

The saga continues

Mutual assistance in criminal matters suspended, but sequestration maintained

Par Maria Ludwiczak Glassey le 12 April 2024

In a ruling 1C_543/2023 of 7 March 2024, which is intended for publication, the Federal Supreme Court (FSC) confirms its case law concerning the suspension of mutual assistance and the maintenance of sequestration of funds seized in Switzerland in execution of a request submitted by Russia prior to the aggression in Ukraine. It extended the suspension to a sequestration that had already lasted eight years and ruled out the possibility of invoking Article 2 EIMP.

The Federal Criminal Court (FCT) (RR.2022.183, 27 September 2023) had upheld the appeal against the decision of the Federal Prosecutor's Office (FPS) to maintain the sequestration, declaring that mutual assistance should be refused and the freeze lifted, subject to a three-month period to allow the FPS to issue a sequestration order in the context of (new) Swiss criminal proceedings. The Federal Office of Justice (FOJ) is appealing to the Federal Supreme Court.

The case raises two substantive issues. The first is whether mutual assistance should be refused because of the application of art. 2 EIMP, as the Federal Court did not address this provision in BGE 149 IV 144. The second question concerns the proportionality of maintaining the sequestration in question, with regard to its duration.

The Federal Court answers the first question in the negative : art. 2 EIMP cannot be invoked in the context of an appeal against a decision to maintain a seizure. The complaint is reserved for cases of surrender abroad, whether of a person (extradition) or of property (bank documents or assets).

The second question has three parts. The first relates to the duration of the proceedings in the requesting State. The TF ruled that this was a complaint under art. 2 EIMP which, as already explained, could not be raised. The second aspect concerns the principle of expedition governing the activities of the Swiss authorities when executing the foreign request : this aspect is not problematic in casu. The final aspect of the proportionality of the sequestration relates to the guarantee of ownership and directly concerns the duration of the sequestration of the assets in Switzerland and its balancing against the said guarantee. The Federal Court reiterated its case law on the acceptable duration of a sequestration, particularly in relation to the complexity and progress of the foreign proceedings, and concluded that there had been no violation. However, it enjoined the FOJ to monitor the progress of the Russian criminal proceedings and, if necessary, to set a deadline for the Russian authorities to produce an enforceable decision. For these reasons, the Federal Court upheld the appeal.

The ruling follows on from the ATF 149 IV 144 handed down a year earlier (see Ludwiczak Glassey, cdbl.ch/1270/). At that time, I did not dwell on the argument that the sequestration

ordered during mutual assistance could serve to guarantee the availability of funds for the needs of future Swiss criminal proceedings. However, this argument was taken up again this time by the TPF, without any legal basis. As the MPC had not initiated such proceedings, the issue did not have to be addressed by the TF.

It is noteworthy that nowhere does the Federal Court mention the legal basis for the sequestration, namely art. 18 EIMP, the conditions for which must nevertheless be met : a sequestration is a restriction on the fundamental right to property (art. 26 al. 1 Cst.) and cannot be ordered in the absence of a legal basis (art. 36 al. 1 Cst.).

According to this provision, a provisional measure relating to mutual assistance may only be ordered if “a procedure provided for by ?l'EIMP? does not seem manifestly inadmissible or inappropriate”. The “procedure” in question here consists of restitution with a view to confiscation or restitution to the rightful owner (art. 74a EIMP) or, depending on the foreign ruling, the enforcement of a foreign decision (art. 94 et seq. EIMP). As for the condition that this procedure must not seem “manifestly inadmissible or inappropriate”, this implies, contrary to what the TF considers, an analysis of art. 2 EIMP. If this ground for refusal is met, no assets can be handed over to Russia. It was in the light of this principle that the situation in Russia was examined in ATF 149 IV 144 (although the provision was not mentioned) and, more generally, that the granting of mutual assistance to Russia is no longer justified since Russia’s withdrawal from the Council of Europe and its aggression against Ukraine. Accordingly, it must be possible to invoke the complaint based on art. 2 EIMP in an appeal against a sequestration decision, in order to determine whether mutual assistance is not manifestly inadmissible within the meaning of art. 18 EIMP.

The TF’s reasoning on the argument relating to the duration of the sequestration and the restriction of the guarantee of ownership leads the Swiss authorities to adopt a contradictory attitude towards the requesting State. The FOJ is asked to check regularly on the progress of the Russian criminal proceedings and to set the Russian authorities a deadline for producing a final decision on the fate of the funds. However, if such a decision were to be sent to Switzerland in the near future, it could not be acted upon, as mutual assistance to Russia is not possible at this stage. The sequestration would then have to be lifted.

In my view, confusion has arisen between, on the one hand, the suspension of mutual assistance (i.e. the fact that mutual assistance cannot currently be granted to Russia for an indefinite period, but with the hope that the situation will develop favourably) and, on the other hand, the suspension of ongoing cases, implying the continuation of provisional measures ordered before the change in Russia’s status, a continuation that has no legal basis in mutual assistance law.