CENTRE DE DROIT BANCAIRE ET FINANCIER

Confiscation of illicit gains by FINMA

Between precedents and case studies

Par Vaïk Müller le 18 November 2021

In a ruling dated 19 August 2021 (2C_530/2020), the Federal Court reiterated the principles applicable to the calculation of confiscable gains within the meaning of Art. 35 LFINMA.

A public limited company X authorised by FINMA as a manager of collective investments within the meaning of the LPCC (authorisation now known as manager of collective assets since the relevant provisions were transferred from the LPCC to the LEFin) had entered into business finder contracts with a public limited company Y based in Geneva.

The founder of company Y was sentenced on 8 February 2018 by the Geneva Criminal Court to five years' imprisonment for several criminal offences. He was accused of having invested heavily in assets, without the knowledge of certain clients of a bank he represented, in a US security through, among other things, collective investments managed by X. These investments are said to have resulted in significant losses in 2014 and 2015, particularly for one investor.

By decision of 1 September 2017, FINMA found, following the initiation of enforcement proceedings against X, that X had seriously violated supervisory law by failing in his duties of loyalty, diligence and disclosure imposed by the LPCC. In addition to this finding, FINMA ordered, pursuant to Art. 35 LFINMA, the confiscation of CHF 500,321.75 from X in favour of the Confederation (subject to confiscation under criminal law) while charging X not only with the costs of the proceedings, but also with the costs of the appointed investigator in the enforcement proceedings.

X's appeal having been rejected by the Federal Administrative Court on 28 April 2020, the company lodged an appeal in public law with the FSC. In essence, X sought the nullity or even the cancellation of FINMA's decision.

In law and in substance, the FSC points out that confiscation is a purely administrative measure, the objective of which is to restore legal order by putting the subject back in the situation he would have been in without serious violation of the financial market supervision provisions. Based on the Federal Council's message on the FINMASA, the FSC also emphasises that confiscation promotes fairness among financial institutions by avoiding penalising good students who would be disadvantaged in favour of those who could benefit from their illegal behaviour.

Our High Court then recalls its case law on the notion of 'gain', emphasising that the confiscable gain is calculated according to the principles governing the restitution of the perceived advantage developed in the matter of illegitimate enrichment (art. 62 CO) or the management of affairs without a mandate, known as 'self-interest' (art. 423 CO). The profit that the manager has received and is required to repay is calculated using the net gain method. The expenses actually incurred in making the profit must be deducted from it. However, neither fixed costs nor overheads are taken into account, as these are in any case borne by the taxpayer (cf. cdbf.ch/1058/). The TF mentions in passing, this point not really being at the heart of the judgement, the possibility for FINMA to estimate the amount of the forfeitable gain in the event that it is impossible to determine the gain precisely or if its determination requires disproportionate means (not without limit, however, see the judgement of the TAF B-3930/2016 concerning the forfeiture of the gain in the BSI case following the 1MDB scandal).

The FSC also recalls the content of the principle of proportionality (art. 5 para. 2 Cst) and the fact that FINMA must, as such, ensure that confiscation does not lead to disproportionate consequences. This may be the case if the measure is likely to cause the taxpayer to go bankrupt. In general, the Federal Supreme Court endorses the Federal Administrative Court's argument that 'the interest in the proper functioning of the financial markets requires that confiscation not be reduced too easily simply because it could create liquidity problems, at the risk of rendering the compensatory function of the measure meaningless'.

Ultimately, in the case in question, the Court of First Instance rejected all of the appellant's arguments. In particular, the Court emphasised that the measure was neither disproportionate nor likely to result in bankruptcy, as X was not in a situation of over-indebtedness (after the measures were pronounced) and could even benefit from staggered payments. The CF also points out that the amount of the confiscation was not greater than the gains recorded by X as a result of its violations. The TF rejected the argument that the change of management team and the damage to X's image that the new team was trying to rectify were valid grounds for a further reduction in the amount confiscated (which had already been reduced due to the risk of bankruptcy). Finally, the Court of Cassation specifies, in response to a complaint from X, that confiscation is not a means of dissuasion against the current bodies of a taxpayer, but rather a means of removing the advantages unduly received in violation of financial market law.

In summary and conclusion, while this case law is not innovative, it does constitute a good summary of the case law of the FSC on the matter. It can also contribute to casuistry and enable practitioners to better define the arguments that are likely (or not) to be accepted by the courts, in particular by our High Court.
