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## **BRAND NEW RULES FOR CRIMINAL PRACTITIONERS IN SWITZERLAND**

### **Introduction**

The Swiss Code of Criminal Procedure entered into force on 1 January 2011. The unification of the rules governing criminal proceedings will lead to a fair amount of amendments, some of which are formal in nature, others of which crucially impact certain aspects of the systems of criminal proceedings which have been up until now disparately governed by the cantons of Switzerland.

### **The choice of the prosecuting model**

The most essential evolution imposed by the Swiss Code of Criminal Procedure (hereafter "CCP") is certainly the choice of a single model for the entire country. The lawmaker was given the task of deciding between four different models which are actually in place in various Swiss cantons. The four models include: Investigating Judge I, Investigating Judge II, Prosecutor I and Prosecutor II, and differ depending upon the means and tools allocated to law enforcement authorities, as well as prosecuting and investigating authorities.

Numerous discussions took place before Parliament. During these discussions each canton tried to claim that its model was the most efficient. However, after a series of intense negotiations, the Prosecutor II model was finally adopted. The Prosecutor II model is the system currently in place in the cities of Basel, Saint-Gall, Solothurn, Zurich, Appenzell, the country side of Basel (for white-collar offenses) and in the Italian part of Switzerland. It is also the system that will be in place before the Swiss Federal Tribunal (Switzerland's Supreme Court) from the moment the new criminal procedure enters into force on 1 January 2011.

One of the main characteristics of this model is the absence of investigating magistrates. Under this model prosecutors are in charge of the proceeding during all of the investigation stage. In

effect, the Office of the Prosecutor will decide whether to open an investigation and will give instructions to the police. In addition, the Prosecutor will assess the facts and their legal qualification. The Prosecutor's Office shall also collect the evidence, determine when to close the investigation and in some cases render a decision or send the defendant before a criminal court for the first stage of the trial.

As a consequence of the introduction of the so-called Prosecutor II model in Switzerland, all powers to prosecute and investigate are concentrated in the hands of the Office of the Prosecutor so as to strengthen the role of the Prosecutor throughout the criminal proceeding. Hence, the Prosecutor's Office will not only monitor and coordinate the work of the police during the pre-investigation and investigation phases, but also undertake all initial steps in the proceeding. According to the lawmaker, the advantage of such a system is reflected in the greater efficiency of concentrating in the hands of a single body the search of evidence, the investigation and the prosecution.

### **Adversarial proceeding**

Because of the important weight placed on the role of a prosecutor, the lawmaker has decided that an adversarial proceeding should also take place from the outset of an investigation. The right to an adversarial proceeding generates from the guarantee of a fair trial as defined in the European Convention of Human Rights ("ECHR"). The new system also accounts for the defendant's right of defense, that being the right to understand the charges and the underlying evidence as well as the right to argue against them. Under the CCP, the rights of the defendant will also be protected as s/he will be allowed to be assisted by counsel as well as have access to the file of the proceeding. If the principle of the adversarial proceedings is known in some of the cantonal codes of procedure, its application may differ from one canton to another, especially with respect to the moment of the access to the file by the defendant. However under the CCP these differences will be largely eliminated.

With the entering into force of the CCP, the right to an adversarial proceeding will be present from the outset of the investigation. Thus, defense lawyers can be active from the very start of the investigation to ensure that the defendant's right to an adversarial proceeding will be protected throughout the entire criminal proceeding which is to follow.

Therefore, when a person will be suspected to have perpetrated an offense, s/he will be allowed to be represented by counsel for each step of the proceeding led by the prosecuting authority. The acknowledgment of the existence of this right from the outset of a proceeding will have important consequences with respect to its implementation. For instance, in Geneva, a mechanism is prepared to have lawyers on duty to ensure that, in serious cases, the defendant will be assisted by counsel already during the first examination. The ECHR case law has confirmed that such a right should be guaranteed whenever a person is suspected of having perpetrated a criminal offense. It is therefore likely that the Federal Tribunal will have to decide upon the application of this adversarial principle in order to ensure uniform application in all of Switzerland.

## **Court of coercive measures**

With an effort to guarantee the right to an adversarial proceeding and all the other rights of the defendant during a preliminary investigation, the lawmaker has also provided for an authority which will control the activity of Prosecutors. That authority will be the Court of Coercive Measures ("CCM").

In substance, the CCM will control any coercive measures ordered during the investigation by the Prosecuting Office. In this respect, the CCM will authorize (i) the monitoring of postal correspondence and telecommunication, (ii) the use of undercover agents (iii) the use of technical means of surveillance, (iv) the taking of DNA samples in large investigations, (v) the monitoring of bank accounts, and (vi) certain other preventive measures. In the preliminary proceeding, the CCM shall also decide on the lifting of seals regarding evidence and documents in the context of the exercise of the right to testify or the right to refuse to give evidence. This is particularly true in the case of the lawyer's privilege.

Within the conditions delimited by the CCP, cantons are free to decide upon the necessary qualifications for its CCM and its internal organization. In Zurich, for example, either a sole judge of the district court or a member of the higher court will be competent in this regard.

## **Protection of lawyer's privilege**

Another relevant development relates to the protection of lawyer's privilege. Section 264 par. 1 of the CCP prohibits the confiscation of evidence, especially briefs and correspondence, that concern the relationship between the defendant and his/her counsel, independent of the documents' location.

This last aspect of Section 264 par. 1 of the CCP is a departure from current case law which only protects documents under lawyer's privilege, which are within the geographical scope of the lawyer or which have been taken from him/her by force.

With the entering into force of the new criminal procedure, the scope of the lawyer's privilege will be increased. For example, documents which originate from the lawyer will no longer be subject to seizure when found in the hands of the defendant.

## **Plea bargain**

Another important novelty lies in the lawmaker's decision to offer the possibility, in some cases, for the parties to reach a negotiated outcome in the frame of the criminal proceeding.

In addition to specific proceedings such as the so-called "penal ordinance" and the proceeding related to misdemeanors, the CCP provides for a simplified proceeding which up until now was rare at the cantonal level. From now on, under the CCP, agreements between prosecuting authorities and defendants will become official and subject to regulation. Keeping in line with the principles of celerity and procedural limitation, the CCP provides a form of judicial transaction in the frame of the criminal proceeding. In this respect, a defendant who accepts the relevant facts

and the civil claims against her /him may request from the Prosecutor's Office the execution of a simplified proceeding. This acknowledgment must then be made in the form of a declaration recorded in minutes or in an agreement with the plaintiff.

The Prosecutor's Office shall then decide, without a preliminary investigation, the terms of the plea bargain. The drafted plea will have to be accepted by the defendant and the plaintiff prior to be ratified by the Court of First Instance. The court's role will be limited to a review of the lawfulness of the proceeding and the fairness of the sanction. If either the parties or the court reject the plea, an ordinary preliminary proceeding shall be initiated.

### **Avenues of appeal**

The CCP provides two avenues of ordinary appeal: the petition and the appeal. Although the petition already exists against numerous decisions at the level of the investigation, the novelty concerns the appeal. Under the CCP there may be a possibility to influence final decisions before a higher court on factual grounds.

For instance, by contrast, in Zurich it is currently only possible to appeal a decision rendered by a higher court (in case of serious offenses) through the means of an appeal limited to the legal reasoning. The jurisdiction of first instance granted to the court as well as the presence of jurors will fully disappear with the entering into force of the new criminal procedure.

However, under the CCP higher courts will have full jurisdiction to review all aspects of a judgment. Higher courts will also have the power to review decisions which were not criticized to prevent unlawful or inequitable decisions.

Pursuant to the CCP, the appellate court will have the power to review the steps taken by the police, the Prosecutor's Office and the relevant criminal authorities for misdemeanors. The appellate court will have the power to consider the decision taken by the courts of first instance for which an appeal is not available. Under the CCP the deadline for an appeal will be 10 days.

### **Conclusions**

Many of the practical consequences of the entering into force of the CCP are still unknown. One can only expect that these numerous uncertainties will appear before the courts for judicial control up to the last instance, the Federal Tribunal. Indeed, some "grey areas" have already been detected at various levels by scholars. Each actor of the financial circuit can potentially be concerned by a criminal proceeding. Thus, it will be of utmost importance to remain attentive to the potential surprises that case law will certainly provide.

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