

Unfair competition

Can an intermediary's commissions be confiscated ?

Par Fabio Burgener le 9 April 2024

In a ruling 7B_135/2022, the Swiss Federal Supreme Court details the conditions under which commissions resulting from contracts tainted by an offence of unfair competition may be subject to confiscatory measures (art. 70 and 71 of the Swiss Criminal Code).

A Swiss public limited company active in private equity proposed, on behalf of a foreign entity, the purchase of shares in a German company operating in the medical sector. The search for new investors generally began with "cold" telephone calls. Employees proceeded according to guides drawn up by the founder and sole director of the Swiss company. Interested parties would then receive documentation about investing in the German company.

Between April 2008 and May 2016, the Swiss company approached at least 203 investors, who then entered into agreements with the foreign entity to acquire shares in the German company. Under these agreements, the investors paid a total of over EUR 67 million. Of this amount, the direct seller received commissions of around EUR 16 million.

This activity was accompanied by several unfair acts. The direct seller gave the inaccurate impression that it was acting as a mere intermediary, with FINMA authorization, even though interpersonal links existed between the entities involved. The documentation was misleading with regard to the valuation of the German company and the share price. Investors were unaware that the direct seller was charging commissions of 23.8 % on the amounts invested. The contracts concealed the fact that part of the transactions took place overdrawn. Details of the German company's shareholder structure were false.

Following bankruptcy proceedings initiated in April 2018, the German company was dissolved.

For these facts, the Zurich Court of Appeal found the founder of the direct debit company guilty of multiple offences under the Unfair Competition Act (art. 3 para. 1 let. b and art. 23 UWG), in addition to the offence of unauthorized practice (art. 44 para. 1 FINMA). It punished him with (i) a 24-month suspended prison sentence, (ii) a two-year ban on trading (art. 67 PC), (iii) the confiscation of bank assets and two watches belonging to him (art. 70 PC) and (iv) a compensation claim (art. 71 PC).

In his appeal to the Federal Supreme Court, the founder of the direct seller company's main grievance concerned the confiscation of assets (art. 70 of the Swiss Criminal Code) and the compensation claim (art. 71 of the Swiss Criminal Code) ordered to deprive him of the

pecuniary advantage resulting from the infringements of the law on unfair competition.

Under art. 70 para. 1 of the Criminal Code, the judge may order the confiscation of assets “which are the result of an offence”. The aim of this measure is to deprive the perpetrator or a third party of an unlawful pecuniary advantage. Its conditions are (i) the commission of conduct typically contrary to criminal law and unlawful, (ii) assets, (iii) a causal link between the conduct and the assets, and (iv) the absence of restitution to an injured party. When the assets to be confiscated are no longer available, the judge orders their replacement by a compensatory claim from the State in an equivalent amount (art. 71 al. 1 phr. 1 CP).

The High Court began by pointing out that the criminal offences had not directly generated any pecuniary advantage. Rather, the advantage obtained by the direct seller consisted in the commissions resulting from the contracts entered into by the investors. The assets confiscated by the previous authority are therefore at most the indirect result of the criminal offences. However, this circumstance is not sufficient to exclude confiscation.

From a factual point of view, the federal judges went on to find that the appeal court had established that each of the acts of deception was of such a nature as to influence the purchasing decision of potential investors ; on the other hand, the previous authority had not found that the injured parties (or some of them) had actually been influenced and that the deceptions had constituted the necessary cause for the conclusion of the contracts and the payments made on this basis.

This demonstration is satisfactory with regard to the constituent elements of the offence of unfair competition (art. 3 al. 1 let. b and art. 23 UWG), where a risk of deception or misleading is sufficient (offence of abstract endangerment). On the other hand, it does not accept the causal link requirement for confiscation.

Consequently, the Federal Supreme Court partially annulled the decision of the Zurich appeal court. It points out that the decision taken does not contain the factual and legal grounds for determining whether the contracts would have been concluded without the infringements of the law on unfair competition and, if so, how much the appellant’s unlawful pecuniary advantage would amount to (art. 112 al. 1 let. b and al. 3 LTF). The previous authority will have to carry out this examination and issue a new decision on the extent of the confiscation and the compensatory claim.

This ruling clarifies that, in the case of confiscatory measures, the condition of a causal link must be accepted when the criminal offence leads to the conclusion of an objectively legal act, the execution of which results in an increase in the assets of the perpetrator (or a favored third party). Such a solution had already been adopted in the case of fees paid to an intermediary in connection with a contract tainted by corruption (Burgener, cdbf.ch/1204/).

Aware of the difficulties involved in establishing a causal link when many injured parties are involved, the federal judges point out that the presumption of innocence (art. 6 § 2 ECHR) does not apply directly to confiscatory measures. The degree of proof required is limited to overriding probability. Furthermore, the person objecting to the confiscation must substantiate the reasons for his or her objection and cooperate in establishing the relevant facts.

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