

INADMISSIBILITY IN CRIMINAL PROCEEDINGS OF EVIDENCE PRODUCED TO FINMA

In a significant decision dated 21 July 2025 (7B_45/2022), the Swiss Federal Supreme Court ('SFC') addressed crucial questions regarding the interplay between administrative and criminal proceedings in the financial sector. It clarified that evidence tailored for and produced to FINMA based on the duty to cooperate in administrative proceedings is inadmissible and may not be exploited in criminal proceedings where the relevant party had not been informed by FINMA of its right not to incriminate itself (*nemo tenetur* principle).

Since the accused's criminal conviction in the present case was based on questionnaires filled out upon the request of FINMA (and not on pre-existing documents), without FINMA having informed the accused about his privilege against self-incrimination, the SFC concluded that the accused had not been afforded a fair trial. Due to this, the SFC cancelled the conviction and referred the case back to the lower court for a new decision, which may no longer consider the evidence that was found inadmissible.

FACTUAL BACKGROUND

In 2014, B. SA, with A. as president and board member, sought confirmation from FINMA regarding its regulatory obligations for fund management activities. FINMA responded by requesting the completion of detailed questionnaires, emphasising the obligation to provide truthful information and warning of potential consequences for non-cooperation.

After B. SA submitted the completed forms, FINMA filed a criminal complaint with the Federal Department of Finance ('FDF') against the responsible persons for allegedly conducting unauthorised financial intermediary activities between 2012 and 2014. Administrative criminal proceedings were initiated, resulting in a penal order from the FDF and subsequent judicial review.

Ultimately, A. was found guilty by the Federal Criminal Court, a decision that was partially upheld on appeal, before A. brought the matter before the SFC, raising, among other issues, the violation of his right not to self-incriminate (*nemo tenetur* principle).

SFC DECISION

The SFC reaffirmed that the *nemo tenetur* principle is a core component of the right to a fair trial under art. 6 of the European Convention on Human Rights ('ECHR') and Swiss constitutional law. This principle protects individuals from being compelled, directly or indirectly, to provide evidence or statements that could expose them from a criminal law standpoint.

The SFC further examined the statutory obligation to cooperate with FINMA under the Financial Market Supervision Act ('FINMASA'), noting that while parties are generally required to provide information and documents in administrative proceedings, this obligation is not absolute. Specifically, the SFC highlighted that when the information requested by FINMA could expose the individual or entity to criminal liability, the right to refuse cooperation applies,

and the person or entity must be informed of this right before any evidence gathering by FINMA.

In the present case, the SFC found that FINMA had required B. SA and A. to complete detailed questionnaires as part of a pre-enforcement investigation, without informing them of their right not to self-incriminate. The SFC determined that the absence of such a warning, combined with the context and the risk of criminal liability, constituted a violation of procedural safeguards. The SFC clarified that **the duty to cooperate in administrative law does not override the *nemo tenetur* principle when there is a risk of self-incrimination.**

The SFC held that if such documents/statements (collected by FINMA without having informed the affected individual or company of their right not to self-incriminate) were to be admitted as evidence in criminal proceedings, this would undermine the procedural protections guaranteed by law and could enable law enforcement authorities to circumvent the safeguards of criminal procedure by first collecting evidence in an administrative context.

As a result, the Court concluded that evidence obtained in violation of the right not to self-incriminate – in this case specifically referring to the completed questionnaires – was inadmissible in subsequent criminal proceedings.

Accordingly, the SFC ordered that the contested decision be cancelled, and the case returned to the lower court for a new decision, explicitly excluding the inadmissible evidence from consideration. Consequently, the lower court was instructed by the SFC to assess whether the remaining evidence was sufficient to support a conviction.

COMMENTS

Criminal proceedings in the financial sector are often prompted by criminal complaints filed by FINMA following pre-enforcement or actual enforcement proceedings. Moreover, due to FINMA's denunciation duty and the extensive cooperation between FINMA and prosecution authorities (art. 38 et seqq. FINMASA), evidence gathered in FINMA proceedings often ends up as part of criminal proceedings. This inevitably raises the question of its admissibility.

The new SFC decision confirms that FINMA is, in principle, obliged to hand over evidence to the prosecution authorities and can only refuse to do so in exceptional circumstances outlined in art. 40 FINMASA. The person or entity affected by the sharing of documents/information between FINMA and the prosecution authorities is not a party to the cooperation proceedings and cannot prevent such information from being transmitted. However, the person or entity concerned can still dispute the admissibility of such evidence in criminal proceedings, especially invoking the *nemo tenetur* principle.

The FSC's decision is based on the premise that the duty to collaborate with FINMA no longer applies where the person or entity concerned is exposed to criminal prosecution or if its position in pending or future criminal proceedings could be affected.

In the present case, FINMA had invited B. SA and A. to complete detailed questionnaires by stressing not only their duty to collaborate (art. 29 FINMASA) but also the criminal consequences of conducting unauthorised financial intermediary activities (art. 44 FINMASA) and providing inaccurate information (art. 45 FINMASA). In such circumstances, according to the SFC, *nemo tenetur* applies and prevails over the duty to collaborate. By failing to inform B. SA and A. about their right not to incriminate themselves, FINMA breached the *nemo tenetur* principle, rendering the evidence inadmissible in the FDF's administrative criminal proceedings opened upon FINMA's denunciation.

The SFC has issued a decision that, while not formally characterised as a landmark ruling, is nevertheless clear and strikingly progressive. Before this point, evidence gathered in administrative proceedings was deemed inadmissible in criminal matters only where it had been obtained through improper compulsion, e.g. under the threat of criminal sanctions (cf. SFC 142 IV 207, para. 8 et seq.; SFC 140 II 384, para. 3.3; SFC 138 IV 47, para. 2.6).

This latest SFC decision 7B_45/2022 marks a clear departure from this reasoning, adopting a more rigorous approach that offers greater protection under the *nemo tenetur* principle and avoids its circumvention by law enforcement agencies through administrative proceedings.

It is also noteworthy that the SFC expressly states that the *nemo tenetur* principle applies not only to individuals in this context, but also to legal entities, as soon as they face the risk of criminal prosecution, for example under art. 102 of the Swiss Criminal Code and/or art. 49 FINMASA. This statement is welcome as it contrasts with past decisions of the SFC which suggested that the *nemo tenetur* principle should not provide as much protection for corporations (see SFC 140 II 384, para. 3.3.4).

As a result of the SFC decision 7B_45/2022, we anticipate in practical terms that:

- FINMA will have to inform proactively persons and entities from whom it seeks cooperation of their right not to incriminate themselves, particularly where there is a risk of criminal exposure;
- Cooperation with FINMA and ultimately the latter's supervisory activities could be impacted where the relevant parties rely on their right not to incriminate themselves;

- The outcome of pending criminal proceedings which rely on evidence collected by FINMA in breach of the *nemo tenetur* principle might be significantly affected.

It will also have to be monitored how this SFC decision will impact the interaction between administrative and

criminal proceedings outside the financial industry. There are indeed many other legal fields (e.g. tax law) where the duty to cooperate with the administrative authority often paves the way for a criminal accusation and ultimately conviction.

AUTHORS



Andrew M. Garbarski

Partner

andrew.garbarski@baerkarrer.ch

T: +41 58 261 57 22



Massimo Chiasera

Partner

massimo.chiasera@baerkarrer.ch

T: +41 58 261 55 33



Louis Frédéric Muskens

Associate

louis.muskens@baerkarrer.ch

T: +41 58 261 57 64