually wish to bring criminal charges and act as private plaintiffs in the criminal proceedings?

– At what stage of the investigation can it be expected that the contents of the interview(s) may become relevant for criminal proceedings?

– Who will conduct the interview that may become relevant evidence for criminal proceedings?

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