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Extradition to the United States

The Federal Supreme Court clarifies the concept of secondary insider

Par Yannick Caballero Cuevas le 22 June 2021

In a judgement 1C_196/2021 of 28 May 2021 intended for publication, the Federal Supreme Court clarifies the concept of secondary insider within the meaning of Art. 154 para. 3 FMIA in the context of an extradition request.

On 5 January 2021, the Federal Office of Justice (FOJ) ordered the extradition of an individual A. (Appellant) to the United States. He is accused of having committed large-scale insider trading offences from 2013 to 2017. A. and an accomplice are alleged to have received insider information through an intermediary in relation to a listed biotechnology company and two investment banks. This information is said to have enabled them to earn several million dollars in revenue. Furthermore, they also allegedly put measures in place to conceal their activities and launder the income obtained in this way. Finally, they allegedly paid money to the intermediary so that he could pass on information from the primary insiders.

The FOJ maintains that these facts could constitute, under Swiss law, incitement to breach professional secrecy (art. 147 para. 1 let. b LIMF), obtaining a pecuniary advantage (art. 147 para. 1 let. c and para. 2 LIMF) and finally secondary insider trading (art. 154 para. 3 LIMF). An appeal is then lodged against the extradition decision before the Appeals Court of the Federal Criminal Court, which rejects it (cf. RR.2021.24).

Acting through the public law appeal channel, the Appellant argues that the case in question raises two legal questions, namely (i) whether the principle of favour may apply when the maximum penalty provided for by Swiss law is lower than the threshold set in the Extradition Treaty with the United States (TExUS), and (ii) whether the condition of double criminality in matters of extradition is fulfilled with regard to Art. 154 para. 3 LIMF. It is this last question that interests us and which is addressed in this commentary, since the principle of favour has already been accepted by the Federal Court in several rulings (cf. ATF 145 IV 294 c. 2.1, ATF 142 IV 250 c. 3). Indeed, its established case law on the matter states that the existence of an extradition treaty does not deprive Switzerland of the power to grant its cooperation under the broader rules of its domestic law.

The Federal Court first analyses Art. 2 para. 1 TExUS. This provision stipulates that extradition is granted when the perpetrator of the offence is liable to a custodial sentence or detention order for a period of more than one year in accordance with the law of both contracting parties, thus excluding extradition for trivial cases. However, dual criminality does not mean that the

criminal standards are identical (art. 2 para. 2 let. a TExUS). In fact, the authority to which the extradition request is submitted carries out a *prima facie* examination of the punishability of the offences being prosecuted under Swiss law. Thus, the facts presented in the request are examined as if they had taken place in Switzerland.

The Federal Court then examines Art. 154 para. 3 LIMF, which provides that secondary insiders, i.e. persons who have obtained the information from a primary insider or who have obtained it by committing a crime or offence, are punished by a custodial sentence of up to one year or a financial penalty. Art. 154 para. 4 LIMF, on the other hand, provides that cases of accidental insider dealing are punishable by a simple fine. Accidental insider dealing is understood to mean any person who has obtained the information either by chance or in circumstances where the source of the information cannot be determined.

The whole issue is therefore whether or not Art. 154 para. 3 LIMF allows or not a chain transmission of inside information to several persons from the primary insider. In other words, whether a person who has received inside information from a secondary insider (and not from a primary insider) is guilty of secondary insider trading under Article 154 para. 3 LIMF.

In its considerations, the Federal Supreme Court first recalls that the former provision, namely Art. 161(2) aCP on the exploitation of knowledge of confidential facts, concerned both direct and indirect communication of information by an insider. Indeed, anyone who benefits from privileged information transmitted by a chain of insiders must be considered a secondary insider within the meaning of Art. 154(3) LIMF, provided that the chain of information is not interrupted and that the source of the information can be traced. Furthermore, the Federal Supreme Court adds that even if the clarification contained in art. 161 para. 2 aCP has not been included in art. 154 para. 3 LIMF, obtaining insider information through a third party should fall under the scope of this provision.

In conclusion, extradition may be granted pursuant to Art. 154 para. 3 LIMF, as the Appellant is alleged to have received information from intermediaries in the knowledge that this information came from primary insiders. Moreover, he knew the identity of the insiders and is alleged to have remunerated them with part of the proceeds of the offences. Therefore, the Federal Court rejects his appeal.

This ruling therefore clarifies the concept of secondary insider while extending it to persons who received the information through an intermediary but who knew the source of the inside information. The Federal Supreme Court thus adopts a broad interpretation of the concept of secondary insider, which is based on Article 161(2) of the Swiss Criminal Code. In the light of this new case law, two conditions must be met, namely (i) the chain of information has not been interrupted and (ii) it is possible to trace the information back to its source.
