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REVISION OF THE SWISS CRIMINAL PROCEDURE LAW ON THE SEALING OF EVIDENCE

On 1 January 2024, the revised Swiss Federal Code of Criminal Procedure (CCP) came into force. Importantly, the provisions on the sealing and unsealing of evidence have been extensively revised (Articles 248, 248a and 264 para. 3 CCP).

Under Swiss law, the sealing of evidence has become a fundamental pillar of criminal defence, as a safeguard for both the accused and the confidentiality rights of uninvolved third parties. This process ensures that, pending an unsealing decision issued by the competent court, documents or data are shielded from access by criminal authorities.

The sealing of evidence is a vital aspect of Swiss criminal and criminal administrative proceedings, extending to all stages, including mutual legal assistance. It is most pertinent during the investigation phase conducted by a prosecution authority.

Given that prosecutors tend to seize large volumes of evidence, notably electronic data, the sealing and unsealing proceedings have become increasingly complex. This often leads to prolonged proceedings that may take up to several years. Additionally, uncertainties arising from the provisions applicable until 31 December 2023 have resulted in different approaches across cantons and relevant authorities.

To address these challenges, the aims of the revision were to streamline and expedite the unsealing procedure, enhance its precision, and narrow the grounds for requesting the sealing of evidence. In light of these substantial changes, it may be appropriate to consider the impact of the new provisions on dawn raid guidance and materials. Affected parties should also react quickly and seek legal advice if their records or data are seized. Those involved should also assess how the revision may affect their ongoing unsealing proceedings.

SWIFT AND INITIALLY REASONED SEALING REQUESTS

The practice developed in recent years by the Swiss Federal Supreme Court (FSC) states that applications for sealing had to be submitted "without delay", granting the affected parties up to seven days to do so. However, under the revised provisions, holders of pertinent records or data, along with other affected parties with legally protected interests in maintaining secrecy, are now required to submit their sealing request within a condensed time frame of just three days (Article 248 paras. 1 and 2). With this being a statutory, non-extendable deadline, the right to seal is forfeited if it is missed. This underscores the critical need for swift and efficient action by affected parties under the revised legal framework.

According to the wording of Article 248 para. 1 CCP, the three-day time limit begins with "the seizure". Scholars are already debating whether the three-day period begins to run from the time the records or data are actually seized or from the time the seizure becomes known to the relevant person. If the holder of the records or data is absent at the time of the seizure and becomes aware of its right to request the sealing only after the three-day period has lapsed, it should still be possible in our view to exercise such right to ensure its effectiveness.

The sealing request is not subject to any formal requirements. However, according to recent case law of the FSC, the content of the sealing request must at least indicate the grounds for sealing that is being asserted. Importantly, holders of records and data who are not subject to secrecy protection may no longer request the sealing. Accordingly, the new Article 248a CCP only grants "authorised persons" a party status in subsequent

unsealing proceedings. If an application for sealing is considered obviously unfounded or an abuse of rights, the prosecution authority can reject it straightaway. This may become practically relevant in view of the limitation imposed by the new law on the grounds for requesting the sealing of records or data (Article 248 para. 1 CCP). Given the new CCP's acceleration goals, it is yet to be determined whether criminal authorities will stick to the grounds stated in a sealing request to have the effect of restricting the scope of the subsequent unsealing procedure.

Given these multiple uncertainties under the new CCP, it is advisable to submit any sealing requests immediately or as soon as possible within the three-day period, and explicitly state all potential grounds for sealing at this initial stage.

LIMITATION OF THE GROUNDS FOR SEALING

Under the new Article 248 para. 1 CCP, the grounds for requesting the sealing are exclusively derived from the seizure prohibitions outlined in Article 264 CCP. Notably, the opening clause referring to "other grounds" under the old law has been removed by the revision.

Going forward, accused persons may request the sealing and object to the seizure with respect to documents used in their communication with defence lawyers, to their personal records and correspondence if the interest in protecting their privacy outweighs the interest in prosecution, and to items and documents used in their communication with persons who may themselves refuse to testify in accordance with Articles 170–173 CCP and who are not accused of an offence relating to the same case (Article 264 para. 1 let. a-c CCP).

In contrast, except for the attorney-client privilege and provided that this relates to communication with a Swiss or EU/EFTA lawyer (see our briefing of July 2021: Swiss Federal Tribunal Denies Legal Privilege Protection for Correspondence between Non-Accused Persons and Non-Swiss/EU/EFTA Lawyers (baerkarrer.ch)), non-accused persons may no longer request the sealing based on their own private or business secrets, the source protection of journalists, or the protection of their own correspondence with persons authorised to refuse testimony. While it remains to be seen whether this limitation can be upheld in practice, it should for the moment be considered as pertinent especially by companies in proceedings where only their employees or other third parties are accused.

LIMITED DUTY TO INFORM OTHER AFFECTED PARTIES

As was already the case under the previous law, Article 248 para. 2 and Article 248a para. 2 CCP impose a duty on prosecution authorities and courts to inform other affected persons who have a legally justified interest in the protection of secrets about their right to request the sealing.

Especially at the initial stages of criminal proceedings, disclosure prohibitions (Article 73 para. 2 CCP) are regularly issued. While the new sealing law remains silent on this and thus draws into question the impact of disclosure prohibitions on sealing cases, it is advisable in practice, at least for the time being, to operate under the assumption that such disclosure bans will continue to be used by prosecution authorities.

LIMITED PROVISIONAL BAN ON ACCESS

During the three-day period for the sealing request, the records and data may not be inspected or used by the prosecution authorities (Article 248 para. 1 CCP).

That said, it should be assumed that this temporary and suspensive ban on inspection and use neither precludes the previously accepted right of the police to conduct emergency searches, nor the right of prosecution authorities to conduct a cursory review and triage.

SHORT DEADLINE FOR OBJECTIONS AGAINST UNSEALING REQUESTS

As was the case under the old law, the prosecution authority has a period of 20 days to file a request for the removal of the seals with the Coercive Measures Court (CMC) or other competent court; otherwise, the sealed records and data shall be returned to their proprietor (Article 248 para. 3, Article 248a para. 1 CCP). If the above deadline was missed, the prosecution authority cannot repeat the seizure. It is only if new relevant factual or legal developments emerge that the prosecution authority is allowed to proceed with a new search or seizure, in which case the entire process begins anew.

The new law now requires other affected persons to submit objections to an unsealing request within a non-extendable deadline of ten days. If no objections are submitted, the sealing request is deemed withdrawn (Article 248a para. 3 CCP).

This extraordinarily short deadline will pose considerable challenges in practice, particularly in complex white-collar criminal proceedings:

According to consistent FSC case law, there are high expectations for the substantiation of objections in the course of the unsealing proceedings. The authorised persons are expected to state specifically with regard to which individual document they believe there are grounds for preventing unsealing (Article 264 CCP). At the same time, it can also be argued under the new sealing law that the requirements for the underlying seizure – i.e., sufficient suspicion, connection with the offence and proportionality (cf. Article 197 CCP) – are not met, and the CMC then has to assess these requirements alongside the secrecy protections. It remains to be seen, however, whether these substantiation requirements will apply at all during the new 10-day deadline, and if this is the case how they can be adhered to, particularly in complex matters and with large amounts of data. It is noteworthy in this context that the new law mandates an oral triage hearing for cases that are not immediately ready for judgment (Article 248a para. 5 CCP). We consider that this triage hearing constitutes the proper forum to substantiate the invoked objections.

In addition, it remains unclear under the new law when the 10-day time limit begins. It is reasonable to anticipate that the time limit may only be triggered once the authorised individuals have been informed of the unsealing request, and after they have been granted the right to examine the procedural file, as well as, where necessary, the sealed records and data.

Finally, given the expected "equality of arms" between the prosecution authorities and the authorised persons, questions remain regarding the exact legal consequences of the explicit non-extendibility of the time limit.

Until a robust practice for dealing with these challenges has been developed, it is advisable to start preparing the draft objections to the prosecution authority's unsealing application immediately after the seizure. Together with the 20-day deadline for the prosecution authority to submit its unsealing request, the time required for the preliminary examination of such request by the competent court as well as the inspection of the procedural files and the sealed records and data by the authorised party, it may be possible for parties to have roughly a month or more to prepare their objections.

EFFECT ON ONGOING AND FUTURE PROCEEDINGS

It should be noted that Articles 248, 248a and 264 para. 3 CCP are immediately applicable from 1 January 2024 not only to new seizures, but also to ongoing first-instance unsealing proceedings that have not yet been completed (Article 448 para. 1 CCP). In contrast, the old law continues to apply to appeals before the FSC against unsealing decisions that were still issued under the old law (Article 453 para. 1 CCP).

It remains to be seen the extent to which the new sealing law will also be followed *mutatis mutandis* in the context of the Federal Act on Administrative Criminal Law, which notably applies to the prosecution and sentencing of offences related to anti-money laundering reporting duties, tax and cartel-related offences, among others. The new CCP remains silent on this. For the passive international legal assistance in criminal matters, the Mutual Assistance Act expressly refers to the CCP (Article 9).

NEED FOR ACTION

In light of the significant changes brought about by the new sealing law, companies may wish to review and, if necessary, update their dawn raid guidance and materials.

Given the numerous significant uncertainties arising from the new CCP, it is furthermore recommended that holders of seized records or data as well as other affected parties protected by secrecy provisions promptly submit their sealing requests. Taking swift action, at the latest within three days of becoming aware of the seizure, and explicitly stating the grounds for sealing, is essential to navigate the evolving legal landscape and protect the interests of those involved.

In more complex cases, preparations for the filing of objections against an unsealing request by the prosecution authority should be started immediately, seeking professional legal advice and technological support. Parties involved in ongoing unsealing proceedings should assess to what extent the new law may apply to, and affect, their cases. In practice, there should be an assessment of the extent to which IT tools, including AI, may offer technological solutions to the challenges faced.

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