The sealing of evidence under Swiss Criminal Procedure Law

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This article provides a brief overview of how the sealing of evidence is dealt with in Switzerland in the framework of criminal proceedings and international mutual legal assistance matters, and highlights some important aspects to be considered from a practitioner's standpoint.

Introduction

Under Swiss law, the sealing of evidence is a procedural tool available for the purposes of paralysing the effects of a criminal seizure or production order, where there is a need to preserve a particular secret surrounding documents or data that the criminal authorities would otherwise be able to access, introduce into the file of the proceedings and exploit as a means of evidence.

The sealing of evidence applies at any stage of criminal proceedings, including during the trial before the court. However, it is most relevant in practice during the investigation phase, conducted either by the Public Prosecutor's Office (PPO) or by the Federal Office of the Attorney General (OAG).

The sealing of evidence

Who can request it?

The Federal Code of Criminal Procedure (CCP) provides that the right to request the sealing of evidence belongs to the holder of the relevant document or data. However, case law has extended such right to any person who enjoys a legally-protected interest in maintaining secrecy. As a result, those who are entitled to refuse to testify or to otherwise resist compulsory disclosure of information have the right to request the sealing of evidence, irrespective of whether the evidence in question is actually under their control.

For example, if correspondence covered by attorney-client privilege is seized by the prosecution authority, both the attorney and the client may request the sealing of such correspondence, including where it is held by a third party.

The prosecution authority has a duty to adequately inform all interested persons of their right to request the sealing. For the purposes of identifying such persons, the prosecution authority is allowed to proceed with a cursory review of the seized documents or data and may even be expected, in certain circumstances, to request the sealing or set aside certain privileged documents *ex officio*.

The broad approach applied under the CCP has not been followed in the context of the Federal Act on Administrative Criminal Law (ACLA), which notably applies to the prosecution and the sentencing of offences related to anti-money laundering reporting duties or tax and cartel-related offences. Under the ACLA, the sealing request can only be lodged by the immediate holder of the evidence, as opposed to any other interested party.

On what material grounds can the sealing of evidence be obtained?
Under the CCP, evidence must be sealed on the request of any person who may invoke the benefit of a legally protected secret.

Of particular importance is the protection afforded by "professional" or "function" secrecy. The holders of a function secrecy, such as public officials, may assert their right of refusal to testify, provided they are not under an obligation to report a criminal offence and/or have not been expressly relieved of their duty of confidentiality.

In this respect, attorney-client privilege enjoys the utmost protection. For example, an attorney cannot be forced (either by the authorities or by the client) to divulge privileged information, even where he/she is released from his/her duty of confidentiality. However, legal professional privilege is not a blanket defence. Attorney-client correspondence and attorney work products are only protected if the attorney is not accused in the proceedings, and only to the extent the documents in question were prepared in the performance of the attorney's "typical activity", such as representation in courts or the provision of legal advice. Work produced by in-house counsel or resulting from activities such as asset/trust management are excluded from protection. Moreover, according to recent case law, the work product of an internal investigation conducted by an external legal counsel that is deemed a delegation of auditing/compliance/due diligence work with respect to a bank's anti-money laundering duties is in principle not protected by legal professional privilege and therefore must be handed over to the prosecution authorities, unless it contains clearly identifiable legal advice that must be redacted.

Other possible grounds for sealing include (among others):

- The protection of medical secrecy.
- Trade secrets.
- Media sources and personal privacy (that is, for example, private correspondence) and diplomatic immunity.

Besides the grounds of secrecy and privilege, an interested party can also argue in support of a sealing request that the requirements applicable to the underlying seizure of evidence are not fulfilled and therefore claim, for instance:

- That the evidence in question is irrelevant to the proceedings.
- That the search and seizure of the evidence were disproportionate or undertaken despite a lack of reasonable suspicions of a criminal offence.

How and when can it be requested?
A sealing request can be made in any form (orally or in writing) during a search/raid or immediately thereafter. According to case law, there is a tolerance period of a few days (usually up to five) during which a person entitled to request the sealing may need to seek legal advice. However, it is highly recommended to always act as soon as possible to avoid any risk of forfeiture. A deadline extension can exceptionally be granted to those who were not informed by the prosecution authority of their right to request the sealing or to consult a lawyer.

The sealing can also be requested concurrently with the production of the relevant data or documents to the authority, in which case such evidence can be provided, for example, in a sealed envelope or on a password-protected hard drive.

It is not required by law to substantiate a sealing request, although in practice it is advisable to include at least a brief reference to the relevant grounds, for example, "documents covered by legal privilege".

The unsealing of evidence

Who can request it and when?
On receiving a sealing request, the prosecution authority has the obligation to comply with such request, and is no longer entitled to access and/or exploit the relevant evidence, pending the outcome of the unsealing procedure. It is only under exceptional circumstances, notably if the sealing request is blatantly inadmissible (for example, submitted late), that the prosecution authority can dismiss such request, in which case an appeal can be lodged against the refusal before the cantonal court of appeals.

Subject to the above scenario, the prosecution authority facing a sealing request must initiate the unsealing procedure by filing a detailed unsealing request with the Coercive Measures Court (CMC) within 20 days from receiving the sealing request. If the criminal proceedings are already at the stage of the trial, the unsealing request must be submitted to the court before which the trial is pending.

Failing such unsealing request within the above deadline, the sealed evidence cannot be introduced into the file of the proceedings, or otherwise used by the prosecution authorities, and must be returned to its owner. However, this restitution carries no *res judicata* (matter already judged) effect. In the case of new factual or legal developments, the prosecution authority is allowed to proceed with a new search or seizure, in which case the entire process begins anew.

What are the procedural considerations?
Once the unsealing procedure is launched, the CMC, or the competent court, will first share the unsealing request with the concerned parties and invite them to comment on it, based on the evidence in question. The unsealing request can be challenged by invoking a legally protected secret and/or by arguing that the requirements for a search/seizure (such as its proportionality) are not fulfilled in the case at hand.

The CMC, or the court, will then have to sort the evidence. It will first identify and set aside evidence that has no "potential utility" for the investigation and then examine whether or not the remaining evidence is covered by the material grounds on which the sealing request is based, including those of secrecy or privilege.

While the CMC enjoys a broad margin of discretion throughout this sorting process, the person who has made the sealing request has a duty to collaborate with and assist the CMC, which is often unfamiliar with the facts and technicalities of the case at hand.

The sorting of evidence is not specifically governed by legal provisions and court practice is said to vary from one canton to another. The Swiss Federal Supreme Court (SFSC) has provided some guidance throughout its case law and determined, for example, that the CMC is entitled to use keywords or other schematic criteria provided by the prosecution authority to sort the data. Faced with extensive amounts of data, the CMC can outsource the extracting and/or sorting process to an expert, but cannot delegate such task to the criminal prosecution authorities, or to the police, which is subordinated to the PPO.

Despite a statutory (albeit non-binding) time limit of one month to render a decision, most CMCs in Switzerland incur significant delays (exceeding one year, in some cases) in the treatment of the unsealing requests. The authorities' lack of resources and the amount of data involved that needs to be reviewed and sorted make it literally impossible for the authorities to meet the relevant deadline. For this reason, the sealing of evidence is often used by the accused as a tool to slow down the investigation and potentially discourage the prosecutor in charge. Moreover, in parallel to and pending the CMC's decision, the unsealing procedure will often accommodate informal discussions between the parties and the PPO/OAG. It is not uncommon to eventually agree on a list of keywords or specific criteria used for the sorting of evidence by the CMC or to agree on the exclusion/redacting of certain information from its scope.

If the CMC refuses to lift the seals over evidence, the latter becomes "absolutely unusable" in the course of the criminal proceedings.

The decision of the CMC cannot be challenged at the cantonal level and must be deferred directly to the SFSC. If the CMC has ordered the lifting of the seals, the interested party will have to promptly request the stay effect in its appeal, at the risk of suffering irreparable damage if the relevant evidence is made available to the prosecution authority pending the outcome of such appeal.

Draft amendment of the CCP

Seven years after the entry into force of the CCP in January 2011, a draft amendment published on 1 December 2017 advocates for a slightly more detailed provision on the sealing of evidence. Unfortunately, the draft act sheds no light on the document/data sorting process, which is likely to continue to develop in case law. However, it does provide for enhancement of the sealing/unsealing process by:

- Expressly setting forth the right of the beneficiary (and not merely the immediate holder) to request the sealing of the evidence in question.
- Broadening the competence of the CMC to the unsealing of evidence during criminal trials.
- Accommodating an appeal against the decisions of the CMC on the cantonal level prior to their deferral to the SFSC.

Specificities in international mutual legal assistance matters

The sealing mechanism in the framework of mutual legal assistance (MLA) is more restrictive than the procedure followed under domestic criminal proceedings.

One such restriction stems from the limited scope of persons who can request the sealing. As things stand, only the holder of the documents or data, or the owner/tenant of the searched premises, is entitled to request the sealing. However, case law has extended the right to request the sealing to the account holder if the MLA request concerns banking documentation.

Moreover, in the field of MLA, the main purpose of the sealing procedure is to protect privileged information. Practice shows a restrictive approach to the matter, limited first and foremost to cases with "qualified professional secrecy", such as attorney-client privilege, and often excludes banking or business/trade secrets.

From a procedural perspective, both the unsealing and subsequent sorting process must be undertaken by the Swiss authorities prior to any handover of evidence abroad. Therefore, a sealing request followed in turn by a request for

unsealing within 20 days launches a process of judicial review with the aim of identifying which documents or data are privileged within the meaning of the Mutual Assistance Act (IMAC). The judicial decisions on this matter cannot be appealed immediately (as they are not deemed to cause irreparable harm) and must instead be challenged before the Swiss Federal Criminal Court (SFCC) together with the final decision ("closing order") that concludes the MLA proceedings or its relevant tranche.

Once privileged information is set aside by the competent court, the Swiss authority executing the MLA request receives the remaining (unsealed) evidence and must sort it out in accordance with the principles of proportionality and "potential utility" (which prohibit fishing expeditions or "bulk" transmissions of evidence abroad), before rendering a final decision that concludes the MLA proceedings. In consequence, the executing authority gains access to a vast array of evidence and may decide, on that basis, to open its own criminal probe in Switzerland based on the same complex of facts.

Conclusion

As a foundation of criminal defence, the sealing mechanism serves to protect privileged or sensitive information and to uphold the right of refusal to give evidence, whether in domestic criminal, criminal administrative proceedings or in the framework of a MLA request.

The sealing mechanism is at times also a powerful tool at the disposal of the parties in delaying criminal proceedings for strategic purposes. An increasing caseload and the tendency to seize massive volumes of electronic data during searches often result in complex unsealing procedures spanning several years, which are fundamentally at odds with the principle of expediency prevailing in criminal proceedings.

The fast-changing technical landscape and the potentially endless capabilities of artificial intelligence may ultimately offer better solutions for judicial authorities and practitioners alike. However, in the meantime, both must turn towards the case law of the SFSC to find practical ways of dealing with the increasing complexity of unsealing procedures.

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