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White-Collar Crime 2021

Switzerland: Trends & Developments

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Trends and Developments

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Introduction

The Swiss Financial Market Supervisory Authority (FINMA), the Federal Department of Finance (FDF) and the Office of the Attorney General of Switzerland (OAG) are the main authorities in charge of monitoring the Swiss financial market and protecting its integrity.

As a regulatory authority, FINMA is responsible for investigating the violation of supervisory law and taking appropriate measures to restore compliance with the law, making use of coercive measures where necessary. The term "enforcement" covers all investigations, proceedings and measures taken by FINMA in connection with violations of supervisory law (Article 30ff of the Swiss Financial Market Supervision Act, FINMASA).

In certain cases, the behaviour of financial market participants may also fall within the scope of criminal offences. FINMA has an obligation to report them to the competent prosecution authorities. Depending on the nature of, and circumstances surrounding the criminal offences at stake, the competence to prosecute lies either with the OAG, with a cantonal prosecution office or with the FDF.

For instance, FINMA investigates insider trading and market manipulation cases and then coordinates its efforts with the OAG for the prosecution of the criminal offences (Article 161 of the Swiss Criminal Code and Articles 142–143 of the Financial Market Infrastructure Act). While, according to Article 50 FINMASA, violations of criminal provisions set out in such Act or in other financial market acts (which include, for example, the Anti-Money Laundering Act) fall within the competence of the FDF.

Pursuant to Article 29 FINMASA, persons and entities under the supervision of FINMA must provide FINMA with all information and documents that it requires to carry out its tasks. Withholding essential information or providing false information to FINMA may trigger criminal sanctions.

In practice, the extensive duty to co-operate set out in Article 29 FINMASA may conflict with the fundamental right not to incriminate oneself (nemo tenetur se ipsum accusare) afforded by the European Convention on Human Rights, in particular where the information provided to FINMA in the context of its supervision is subsequently made accessible and used as evidence by a criminal prosecution authority in parallel or subsequent criminal proceedings.

Documents and Information

Documents and information provided to FINMA by regulated persons or entities may be shared by FINMA with criminal prosecution authorities, upon their request, in the frame of mutual assistance proceedings and the exchange of information between authorities (eg, Article 38 FINMASA). However, the obligation for FINMA to provide mutual assistance to prosecution authorities is not absolute. It assumes that there is no overriding public or private interest to maintain secrecy over the documents and information. One can oppose, for example, that the disclosure may affect ongoing proceedings before FINMA or adversely affect its supervisory activity (see also Article 40 FINMASA).

The Swiss Federal Supreme Court recently confirmed that a person who argues that it has been impacted by the transmission of documents in the context of mutual assistance between FINMA and a criminal prosecution authority has no standing to intervene in such (administrative) proceedings. However, it may assert its rights in the frame of the criminal proceedings, in particular by challenging the admissibility of the so-gathered evidence, arguing that it was obtained in violation of its right not to incriminate itself (Article 141 CrimPC; decision 1B_268/2019 of 25 November 2019).

Moreover, during the criminal investigation, it may be requested that the documents obtained by the prosecution authorities from FINMA shall be placed under seals. This means that, pending the outcome of the unsealing proceedings before the competent court, the prosecution authorities are prevented from reviewing and using relevant documents for the purpose of their investigation.

It should be emphasised that the right not to incriminate oneself is not intended to prevent documents containing secrets worthy of protection from coming to the attention of the criminal authorities, but to prevent evidence obtained in violation of this principle from being used as a basis for accusation or conviction.

In a landmark ruling from May 2016, the Swiss Federal Supreme Court confirmed the unsealing of a memorandum that a bank, prosecuted for money laundering in connection with the Malaysian bribes that allegedly transited through its accounts, had drafted for FINMA's supervisory purposes. The bank requested the sealing of the memorandum, which analysed the bank documents on which the money laundering accusations were based. The Supreme Court upheld the unsealing request from the OAG and concluded that the memorandum had been prepared based on a request for information from FINMA, without the threat of criminal sanctions. Consequently, the principle nemo tenetur se ipsum accusare did not prevent the seizure of the memorandum in possession of the bank (BGE 142 IV 207).

In June 2020, the Swiss Federal Supreme Court similarly ruled that the prosecution authority could use in its money laundering investigation against a bank the report prepared for FINMA by the investigator it had mandated against such bank in connection with the very same set of complex facts, even though the bank had applied for the sealing of the report based on the nemo tenetur principle and the protection of business secrecy. In that case, the bank claimed that it had to provide documents to FINMA under the threat of criminal sanctions but it failed to demonstrate that the report in question resulted from the documents provided under threat (Decision 1B_59/2020 of 19 June 2020).

Bank Examination Privilege

Confidentiality is a key ingredient in maintaining dialogue and communication between the regulator and the financial institutions. Indeed, financial institutions are more likely to volunteer information to the regulator when they know that it is mindful of this sensitivity and the impact of potential disclosure. However, maintaining such confidentiality may be a true challenge in case the relevant facts give rise to parallel or subsequent criminal investigation.

By way of comparison, the situation is different in the USA where federal courts have developed the so-called "bank examination privilege". The purpose of such privilege is to enhance effective supervision and generally protects from disclosure the communication between financial institutions and regulators.

In essence, the bank examination privilege covers all confidential supervisory information,

which encompasses regulator-to-bank and bank-to-regulator communications, internal agency communications that are not shared with banks and internal bank communications that are not shared with regulators.

It is important to note that the privilege strikes a balance. A court may override the privilege if the requesting party has a sufficiently strong interest, known as good cause, to obtain information that outweighs the interest in confidentiality.

However, in many cases, the bank examination privilege will preserve the confidentiality of the most sensitive aspects of the bank's examination records.

Conclusion

The tensions that arise between the duty to co-operate with a supervisory authority and the fundamental right not to incriminate oneself in the context of criminal proceedings pose a real problem in practice. This situation needs to be properly addressed and resolved by the Swiss lawmaker by the inclusion of a supervisory privilege in the law. It seems that this is the only sustainable solution to avoid supervisory proceedings being opportunistically leveraged on and used by criminal prosecution authorities to secure incriminating evidence.

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Andrew M. Garbarski specialises in white-collar crime, administrative criminal law, international judicial and administrative assistance, as well as financial and commercial litigation and insolvency. During recent years, his work has encompassed complex multi-jurisdictional financial crime and asset recovery matters, as well as the representation of clients before the Swiss prosecution authorities and courts. Andrew M. Garbarski teaches white-collar crime and criminal procedure law as a professor at the University of Lausanne and regularly publishes in his practice areas. He was recently appointed by the Federal Office of Justice (FOJ) as a member of the Working Group dealing with the modernisation of the Administrative Criminal Law.

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