

Background paper (Thursday 6 September, 10:30-12:00)

Switzerland's experience and best practice in the fight against corruption and illicit acquisition of assets by politically exposed persons

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Switzerland has a comprehensive set of policies to fight crime such as corruption, both at the national and international level. The anti-corruption policies are closely linked to the government's efforts to fight organized crime and money-laundering. In many cases, there is a close link between corruption and illegal holdings of *politically exposed persons* (PEPs). As a major international financial centre, Switzerland has a fundamental interest in ensuring that illicitly acquired assets do not find a safe heaven in Switzerland. The Swiss government has therefore put in place a comprehensive range of legal instruments and measures for identifying, blocking and returning assets of criminal origin.

Switzerland handles assets illicitly acquired by PEPs in the same way as other assets of criminal origin. The Swiss banking secrecy law does not protect assets of criminal origin. The legal instruments deployed for preventing entry of illegally acquired assets, and for identifying, blocking and returning such assets, are manifold: criminal law, money laundering provisions, mutual legal assistance, and regulations governing the due diligence of banks. In some specific cases, the federal government has the power to block assets on its own initiative, in order to assist the country concerned in its efforts to recover them.

Experience has shown that the existing array of instruments is effective in dealing with illicit assets of PEPs. Switzerland is a worldwide leader in the field of asset recovery of PEPs. Over the past 20 years, Switzerland has returned ca. 1.6 billion USD to their countries of origin. No other government has returned a comparable amount.

From these many successful proceedings, some **practical advices** can be drawn:

- **be ready to help:**
enact a domestic legislation which puts you in a position to basically be able to grant assistance without treaty. Use an all crimes approach. In case of doubt, submit the assistance to (e.g. Human Rights) conditions.
- **find the money:**
effective KYC requirements and swift reporting mechanisms are necessary.
- **restrain the money:**
enact domestic legislation to give you the power to act quickly and under reasonable standards of evidence.



- **keep the money restrained:**
corresponding domestic law provisions are necessary in order to allow the requesting State to bring the criminal proceeding to an end and confiscate the money.

- **return the money:**
find the accurate(s) ground(s) to decide so
 - a) foreign confiscation decision
 - b) domestic confiscation decision
 - c) evident link between the money and the facts under investigation in the requesting State
 - d) decision issued in other related proceedings (administrative/civil)

- **monitor the use of the money:**
case by case and only with the consent of the requesting State. Monitoring under the responsibility of an international organisation

- **use a lawyer in the requested State as an interface:**
useful adviser (and traveller!) between requesting and requested States

Corruption and other offences linked to politically exposed persons - Restitution of Assets

SWISS PAPER

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Along with other financial places of major importance, Switzerland had to find an answer to the problem of assets embezzled or stolen abroad and subsequently transferred to its territory. The main problem was to find a way to return such assets quickly to their rightful owner abroad as well as to take into account any justified claim filed in Switzerland against these funds. In 1983, when the Federal Act On International Mutual Assistance in Criminal Matters (IMAC) entered into force, a provision was enacted to regulate the question (Art. 74 IMAC). Since then, the Swiss authorities have, on numerous occasions, been able to help foreign countries by returning funds to the victims abroad.

1. Brief international overview

It is only in recent years that the issue of returning stolen or embezzled assets has been tackled within the field of international cooperation in criminal matters. Most of the time, the rightful owners of such funds were obliged to turn to civil law to recover their property.

There were always doubts whether Article 3 of the 1959 European Convention on Mutual Assistance in Criminal Matters (ECMA) covered seizures with a view to compensation (séquestre conservatoire) in addition to seizures of evidence (séquestre probatoire). The Swiss Supreme Court has ruled that the Convention applies only to the seizure and transfer of evidence.

The absence of an international rule on the surrender of assets has not been compensated for by the Convention on Money Laundering and the Search, Seizure and Confiscation of the Proceeds from Crime (in short: Money Laundering Convention, GwUe), which regulates support for investigations and the confiscation of criminal moneys, but not their handing over. The basic rule established by the Convention is the confiscation of assets in the country where they are located, with a (subsequent) possibility under Art. 15 to share them with another member country which has helped in the confiscation. But the Convention permits extensive reservations in favor of domestic law, thereby often lowering its value in individual cases. An enquiry made by the Council of Europe has shown that the vast majority of members has not frequently applied the GwUe in practice.

The return of assets to the victims is now regulated in several recent conventions (not yet in force) or draft conventions.¹

¹ Second Additional Protocol to The European Convention on Mutual Assistance in Criminal Matters (Art. 8); EU Convention on Mutual Assistance in Criminal Matters (Art. 8) , UN Convention for the Suppression of the Financing of Terrorism; UN Convention against Transnational Organized Crime.

2. Return of Assets under Swiss law

2.1 Legal Basis

The new rule on the handing over of assets was one of the main changes in the law amending the IMAC of October 4, 1996. It establishes a clear distinction between handing over for the purpose of giving evidence² (normally followed by repatriation to Switzerland) and handing over for the purpose of forfeiture or return to the person entitled abroad.³

At this stage, it must be expressly pointed out that the handing over of objects or assets within the framework of an extradition procedure is regulated separately⁴ (so-called "extradition of objects and assets").

The question of the handing over of objects and assets is dealt with in many bilateral agreements.⁵

The requirement of reciprocity⁶ plays an important role in the handing over of assets. This requirement is however not absolute, and can be left aside depending on the type of offense or on the necessity of combating certain offences.⁷

2.2 Handing Over for the Purpose of Providing Evidence

The handing over of objects, documents (originals) or assets to foreign authorities for the purpose of providing evidence is regulated in Art. 74 IMAC, as well as in most international agreements.⁸ As a rule, third parties that have acquired rights in good faith⁹ are protected and the requesting State has an obligation to return.¹⁰ There are also rules in favor of authorities.¹¹ It is worth mentioning here that, in some cases, valuables returned as evidence are not returned back because they are restored to the victim within the framework of the foreign proceeding.

In practice, as long as the transport costs remain insignificant, surrender only for the purpose of providing evidence poses few problems.

² Art. 74 IMAC

³ Art. 74a IMAC

⁴ cf. Art. 59 IMAC; note that such handing over of objects and assets can still be effected if the person is not actually extradited, e.g. in case of the escape or death of the person pursued; Art. 59, para. 7 IMAC. Under Art. 74a IMAC, the return of objects and assets is mandatory if the conditions for extradition are met.

⁵ An actual obligation to surrender exists with Germany Austria and France. With the USA, an obligation to surrender exists only for objects and assets belonging to the requesting State or one of its member states or cantons

⁶ Art. 8 IMAC

⁷ Art. 8 para. 2 IMAC

⁸ e.g. Art 3 and 6 ECMA

⁹ Only property rights remain reserved

¹⁰ Art. 74, para. 2 IMAC; Art. 6, para. 2 ECMA

¹¹ Also, in particular, the oft-cited fiscal liens (cf. Art. 74, para. 4 and Art. 60 IMAC), which however are of minor significance in practice

2.3 Handing Over for the Purpose of Forfeiture or Return

Problems of greater significance arise when the assets or objects are to be sent to the foreign authorities for the purpose of forfeiture or return to the person entitled (usually the claimant).

The former provision of the IMAC was not precise enough for the Federal Supreme Court, which subsequently clarified the regulation in two well known cases.¹² This was one of the main reasons for amending the IMAC. The present provision of Art. 74a IMAC broadly follows the solution proposed by the Federal Supreme Court.

At first it should be mentioned that handing over for the purpose of forfeiture or return can be influenced by Part Three (before the judgement¹³) as well as Part Five (after the judgement¹⁴) of the IMAC. If an order for judicial assistance fulfils the condition made in Part Three of the IMAC that the requesting State must have made a final and enforceable judgement before the handing over is executed, this does not change the nature of the case which remains one of providing assistance in accordance with Part Three of the IMAC.

The description of the assets or objects to be handed over is regulated in Art. 74a, para. 2. The list is exhaustive and includes the objects used to commit a punishable offence as well as the profits of the offence and any replacement value.¹⁵

The handing over is ordered with the usual conclusive decree.¹⁶ However, as a rule, the objects are not handed over until the requesting State presents a final and enforceable decision which settles the question of future ownership (return to the State / return to the person entitled).¹⁷ However, the regulation has a certain degree of flexibility as regards two elements:

- a) Instead of a *sentence*, it solely refers to a *ruling*, which implies simpler forms of decree (return decisions etc.).
- b) The condition is not mandatory, but is to be imposed *only as a rule*, which excludes all clear-cut cases.¹⁸

Stringent requirements are set not only for the handing over to foreign authorities, but also for the release to an entitled person who has acquired rights in good faith in Switzerland.¹⁹ It

¹² PEMEX (Mexico) and Marcos (Philippines)

¹³ This rule, however, is already ambiguous. In practice, judicial assistance is still permissible for the examination of a plea agreement already accepted by a US court, i.e. an admission of guilt. The revision of sentences was also considered, cf. Art. 5, para. 2 IMAC

¹⁴ Art. 94 ff. IMAC (execution of criminal judgements)

¹⁵ According to Art. 59, para. 2 Swiss Criminal Code ; see also Art. 7, para. 2 and Art. 13, para. 3 of the Money Laundering Convention. The return of the replacement value has simplified the matter considerably. Now, it is no longer necessary, e.g. in the case of narcotics dealing, to link each entry made to an account with the corresponding sale of drugs.

¹⁶ Art. 80d IMAC; see also Art. 74a, para. 1 IMAC

¹⁷ This regulation was particularly disputed on the occasion of the amendment of the IMAC. There was no general acceptance of the objections that handing over should not involve a change of ownership and that the requirement of a judgement would result in a substantive judgement that is otherwise not usual in mutual legal assistance law.

¹⁸ The example given in Parliament was the theft of a famous work of art from a well known museum. A judgement of the Federal Court , relating to a stolen painting, created an initial positive precedent. The Abacha case is also an example where the link between the assets in Switzerland and the offences committed abroad was so evident for a part of the money that no confiscation decision was necessary.

¹⁹ Art. 74a, para. 4, let. c and para. 5 IMAC

is therefore possible that the number of (lengthy) clarification procedures by the Swiss assistance authorities will increase in the future.²⁰

3. Special issues raised by cases involving politically exposed persons (PEP)

Based on Switzerland's practical experiences, cases related to PEP raise the following specific problems:

- a) The long time spent as head of a country: it makes it very difficult to trace the proceeds from offences committed during the time when the PEP was governing the country (e.g.. Mobutu, Suharto, Duvalier). The evidence needed to confiscate such proceeds is often no longer available.
- b) Immunity of the Head of State: it can hinder or delay prosecution. The Swiss Supreme Court has ruled that, in relation to bank accounts, the immunity privilege can only be disputed if the link between the account and a foreign State was recognizable (i.e. no immunity granted to an account opened on behalf of a PEP by a straw man or a shell company).
- c) Political stability, human Rights issues (procedural guarantees) in the requesting State: it is often precarious and makes a return of funds impossible, or at least risky. Moreover, it is not easy to set conditions for the allocation of funds to a sovereign State.

²⁰ Note also Art. 33a Decree - IMAC, whereby objects and assets that have been secured can be seized