CENTRE DE DROIT
BANCAIRE ET FINANCIER

Sequestration of bank assets

As criminal proceedings drag on, the Supreme Court lifts the sequestration order

Par Joël Pahud le 25 April 2024

A protective criminal sequestration order may appear disproportionate when the proceedings in which it is involved drag on without sufficient grounds. Decision 7B_366/2023 of 14 February 2024 provides a rare illustration of the application of this principle by the Federal Supreme Court. The Federal Court lifted the sequestration orders issued in February 2018 on bank assets, as the Geneva public prosecutor had decided, but contrary to the decision of the cantonal court of second instance.

In February 2018, an oil company belonging to a South American state filed a criminal complaint in Geneva against some of its employees, as well as two employees of Group B : it denounced acts that it qualified as bribery of foreign public officials (art. 322septies CP), money laundering (art. 305bis CP) and data concealment (art. 143 CP). The company suspected that its employees had received corrupt amounts from B's bank accounts or from companies controlled by B's employees.

On 19 February 2018, the Public Prosecutor's Office ordered the sequestration of several bank accounts for a total amount exceeding the equivalent of CHF 80 million. The accounts are in the name of B, its employees or companies of which they are beneficial owners. One is in the name of an employee's daughter.

In November 2022, the Public Prosecutor's Office lifted the receiverships. After pointing out that criminal proceedings had been discontinued in the South American country in question and that the complainant had failed to respond to its enquiries about illicit transactions, the Public Prosecutor's Office noted that the electronic files that it had had seized in Geneva in 2018, as well as the "image" of the complainant's server that it had received (also in 2018), had not yet been used, due to a lack of sufficiently selective sorting criteria. As a result, the initial suspicions have not completely and definitively disappeared, but as things stand, the evidence gathered does not strengthen the prospect of confiscation of the sequestered assets. It is also clear from the judgment under review that the hearings conducted, as well as the mutual assistance with Spain and the United States, did not yield any immediately useful information.

The Court of Justice upheld the appeals lodged by the plaintiff (ACPR/469/2023 of 20 June 2023). In the Court's view, there were two sufficiently unusual factors to suggest that the initial suspicions had been strengthened, making it necessary to maintain the receiverships : (1) the small size of Group B on the oil market compared with other traders, and (2) the award to the

defendants of 12 % of the tenders – one transaction in eight – between October 2016 and March 2017, i.e. at a time when the country in question was going through a period of instability and constitutional crisis.

Following an appeal by the holders of the sequestered bank accounts, the Federal Court began by pointing out that, according to established case law, protective sequestration under criminal law – within the meaning of Article 263(1)(d) or (e) of the Swiss Criminal Code – is a measure based on probability, which is justified as long as there is a likelihood of confiscation, a compensatory claim or an award to the injured party. Sequestration can only be lifted if it is clear and indisputable from the outset that the material conditions for these measures have not been and cannot be met. However, the likelihood of a confiscation, compensatory claim or allowance to the injured party should increase during the investigation. A criminal sequestration order may appear disproportionate if the proceedings in which it is involved drag on without sufficient grounds.

The Federal Supreme Court therefore examined whether the initial suspicions were strengthened during the course of the investigation and answered in the negative. In particular, it rejected the Court of Justice's arguments that the figures were not comparable and that their unusual nature was not immediately obvious. This is not sufficient to consider that sequestration is still justified. Nor can we be satisfied with the hypothetical result of the – future – use of the data available to the authorities. Finally, the Federal Supreme Court notes that the foreign classification cannot be ignored, even if it is not established that the facts investigated and the persons targeted by the criminal proceedings in the South American country would be the same as those examined in Switzerland.

Ultimately, the Federal Court ruled that there was no longer sufficient suspicion to maintain the sequestration proceedings and that the cantonal court's decision violated federal law.

In our view, this ruling calls for the following observations :

The strengthening of suspicions during the course of an investigation as a condition for maintaining a criminal sequestration order must not be just wishful thinking. From this point of view, the intervention of the Federal Court is to be welcomed in a case where, apparently, the criminal proceedings were not progressing or were no longer progressing, even though the assets had been sequestered for several years.
That said, the way in which the investigation was conducted, as set out in the judgment under review, raises a number of questions with regard to the maxim of the investigation (art. 6 of the Code of Criminal Procedure) and the fact that the offences in question were prosecuted ex officio. On the one hand, the Public Prosecutor's Office appears to have imposed quasi-"obligations" to cooperate on the complainant, and then deduced from answers that were deemed incomplete a reason to lift the sequestration. On the other hand, the Public Prosecutor's Office did not use (even in an embryonic way) the electronic data at its disposal for about five years. The Federal Court was surprised by this, but noted that the volume of data was particularly large and that the plaintiff had not cooperated appropriately. The compatibility of these considerations with the aforementioned maxim does not seem obvious to us.
Lastly, the argument based on the fact that the case was closed abroad is difficult to understand for those who only have access to this judgment and that of the Court of Justice : why should the fact that the case was closed abroad be taken into account when it has not been established that the facts and the persons under investigation are the same as in Switzerland ?