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Switzerland: Trends & Developments

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Trends and Developments

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Reform of the Swiss Code of Criminal Procedure

Introduction

The purpose of this contribution is to briefly present the salient elements of the recent revision of the Swiss Code of Criminal Procedure (CCP), which is expected to come into force in the near future. The aim is to highlight the most important changes for practitioners active in the field of white-collar crime.

After a brief reminder of the reasons that led the Swiss Parliament to undertake this revision and its stages, the article will present two amendments that in the authors' view deserve particular attention, namely those concerning the sealing procedure and those relating to criminal orders. This piece will also briefly mention certain amendments envisaged by the Federal Council which were widely debated before Parliament, hence their interest, before being finally rejected.

Brief historical review

Unifying criminal procedure at the federal level, the CCP came into force on 1 January 2011.

The preliminary draft revision was put out for consultation by the Federal Council in December 2017. It was intended to address certain difficulties of application and to adapt certain rules of the CCP in order to make them more in line with practice. The revised provisions were also intended to codify elements developed by case law over the years of application of the CCP.

After gathering the views of stakeholders and interested parties on the preliminary draft, the Federal Council published its draft revision in August 2019 (FF 2019 6437). Parliamentary deliberations took place in several sessions of the National Council and the Council of States from 18 March 2021 to 17 June 2022, when the Federal Chambers adopted the final text (FF 2022 1560).

The referendum period ran until 6 October 2022, without opposition. The date of entry into force of the new law is not yet (October 2022) known. However, it is expected to come into force in 2023.

Significant changes retained

Unsealing procedure

The unsealing procedure (Articles 248 and 248a, CCP) has undergone significant changes under the revision. As a reminder, sealing is designed as an instrument to oppose search and seizure and thus prevents the prosecuting authority from acquiring knowledge of the documents, data and other objects concerned, when a legally protected secret is invoked, until the application for unsealing has been ruled on.

In practice, no unanimous rule has been established as to the time limit within which sealing must be requested. Therefore, the revision of the CCP introduced a time limit of three (calendar) days following the search or seizure of documents or data, within which the holder must request sealing. The criminal authority is obliged to grant the same three-day period to the interested person to request sealing, if the authority

finds out that the latter is not the holder of the concerned documents or data.

In this respect, even if the wording of the new legal provisions is ambiguous, it is widely argued that the interested person will in the future also retain the possibility of requesting sealing, independently of a request from the holder to this effect, in line with the case law of the Federal Supreme Court developed under the current legal provisions. Indeed, it would make no sense for the authority to be obliged to summon the non-holder and give them the opportunity to request sealing, but to deny the same interested person the right to request sealing on their own initiative.

Another important change concerns the grounds on which sealing may be requested. By introducing, in Article 248 of the CCP, a reference to the exceptions to seizure contained in Article 264 of the CCP, Parliament seems to have wished to clarify that the grounds for sealing cannot go beyond those for opposing seizure. If this interpretation were to be confirmed, it would mean a restriction of the grounds for sealing that can be invoked by non-accused parties.

Regarding the unsealing procedure (Article 248a, CCP), the revised provisions establish the competence of the Coercive Measures Court (CMC) to decide on unsealing requests, also in the context of proceedings before the Court of First Instance, whereas the current law limits the CMC's competence to preliminary proceedings, ie, the investigation phase by the public prosecutor.

Unsealing procedures are very often time-consuming in practice. Therefore, the revised CCP now imposes short deadlines for the judicial authorities to rule upon unsealing requests and envisages relatively rigid procedural forms, with the aim of avoiding, as far as possible, criminal proceedings becoming bogged down by the unsealing procedure.

However, the Federal Council's proposal to make it possible to appeal against the CMC's unsealing decisions to a cantonal authority, to relieve the Federal Supreme Court, was rejected by the Federal Chambers.

Criminal orders

Other significant changes resulting from the revision of the CCP concern the procedure for criminal orders (Article 352 et seq, CPC).

As a reminder, the criminal order is basically conceived as a proposal for judgment, which gives the public prosecutor the power to convict a person if, during the preliminary proceedings, the person has admitted the facts or these are established and, subject to the revocation of a suspended sentence or conditional release, the public prosecutor deems it sufficient to impose a fine, a pecuniary penalty of up to 180 days' fine or a custodial sentence of up to six months.

In practice, the criminal order is the instrument by which more than 90% of criminal convictions are handed down. It therefore has considerable significance.

As the law stands, however, the criminal order does not allow the public prosecutor to decide on the civil claims of the plaintiff. If they are recognised by the accused, they are simply mentioned in the criminal order. Otherwise, the plaintiff is referred to the civil court.

Under the revised provisions of the CCP (Article 353 paragraph 2, CCP), the public prosecutor may now rule on the civil claims of the plain-

tiff, including those contested by the accused, if no additional evidence is required to rule on them and the value in dispute does not exceed CHF30,000.

In line with this amendment, the revised CCP also codifies the plaintiff's right to object to the criminal order, subject, however, to the penalty imposed on the accused which the plaintiff cannot contest (Article 354 (1) (abis) and (1bis), CCP).

In addition, in future, the public prosecutor will be obliged to hear the accused if it is likely that the criminal order will result in a custodial sentence being enforced (Article 352a, CCP). As the law stands at present, the public prosecutor is entitled to issue a criminal order immediately, without first hearing the accused, if they consider that the facts of the case are sufficiently established based on the file, regardless of the penalty envisaged.

Major changes rejected

Rejection of the amendment concerning the taking of evidence

Currently, according to Article 147(1) of the CCP, the accused has the right to be present at the taking of evidence by the public prosecutor. The accused may also consult the entire case file no later than after his first hearing. (Article 101(1), CCP).

In its draft revision, the Federal Council proposed to restrict the right of the accused to participate in the taking of evidence. It wanted to exclude the accused and their lawyer from a hearing until they had made a substantial statement about the commission of the offense reproached. In the same vein, the accused and their lawyer could have been denied access to the minutes of a hearing from which the accused had been excluded until they had been asked to comment on the statements made by the person heard.

The National Council did not want such an amendment, as it considered that it violated the accused's right to remain silent and their right to adversarial proceedings. The Council of States, on the other hand, limited itself to restricting the accused's right to participate to the first hearing of a co-defendant.

As no solution could be found between the two Chambers of the Swiss Parliament, this amendment was simply abandoned. However, it shows that there is a strong desire on the part of some parliamentarians and the criminal authorities to limit the rights of the accused vis-à-vis the public prosecutor.

Rejection of the right of appeal by the public prosecutor against detention decisions

As the law currently stands, only the accused may appeal against decisions of the CMC ordering pre- trial detention or detention on security grounds (Article 222, CCP).

However, the Federal Supreme Court has established, through case law, a right of appeal in favour of the public prosecutor against certain decisions of the CMC ordering the release of the accused.

In support of its 2019 draft, the Federal Council wanted to codify this case law.

Following the debates in the Chambers, however, this amendment was rejected, and the right of appeal granted to the public prosecutor will disappear to favour a quick decision of the CMC.

Conclusion

The Federal Council's draft revision proposed several changes, some of which, notably the one relating to the limitation of the rights of the accused, gave rise to heated debate. In the end, the text voted by the Federal Chambers, which is due to enter into force shortly, contains only limited changes. However, they will have an impact on practitioners, and the ambiguity of some of the wording used in the revised articles, particularly with regards to the issue of unsealing, will inevitably give rise to debate in criminal proceedings and before the courts.

Bär & Karrer Ltd is a leading Swiss law firm with more than 200 lawyers. The firm's core business is advising its clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. The firm's white-collar crime practice encompasses advice and representation in all areas of business crime, including fraud, money-laundering, corruption, disloyal management, organised insolvency, corporate criminal liability, blocking statutes, economic espionage and all aspects relating to the Swiss anti-money laundering regulations. Bär & Karrer's white-collar team act for corporations or individuals, whether they face investigation by the prosecuting authorities or are the victims of a criminal conduct. In the latter case, where appropriate, it focuses its efforts on asset tracing/freezing and recovery steps in order to achieve reparation. It has extensive experience in advising clients in cross-border matters, including mutual legal assistance and extradition proceedings.

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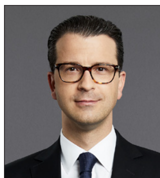

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