

Seminar
Identifying, Restraining and Recovering
Stolen Assets in the OSCE Region
Session IV
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PC.DEL/790/12/Rev.1
4 September 2012

ENGLISH only

Asset Tracing

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Vienna - September 4, 2012*

Obtaining banking information in financial centers
Identifying beneficial owners

Bank documents potentially relevant include :

- a name search on the holders of an account, the beneficial owners (*Form A*) and the powers of attorney
- the "Know your Customer" (*KYC*) and other compliance documents provide valuable information about the persons and entities linked to the account and their economic or business background
- the Swifts and clients' orders to identify specific operations on a given account

Consider that commercial books and records, including bank records, must legally be kept for a maximum period of ten years.

Accessing property registries

Real estate owners are registered in public registries, accessible on demand to everyone. The transactions are published in an official journal, usually with the price paid by the buyer.

Issues include :

- the shareholders of a company owning real estate are not registered, and the transactions on the shares of the company are not in the public domain
- the beneficial owners are not registered
- the notaries instrumenting the acts are not required to control the origin of the assets used on real estate operations, nor to report suspicious transactions (*under discussion to be modified*)

Determining the linkage - forensic audits and other methods

Any usual investigative measure to secure elements of proof are used, respectively can be requested through MLA, such as :

- provisional measures (*notably freezing of assets and other values*)
- house search
- seizure of documentary evidence
- phone, email and internet tapping
- bank account monitoring
- witness statements to take
- audits (*by internal or external analysts*)

Analytical tools can help :

- flow charts
- computerized searches on data sets

Determining the losses - operating mode

The complexity of the investigations grows with each stage of the money laundering process as defined by FATF :

- the placement, i.e. the introduction of the proceeds into the financial system
- the layering, i.e. moving the funds to anonymise them from their illegal source
- the integration of the funds into the legitimate economy

The most common difficulties include :

- tracing funds over multiple bank accounts in various (not always as cooperative as they should) jurisdictions
- time consuming procedures
- the material and legal quality of the elements of proof collected abroad
- piercing the corporate veil of multiple off-shores and similar
- bona fide third parties rights when the proceeds are invested into the real economy

Determining the losses - volume

Swiss Courts tend to admit that the proceeds of corruption may include the profits gained through active corruption, notably the profits a company makes by bribing to enter or stay on a market.

Such proceeds are confiscated and allotted to the State, unless a victim is entitled to claim damages to be covered by the proceeds ; under Swiss law, such damages may only be claimed by the so-called « direct » victims, i.e. the persons or entities directly affected by the crime under consideration :

- neither share holders of a defrauded company nor citizens of a country whose public funds have been diverted being direct victims, they cannot claim the assets in compensation for their losses or damages
- it remains unclear if the competitor, evicted through bribery, is a direct victim of active or passive corruption
- the State is no direct victim of passive corruption of its public officials, thus cannot in that capacity claim the return of the bribe
- neither drug addicts, nor ordinary citizens affected by the illegal narcotics trade can claim damages if proceeds are confiscated

Embezzled public funds are to be returned to the victim State, possibly under bilateral agreement if "appropriate" (UNCAC, art. 57), notably if the corrupt structure is still in place.

As a general rule, bona fide third parties rights prevail over the victim's rights to damages from the proceeds.

Mutual legal assistnce
Sending and enforcing international freezing and seizing orders

The usual mechanisms of International Mutual Legal Assistance apply

Swiss legislation

Penal Code (CP - RS 311.0) + Penal Procedural Code (CPP - RS 312.0)

For complete legislation see : <http://www.admin.ch/ch/f/rs/rs.html> (in French)

Mutual Legal Assistance (MLA) framework

Swiss law on International Mutual Legal Assistance in Criminal Matters (IMAC - RS 351.1)

European Convention on Mutual Assistance in Criminal Matters (ECMA - STE 030)

Bilateral treaties

Specific MLA provisions, found in various international conventions, have been implemented in domestic legislation or are a reference to interpret it :

- CoE against Money Laundering (STE 141 - 1990)
- OECD Convention against Corruption of Foreign Officials (1997)
- UNTOC (2000), art. 18 - 21
- UNCAC (2003), art. 51 - 59

Administrative and civil legislations may include provisions for exchanging information, notably of fiscal nature, and carrying out foreign Court decisions (exequatur)

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The **Swiss Central authority** for international cooperation is the :

Federal Office for Justice

International Legal Assistance Division

Bundesrain 20

CH-3003 Bern

Tel +41 31 322 11 20, Fax +41 31 322 53 80

Their **website** provides updated information about international cooperation, in French, German, Italian and to some extent English, at :

http://www.ejpd.admin.ch/content/ejpd/fr/home/themen/sicherheit/ref_internationale_rechthilfe.html

Switzerland as the requested State

A request for judicial cooperation is turned down by the Swiss authorities if :

- "sovereignty", "national security", "public order" or other "essential national interests" are in jeopardy
- the rules of "fair trial" or "due process" are violated by the requesting State's proceedings (*notably the basic rights of the accused, as defined by UN's 1948 UDHR and its 1966 Covenant on Civil and Political Rights*)
- the person accused is prosecuted for its political opinions, "race", sexual orientation or religious beliefs
- the person accused risks the death penalty

A country to which Switzerland is not bound by a cooperation treaty or a multilateral convention must guarantee reciprocity.

MLA requests Basic conditions

To be accepted and carried out, a request (*translated into English or any of the four official languages of Switzerland*) should provide :

- a copy of the requesting State's relevant legislation regarding the offenses considered
- a summary of the facts being investigated as a suspected criminal activity (*names, dates, operating mode*), if possible with copies of the main relevant documents (*contract, bank order, indictment, witness statement*)
- concrete elements linking the targeted assets to that criminal activity (excluding the so-called "fishing expedition")
- an incomplete request is not turned down but returned for completion

The legal requirements to be met include :

- dual criminality (*conduct based, i.e. the relevant facts must represent a crime in both the requesting and the requested country : not given under Swiss law for simple fiscal evasion or so called "illicit enrichment" / given for money laundering or fiscal fraud*)
- statute of limitation is, as a rule, defined by the State prosecuting the offense ; if the time has expired to prosecute, a request for cooperation should be turned down
- double jeopardy can be a delicate issue, notably when a person has been acquitted in Switzerland for "the same acts" that she is being prosecuted for in the requesting State

As a rule, Switzerland interprets a request according to the "principle of favour", i.e. a broad interpretation in favour of cooperation

MLA requests Procedure

Swiss penal procedure applies.

Specific procedural requests from the requesting State can be considered, such as :

- confidentiality about the measures being ordered
- the formal rights to grant to an accused, a witness or a party, the presence of their lawyers, the taping of an interview, the sealing of documents, etc.

The foreign agents may be allowed to be present and participate in the carrying out of the request in Switzerland, on the condition that they do not use in their own investigation the information they have thus access to, before the formal closure of the MLA procedure.

According to the so called "specialty" reservation, the elements of proof gathered in Switzerland and handed over to the requesting country may not, without prior consent :

- be passed onto a third country
- be used for any other procedure than the one they have been requested and granted for, notably for fiscal procedures

Any person directly affected by a MLA request has the right to challenge it in a Swiss Court (*which can delay the proceedings by a couple of months to a year*).

MLA and National procedures

Asset freezing

Is ordered as a provisional measure :

- proceeds or instrumentalities of crime, direct or indirect, surrogates and compensating value included, can be frozen to prevent their transfer or disposal
- any type asset is concerned, values, cash, paper or real estate
- they must be liable to be confiscated

note : for standard definitions, see UNTOC and UNCAC, art. 2 (also UNTOC art. 12 ; UNCAC art. 31) : (d) 'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets ; (e) 'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence

- reasonable suspicion must be established on factual grounds, excluding fishing expedition
- a freeze is notified through a judicial order by a prosecutor
- no bank secrecy or similar can be opposed to a freezing order
- confidentiality can be imposed to the holder of the frozen assets, for a limited period of time
- the freezing order must be motivated and can be challenged in Court, notably by the holder of the bank account (but not by its beneficial owner) or the proprietor of real estate
- being a provisional, temporary measure, a freezing order must be validated by a formal procedure of confiscation

MLA and National procedures
Asset confiscation

- confiscation is ordered either as follow-up of a criminal conviction or "in rem", in the sense that the perpetrator needs not be identified nor sentenced
- confiscation is ordered by a penal Court, beyond a reasonable doubt that the assets are proceeds or instrumentalities of a crime
- if the assets are under the control of a person linked to a criminal organization, that person must prove that he acquired the assets legitimately (*reversal of proof*)
- bona fide third party rights over the assets are to be safeguarded
- a foreign Court's decision ordering the confiscation of assets located in Switzerland can be carried out via the usual mechanisms of *exequatur*

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