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International mutual assistance in criminal matters

Enforcement in Switzerland of a foreign judgment awarding a compensatory claim

Par Fabio Burgener le 30 May 2023

In a recent decision intended for publication, the Swiss Federal Supreme Court confirms that a request for mutual assistance for the enforcement of a foreign decision imposing a sanction corresponding in Switzerland to a compensatory debt (art. 71 CP) can only be executed in application of art. 94 ff EIMP (TF, 21.04.2023, 1C_624/2022).

In 2011, following requests for mutual assistance from Belgium, the Zurich Public Prosecutor's Office ordered the precautionary seizure of the bank assets of a man named Edouard with C. SA, based in Switzerland. This included an account in the name of A. Inc, an offshore company controlled by Édouard.

In 2018, a Belgian public prosecutor informed the Swiss authorities that Édouard had been definitively convicted of breach of trust and money laundering. A Belgian appeal court found that, between 2001 and 2005, Édouard, as director of a company, illegally withdrew cash from the company's assets for a total amount of around EUR 4.5 million. He then deposited the cash in accounts opened with C. SA in Switzerland, including one in the name of A. Inc. On this basis, Belgium is requesting Switzerland to hand over the assets deposited in the A. Inc. account in the amount of EUR 3,080,225.50 for confiscation and EUR 1,492,896.80 to extinguish a compensatory claim by the Belgian state.

In 2020, the Zurich Public Prosecutor's Office issued a closure decision pursuant to art. 74a EIMP, the operative part of which provided for the surrender to Belgium of the assets deposited in the account of A. Inc. in the amount of CHF 3,311,858 (= EUR 3,080,225.50) for confiscation and CHF 1,605,163 (= EUR 1,492,896.80) to extinguish the compensatory claim.

After unsuccessfully appealing to the Federal Criminal Court, A. Inc. lodged a public law appeal with the Federal Supreme Court. In particular, it challenged the transfer of assets to the Belgian State with a view to extinguishing the compensation claim.

After examining the conditions of the principle of transparency, the Federal Court found that there was an economic identity between Édouard and A. Inc. The company's assets can therefore be used to extinguish the individual's debt.

The central question is then whether the absence of any mention of "compensatory claims" in art. 74a EIMP ("Remise en vue de confiscation ou de restitution") constitutes a qualified silence

or a loophole as such.

This provision, which has been interpreted in detail by the Federal Court, stipulates that Switzerland must, on request, hand over to the foreign authority, at the end of the mutual assistance procedure, the objects or assets seized for safekeeping with a view to confiscation or restitution to the rightful owner.

A literal interpretation leads the federal judges to hold that compensatory claims are not covered by the provision, the wording of which is clear on this point. From a historical point of view, our High Court points out the absence of instructive elements in the preparatory work relating to the adoption of the standard.

From a teleological point of view, the Federal Supreme Court points out that the transfer of assets to a foreign state for the purpose of enforcing a compensatory claim under art. 74a EIMP would contradict the principles of Swiss enforcement law, since it would de facto confer a preferential right on the foreign state. On the other hand, creditors' rights could be respected in the context of a foreign enforcement procedure (art. 94 et seq. EIMP).

In view of the foregoing, the Federal Court finds that the absence of any mention of "compensatory claims" in art. 74a EIMP constitutes a qualified silence. The assets claimed under the compensatory claim cannot be remitted to the requesting state by this means.

The federal judges therefore accepted A. Inc.'s appeal with regard to the enforcement of the part of the Belgian mutual assistance decision relating to the compensatory claim. They specify that, to this extent, the case must be referred to the Federal Office of Justice as the authority competent to rule on the acceptance of the request for exequatur (art. 103 et seq. EIMP).

In the judgment under review, the Federal Court confined itself to confirming, after detailed and convincing reasoning, its case law on the enforcement of a foreign decision awarding a compensatory claim (cf. ATF 133 IV 215).

It now remains to be seen – and the ruling makes no mention of this – how the Belgian decision insofar as it concerns the compensatory claim will actually be enforced in Switzerland. The provisions of the fifth part of the EIMP relating to the enforcement of foreign decisions do not seem to have been designed for this eventuality (art. 94 to 106 EIMP). Only an (overly ?) extensive reading of the law will make it possible to take account of the specific features of compensatory claims.

Once the foreign decision has been declared enforceable in Switzerland, it is clear that the foreign compensatory claim will have to be recovered through debt collection, in the same way as a compensatory claim ordered by a Swiss criminal authority (art. 107 al. 1 EIMP in conjunction with art. 71 al. 3 CP and art. 442 al. 1 CPP).

On the other hand, the question arises as to which Swiss authority – or the foreign state directly ? -will be responsible for collecting the debt through debt collection, starting with the debt collection requisition (art. 67 LP) or, in the case of debt collection from a debtor domiciled or headquartered abroad, a request for civil sequestration (art. 271 al. 1 ch. 6 LP) in order to create a debt collection jurisdiction in Switzerland (art. 52 LP). The procedure adopted must take into account the fact that the sum of money recovered may be the subject of a sharing

agreement between States (art. 1, 2 para. 2 and 11 to 15 CPA).

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