



Russia

Mutual criminal assistance suspended, but sequestration maintained

Par Maria Ludwiczak Glassey le 5 March 2023

In a ruling 1C_477/2022 of January 30, 2023, intended for publication, the Federal Supreme Court decided to suspend the international mutual assistance proceedings in criminal matters and to uphold the sequestration of funds ordered in Switzerland in June 2020 in execution of a request submitted by the Russian Federation in January 2020.

The Federal Supreme Court is ruling on the appeal because it has to answer the general question of what should happen to requests for mutual legal assistance made by the Russian Federation, and in particular whether the sequestration ordered in execution of said requests should be maintained before mutual assistance with this State is suspended. The issue is particularly salient in view of the fact that some CHF 350 million are currently blocked in Switzerland in execution of various requests from the Russian Federation. It is therefore a question of principle.

The Federal Court recalls that the Russian Federation, which was previously one of the States to which mutual assistance could be granted subject to the provision of prior guarantees, is now “one of the States which can no longer obtain it” : the Russian Federation is no longer a member of the Council of Europe or a party to the ECHR, but it remains bound to Switzerland by the European Convention on Mutual Assistance in Criminal Matters. He adds that the present situation must be distinguished from that in which mutual assistance concerns only the transmission of banking documentation, a situation in which mutual assistance may be “purely and simply refused”, and where it could be requested again. Where funds are seized, however, refusal of assistance would imply the lifting of the sequestration, with the consequence that the assets “might no longer be available if a new request were made at a later date”.

The TF explained that, since the seizure had been ordered when mutual assistance was still possible, the conditions of art. 18 para. 1 EIMP had been met, and decided that the situation was comparable to that in which, pending the requesting authority's completion of its request (art. 80o EIMP) or provision of international guarantees (art. 80p EIMP), the provisional measures were maintained (art. 28 para. 6 EIMP).

In addition, the TF indicates that it is possible that a criminal sequestration may be “pronounced in the near future on the assets” in the context of parallel criminal proceedings in Switzerland.

Finally, the TF enjoins the FOJ to “keep abreast of developments on a regular basis and inform

the Court of Complaints so that it can decide whether to resume proceedings”, in order to guarantee the proportionality of the protective measure.

As a preliminary point, we would like to make it clear that we will not dwell on the argument of a possible future criminal sequestration, as it is true that a protective measure ordered in the context of mutual assistance cannot be intended to guarantee a future measure ordered in national criminal proceedings.

Precautionary seizure is a restriction of the fundamental right to property (art. 26 al. 1 Cst.) which must be analyzed in the light of art. 36 Cst. The first condition laid down by this provision is the existence of a legal basis (art. 36 al. 1 Cst.). The seizure of funds in the context of mutual legal assistance is provided for in art. 18 al. 1 EIMP, according to which such a measure is possible in particular if “a procedure provided for in [the EIMP] does not seem manifestly inadmissible or inappropriate”. This condition was met when the sequestration order was issued. The Russian Federation was “downgraded” from the second to the third group of States, although the duration of this downgrading could not be determined. The condition laid down in art. 18 para. 1 EIMP is no longer met. This raises the question of the impact of such downgrading on ongoing mutual assistance procedures.

According to the press announcements made by the FOJ and the MPC mentioned by the TF, mutual legal assistance with the Russian Federation is “suspended until further notice due to the situation in Ukraine”. The TPF, for its part, decided that mutual assistance should be refused (RR.2021.91, RR.2021.84 and RR.2021.239 and press release of May 18, 2022). A refusal of mutual assistance implies ipso facto the lifting of the sequestration measures, and this was the position taken by the Federal Tribunal in the judgment under appeal (RR.2021.76). However, the TF decided that the refusal of mutual assistance, which is appropriate where evidence is involved, is not appropriate where funds have been seized : mutual assistance must then be suspended, not refused.

This is not the solution adopted for extradition, which was refused in a case pending in 2022 (cf. RR.2022.73), despite the fact that only the suspension of proceedings and the provisional measure consisting in the continued detention of the extraditable person can guarantee that extradition, subject to the EECxtr by which Switzerland is bound to the Russian Federation, can be carried out in the future.

Nor is it consistent with the practice prevailing in the field of administrative assistance in tax matters, where the Federal Supreme Court has suspended procedures relating to the exchange of information on request, even though they only concern the delivery of documents (aligning the practice with that prevailing in the field of automatic exchange of information, 2C_219/2022. On this subject, cf. F. Bonzanigo, *Crimen*, August 4, 2022), which was subsequently confirmed by the Federal Council in a communication dated September 16, 2022.

Finally, one wonders how long the sequestration will be considered proportionate and, above all, what will be the fate of future requests for seizure submitted by the Russian Federation, particularly if the situation in Ukraine gradually improves without a reclassification being (yet) possible.

Reproduction autorisée avec la référence suivante: Maria Ludwiczak Glassey, Mutual criminal assistance suspended, but sequestration maintained, publié le 5 March 2023 par le Centre de droit bancaire et financier, <https://cdbf.ch/en/1270/>