CENTRE DE DROIT
BANCAIRE ET FINANCIER

International mutual assistance in criminal matters

Confiscated and coveted funds

Par Maria Ludwiczak Glassey le 16 April 2021

In a judgment handed down on 16 October 2020 (RR.2019.349+RR.2019.350+RR.2019.351), the Federal Criminal Court (FCC) analysed the conditions under which a bank believing it has rights to some USD 37 million deposited in accounts opened in its books, can oppose their surrender to a foreign state.

In criminal proceedings conducted in particular on charges of stock market offences, the United States, through the Department of Justice, sent several requests for international mutual assistance in criminal matters to Switzerland, including one dated February 2017 seeking the surrender of assets deposited in various accounts opened with Bank A. SA, in particular in the name of B. A. SA opposed this transfer.

As a reminder, assets seized in Switzerland as a precautionary measure may be surrendered to the requesting State for confiscation at the end of the mutual assistance procedure (Art. 74*a* para. 1 EIMP). Surrender takes place in principle upon a final and enforceable decision of confiscation by the requesting State (Art. 74*a* para. 3 EIMP).

As regards the right to appeal against the decision ordering surrender to the requesting State, the bank with which the disputed accounts are held is generally not entitled to do so, except where its own interests are affected, in particular where it asserts a right in rem or a limited right in rem. In the present case, the Federal Criminal Court considered that the appeal was admissible on the grounds that Bank A. SA claimed that its claims against the account holders were secured by a pledge.

Under Art. 74*a* para. 4(c) EIMP, several conditions must be cumulatively fulfilled in order for the assets not to be handed over to the requesting State, including those discussed below.

(i) The claims must be guaranteed by the requesting State. The Federal Supreme Court states that the mere fact of being able to actively cooperate in the proceedings initiated by the requesting authority is sufficient for this condition to be met. The Federal Supreme Court notes in particular that “a bank such as Bank A. SA had the ability and resources to monitor B.’s trial, especially since he was an important client of the bank […]. [Bank A. SA] is also represented in the United States by a law firm” (c. 3.3.4). Secondly, the bank must have been aware of the US proceedings, given the media coverage of the proceedings in question and the fact that its employees were interviewed by the OAG in 2012 in connection with those proceedings. Finally, the confiscation order was published in the United States by way of a decree. Although it was

aware of the proceedings, the bank decided not to exercise its right to assert its claims before the US authorities. Consequently, 'the claims of Bank A. SA were guaranteed by the requesting State' (para. 3.3.4).

In these developments, the Federal Criminal Court deals with the right to participate in, or even be heard in, foreign proceedings and, in our opinion, wrongly equates this with a guarantee provided by the requesting state. However, the guarantee referred to in Art. 74*a* para. 4 EIMP does not consist of the mere possibility of asserting rights in foreign proceedings : the third party must be assured of being able to obtain the assets to which it asserts a right in rem. In this case, however, what appears to be held against Bank A. SA is that it did not take any steps, starting with making itself known, to obtain a guarantee from the US authorities.

(ii) The third party must assert a right to the assets. The right in question must be a real right or a limited real right ; a claim is not sufficient. The claim must be determined or sufficiently determinable at the time the contract establishing the right of pledge is concluded (ATF 142 III 746, commented on *in* Thévenoz, cdbf.ch/957/). The bank is asserting claims based on Art. 402 para. 2 CO (liability of the principal for damage caused to the agent by the performance of the contract). Specifically, it argues that a claim for payment is pending against it in its capacity as B.'s bank, for which the plaintiffs in the class action claim to have a claim amounting to several billion dollars. The Federal Supreme Court considers that the bank fails to make the existence of a claim plausible, given its future and indeterminate nature. Furthermore, the loan granted by A. SA to B., secured by a pledge, had been repaid in full. Thus, the potential claim on which A. SA could have based its claim had ceased to exist. In the absence of a claim, and therefore *a fortiori* of a claim secured by a pledge, the condition is not met.

(iii) The third party must have acquired the real or limited real right in good faith. The Federal Supreme Court analyses this condition 'for the sake of completeness' (c. 3.3.7). However, insofar as the Federal Supreme Court ruled out the existence of a claim, this exercise has no practical significance. Nevertheless, the Federal Supreme Court analysed the bank's good faith in relation to the aforementioned pledge and stated that the bank could not have been unaware that B. 'was very likely involved in a fraudulent money laundering scheme at the time the pledge agreement was signed'. Thus, it did not 'demonstrate that it had taken all necessary steps in good time to ascertain the origin of the money [which enabled the loan to be obtained and the pledge agreement to be signed] and the legality of these funds' (c. 3.3.7.3).

As the conditions of Art. 74a para. 4 let. c EIMP were not met, the Federal Criminal Court confirmed the surrender of the assets to the United States for the purpose of confiscation.
