

Contract tainted by corruption

Does the intermediary have the right to keep his fees ?

Par Fabio Burgener le 5 November 2021

In [judgment 6B 379/2020 intended for publication](#), the Federal Court details the conditions under which the intermediary's fees in the context of a corruption scheme may be subject to confiscation measures ([articles 70 and 71 PC](#)).

The Brazilian and Swiss criminal authorities were each conducting proceedings against Alexis, a middleman in the context of the award by Petrobras of operating contracts to B. Inc. and C. BV. with a total estimated value of USD 2,680,000,000.

Following solicitations from the directors of the state-owned company, B. Inc. and C. BV. paid them bribes, notably through Alexis. These bribes were an *essential condition* for the award of the contracts and, indirectly, for the success fees paid by the successful tenderers to Alexis and his companies.

In total, Alexis and his companies received fees amounting to USD 37,244,165.

In 2016, Alexis entered into a cooperation agreement with the Brazilian justice system. On this basis, he was sentenced to 8 years' imprisonment for active corruption and money laundering, as well as a fine of BRL 70,000,000 (equivalent to USD 20,822,300 at the time).

In 2019, as a result of this conviction, the Office of the Attorney General of Switzerland (OAG) closed the criminal proceedings against Alexis for active bribery of a foreign public official ([art. 322^f PC](#)) and money laundering ([art. 305^a PC](#)). However, it issued a compensation claim ([art. 71 para. 1 PC](#)) against the defendant for USD 9,980,000, with the aim of cancelling out the illicit advantage corresponding to the fees received. It also maintained an attachment on bank assets deposited in Switzerland with a view to the execution of the measure ([art. 71 para. 3 PC](#)).

Following the rejection of his appeal by the Appeals Court of the Federal Criminal Court (FCC), Alexis appealed to the Federal Court (FC).

The appellant's main argument is that the compensatory claim ([art. 71 PC](#)) ordered against him contravenes the principle of proportionality. The combined amounts of the compensatory claim and the Brazilian fine correspond to more than 80 % of the fees received in connection with the disputed contracts. Alexis complains that no consideration was given to the fact that he and his companies provided extensive legal services to B. Inc. and C. BV. in the context of preparing bids and negotiating contracts.

After a meticulous examination of the doctrine, the TF holds that, in order to resolve the question of whether and to what extent the income derived from a corrupt contract should be confiscated, it is necessary to ask (1) whether the content of the contract was illegal, (2) whether the corrupt person had discretionary power in relation to the conclusion of the contract or (3) whether the successful tenderer had a right to conclude the contract. The federal judges then emphasise that the pronouncement of a confiscation measure is excluded in the event that the contract would have been concluded in its current form even without the payment of bribes. This is not the case when the bribes influenced the terms of the contract in favour of the service provider (e.g. payment of a higher amount or provision of lower quality services).

In the case in point, the FCC notes that the previous authority did not carry out this analysis, despite the objections raised by the appellant in this regard in the context of the appeal against the dismissal order. The TPF merely accepted the existence of a causal link between the fees received by Alexis and the offence of corruption due to the fact that the directors of Petrobras made the conclusion of the contracts dependent on the payment of bribes.

However, the decisive question is whether, in the absence of corrupt payments, the disputed contracts would nevertheless have been concluded and, if so, under identical terms. This implies above all establishing to whom Petrobras would have awarded the contracts if all the competitors had refused to pay bribes. However, the contested decision does not contain the factual elements necessary to answer this question, particularly with regard to the existence of applicants who submitted objectively better bids.

In addition, the FSC spontaneously notes that, in the contested decision, the FCC relies on the cooperation agreement concluded between the Brazilian authorities and Alexis, in particular on the latter's admissions, but does not respect it. Indeed, the court of appeal allows the pronouncement of a compensatory claim against Alexis even though the fine negotiated in Brazil was intended to remove the illicit advantage obtained by him. The federal judges question the compatibility of this procedure with the principle of good faith ([art. 3 para. 2 let. a CPP](#)). They enjoin the previous authority to examine this question in the event that it maintains the pronouncement of a compensatory claim against Alexis.

Finally, the High Court also admits another grievance of the appellant. Confiscatory measures must be directed against the person – natural or legal – who received the proceeds of the offence. Therefore, with regard to the fees paid to the two operating companies, the criminal authorities must order a confiscatory measure against these companies, and not against Alexis until it has been proven that these sums of money went to him.

Therefore, the Court of Appeal admits the appeal and refers the case back to the Court of First Instance for a new assessment of the three issues raised (proportionality, compatibility with the cooperation agreement and person concerned).