NKF Client News

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Information obtained by FINMA under duty to cooperate without mentioning self-incrimination exemption is criminally inadmissible

According to the Federal Supreme Court, information obtained by FINMA under an obligation to cooperate must only be used in a criminal proceeding if the party was informed of its right to remain silent in case of self-incrimination (7B_45/2022 of 21 July 2025). This new rule is limited to information specifically prepared for FINMA as opposed to the production of preexisting documents of which the authority knows. Besides FINMA, it applies to any other authority or entity discharging public functions where cooperation is mandatory.

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Introduction

The question of when and how the criminal law principle that no one is obliged to incriminate themself (*nemo tenetur*) applies in the context of supervisory proceedings and the duty to cooperate with FINMA (art. 29 FINMASA) has long been debated. It is particularly sensitive given FINMA's obligation to report suspected offences to criminal authorities and to transmit evidence to them.

The following points had been settled so far:

- Persons obliged to provide information to FINMA may refuse to do so if they would put themselves at the risk of a criminal prosecution.[1]
- Information collected by FINMA under threat of criminal sanction (and without an exemption for self-incrimination) is inadmissible in criminal proceedings.[2] As the *nemo tenetur* rule generally, this is (likely) limited to (new) statements made under compulsion, like responses to questions, while preexisting documents of which the authorities know may be collected by compulsion.[3]

The question of criminal admissibility of (new) information provided to FINMA under a *legal obligation to cooperate*, but *without threat of criminal sanction*, had so far not been directly and unequivocally tackled by the FSC, though it had strongly suggested an affirmative answer. The Federal Criminal Court's practice had been contradictory.

1. Facts of the case and judgment

Upon a company's request to confirm that it did not need an SRO affiliation, FINMA asked for information by way of questionnaires. It recalled the duty to provide information, without mentioning the *nemo tenetur* exemption, as usual in this kind of non-contentious (as opposed to enforcement) proceedings[4].

In its assessment, FINMA concluded that the (already deployed) activities required an SRO affiliation and filed a criminal complaint under art. 44 FINMASA in connection with art. 14 AMLA. The FDF and then the FCC convicted the company's director.

On appeal to the FSC, the director claimed that using the questionnaires violated his *nemo tenetur* rights. The court agreed, considering it a circumvention of this principle if the criminal authorities could rely on such information collected by other agencies. It vacated the conviction and remanded the case for a new judgment based on the remaining evidence.

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1 BGer 1B_92/2023 of 11 May 2023, consid. 5.4, 5.5. *Contra* ("in principle") BGer 2C_771/2019 of 14 September 2020, consid. 8.1 and 2C_790/2019 of 14 September 2020, consid. 7.2.

2 BGE 142 IV 207, 214–15. The threat may be by way of decree under art. 48 FINMASA or statutory criminal sanction for non-compliance (*ibid.*, 219).

3 BGE 142 IV 207, 214–15 (though not entirely clear); see also generally BGE 138 IV 47, 52.

4 Typical wording used in enforcement proceedings: *"You have the privilege to refuse an answer in case you would put yourself at the risk of a criminal prosecution."*

2. Scope of the new rule

2.1 New statements/information v. preexisting documents

As *nemo tenetur* generally, the new rule only applies to (new) statements made under an obligation, e.g. responses to questions, not to preexisting documents of which the authorities know.

2.2 Exclusion of investigating agents?

In a sort of *obiter dictum*, the court reasons that the rule does not apply to information obtained by FINMA investigating agents, arguing that their investigations are "informal" and not subject to the APA and that they do not have to inform questioned parties about their rights and duties, "unlike persons heard as witnesses by FINMA". This is unconvincing and rather confusing, but the point is practically less relevant as FINMA regularly mandates cooperation with such agents under threat of penalty (art. 48 FINMASA).

2.3 Extension to other authorities and regulatory bodies than FINMA

Beyond FINMA, the new rule logically applies to any authority or entity discharging public functions with which a party is obliged to cooperate, in- and outside the field of financial markets supervision.

2.4 Proceedings for false information not explicitly addressed

The FSC does not address whether its new rule applies to prosecutions for *false information* (art. 45 FINMASA), where the information provided does not serve as evidence for another (previous) crime but rather constitutes the crime itself (as in TPF 2018 107).

2.5 "Voluntary" responses (in particular as persons called to give evidence)

Before questioning witnesses as such, FINMA regularly asks them to "voluntarily" respond as persons called to give evidence (art. 12 lit. c APA), informing them that in case of a refusal, they could be summoned as witness and omitting a *nemo tenetur* reference.

If the "voluntary" questioning is regarded in isolation, it raises no *nemo tenetur* issue. However, the voluntariness appears quite artificial. Knowing that a refusal to respond will or can trigger a mandatory interrogation, already the first round of questioning is voluntary in name only.

2.6 Relevance of legal representation or assistance?

The company acted for itself in the FINMA proceeding, and FINMA did not alert it to the possibility of legal representation. The present case does not address whether legally represented persons could likewise assert the new rule, and previous case law does not provide a clear answer either.

2.7 No need for identity of party obliged to produce information and accused?

As usual in such cases, the party deploying the unauthorized activities and requested to provide the information was a company, while the accused was a natural person. The FSC

did not discuss this divergence, although the *nemo tenetur* rule only protects the person compelled to provide information. Third parties (also) incriminated by the information may not assert a violation. There may be good arguments for the court's new approach, but it will require further clarification.

3. Positive duty to include *nemo tenetur* reference?

The FSC appears to consider FINMA *obliged* to include a *nemo tenetur* reference in information requests that could lead to a criminal proceeding,[5] which would go beyond the (negative) inadmissibility in criminal proceedings. The FSC and (for written information requests) the FAC had previously denied such a positive duty.

4. Procedural aspects

In practice, the prosecution authority will mostly obtain questionnaires etc. of the kind at issue from FINMA with a criminal complaint or upon an administrative assistance request. Accused persons have no remedy to prevent this information exchange for lack of party status in the administrative assistance proceeding. Neither can they prevent the use of the information by the prosecution authority. They can only challenge the judgment on the merits and argue that it rests on impermissibly obtained information (as done successfully in the present case).

If the information is seized from the accused, he or she can appeal this measure; if it is obtained from a third party, the accused can appeal a refusal to remove the document from the file, though the court might admit both only if the violation is clear.[6] Alternatively, the accused can challenge the judgment on the merits as described above.

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5 Consid. 2.4: *"[L]a FINMA [...] savait que le comportement examiné pourrait déclencher une procédure pénale au sens des art. 44 ss LFINMA. Elle était donc tenue d'informer le recourant de son droit de ne pas s'auto-incriminer"*.

6 See BGE 143 IV 475 (request for removal from the file of illicit evidence submitted by third party); *cf.* also BGer 7B_181/2023 of 24 August 2023, consid. 1.4.2 (though under the sealing procedure, which has not been applicable anymore for *nemo tenetur* issues since 2024).

5. Conclusion

The judgment significantly restricts the use of FINMA information in criminal proceedings by extending the inadmissibility to information collected under a mere administrative-law cooperation duty if the authority failed to mention the *nemo tenetur* exemption in its request. Previously, only information collected under threat of criminal sanction had been considered inadmissible.

Apart from FINMA, the new rule applies to any authority or entity discharging public functions with which supervised parties are obliged to cooperate.

The fact that such a momentous ruling will not be officially published may have been a deliberate decision to leave the door open for a correction under different circumstances.

If you have further questions on this topic, please reach out to your regular NKF contact or us.

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