CENTRE DE DROIT
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Criminal proceedings

Anticipated realisation of seized cryptoassets

Par Fabio Burgener le 23 November 2021

In a judgment 1B_59/2021 of 18 October 2021 intended for publication, the Federal Supreme Court rules for the first time on the procedure to be followed by the criminal authorities when realising seized cryptoassets in advance.

Criminal proceedings have been brought in the canton of Zurich against Alexis for money laundering (art. 305bis CP). In September 2019, the public prosecutor's office seized the defendant's cryptoassets deposited with B. SA with a view to their confiscation. A year later, the prosecution authority issued an order with the following provisions :

1. Orders B. SA to transfer the cryptoassets to the Public Prosecutor's account with C. SA, after the pronouncement has come into force ;
2. Instructs C. SA to convert the cryptoassets into Swiss francs and transfer the proceeds of the sale to the Public Prosecutor's bank account ;
3. Orders the sequestration of the net proceeds from the sale of the cryptoassets.

The Federal Court has received a criminal appeal filed by Alexis against the incidental decision of the previous authority confirming the Public Prosecutor's order.

Regarding the standing to appeal, the federal judges infer from an analogy with the holder of a bank account that the appellant, i.e. the holder of the cryptoassets to be realised, has a legally protected interest in the cancellation or modification of the decision taken (art. 81 para. 1 let. b LTF).

The other admissibility conditions, in particular that of the risk of irreparable harm (art. 93 para. 1 let. a LTF), are also met.

On the merits, it should be recalled that assets are liable to be sequestered in the context of criminal proceedings, in particular with a view to their confiscation (art. 263 para. 1 let. d CPP). Assets listed on the stock exchange or on the market may be realised immediately in accordance with the provisions of the LP ; the proceeds are sequestered (art. 266 para. 5 CPP). Their fate is, in principle, settled in the final decision (art. 267 para. 3 CPP).

The High Court maintains that the interests of the State and of the person subject to sequestration must be preserved as best as possible by the Public Prosecutor's Office when the latter orders the early realisation of sequestered assets. The objective is to obtain the best

possible proceeds following the realisation.

In the present case, the sequestered crypto-assets correspond to a significant market share of each of these assets. A ‘block’ sale of all these assets could thus lead to a significant loss of their value and *a fortiori* have a negative effect on the sale proceeds.

The Public Prosecutor’s Office could not, therefore, in its order, leave the manner in which the securities will be realised at the discretion of C. SA.

Even if the previous authority inferred from two emails from C. SA that a ‘slow’ sale ‘over several months’ would be appropriate and probably the procedure chosen by this company, it dismissed the appeal and thus did not amend the Public Prosecutor’s order in this sense.

Therefore, due to the uncertainty surrounding the modalities of realisation of the sequestered assets, the High Court admitted the appeal and referred the case back to the Public Prosecutor’s Office.

Four lessons regarding the early realisation of cryptoassets can be drawn from the Federal Court’s criticism of the Zurich criminal authorities :

1. The nature and particularities of the assets to be realised must be taken into consideration, in particular market conditions.
2. The protection of the projects underlying the cryptoassets is not the primary concern.
3. When it is foreseeable that the manner in which the early realisation is carried out will have an influence on its result, the provisions of the ordinance must specify the type and the terms of realisation.
4. An expert must be appointed if the criminal authority does not have the necessary knowledge.
