Asset Recovery 2020

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CIVIL ASSET RECOVERY – JURISDICTIONAL ISSUES

Parallel proceedings

1 | Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

Civil proceedings can be conducted in parallel with, in advance of, or within criminal proceedings. The law provides for several procedural means by which civil and criminal proceedings can be coordinated. For example, civil courts can suspend or stay proceedings, if appropriate (article 126 of the Swiss Code of Civil Procedure (SCCP)). Proceedings may be stayed, in particular, if the decision depends on the outcome of other proceedings, such as criminal proceedings. In practice, only in limited cases will the existence of parallel criminal proceedings be sufficient grounds to stay civil proceedings. Civil and criminal proceedings can also be coordinated by granting victims of criminal offences the right to bring civil claims as private claimants in criminal proceedings (article 122 of the Swiss Code of Criminal Procedure (SCCrP)).

Forum

2 | In which court should proceedings be brought?

Civil proceedings are generally brought before cantonal civil courts. In certain cases, however, civil claims can also be brought before the competent criminal authority for proceedings concerning the same subject matter (article 122 of the SCCrP) (see question 1).

As a rule, ordinary civil proceedings should be brought before the courts at the defendant's domicile (natural person), or seat (legal person) (article 10 of the SCCP). Civil procedural rules also set forth special venues depending on the subject matter of the dispute (eg, family law, employment law, inheritance law, property law, contract law, torts, company law), the existence of other relevant connections (eg, place of business establishment), as well as the nature of the claims or parties involved (eg, counterclaims or third-party claims). In particular, for contractual matters, a claim can be filed before the courts either at the domicile or registered office of the defendant, or at the place where the characteristic performance must be rendered (article 31 et seq of the SCCP). The same is also provided in the context of international proceedings (article 10 of the Swiss Private International Law Act (PILA)). In a recent decision, the Swiss Federal Supreme Court changed its practice regarding forum running in an international context and allowed for negative declaratory actions to be filed in Switzerland by a party fearing an action filed abroad by an opposing party; it held that such forum running was possible as far as a forum exists in Switzerland on the basis of the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or the PILA.

As to interim measures, unless the law provides otherwise, they can be ordered either by the court that has jurisdiction to decide the main action or the court of the place where the measure is to be enforced (article 13 of the SCCP). The same is also provided in the context of international proceedings (article 10 of the PILA). As to attachment proceedings in support of a monetary claim, they are regulated specifically by the Swiss Debt Enforcement and Bankruptcy Act (DEBA) (see question 11).

Limitation

3 | What are the time limits for starting civil court proceedings?

The initiation of civil proceedings is limited by the statute of limitations applicable to the underlying claim. However, there is no procedural statute of limitations limiting civil court proceedings as such.

As a rule, claims that arise out of a breach of contract become time-barred after 10 years unless otherwise provided by law (article 127 of the Swiss Code of Obligations (CO)). Some specific contractual claims become time-barred after five years, including:

- rent, interest on capital and all other periodic payments;
- delivery of foodstuffs;
- work carried out by tradesmen and craftsmen;
- purchases of retail goods;
- medical treatment;
- professional services provided by advocates, solicitors, legal representatives and notaries; and
- work performed by employees for their employers (article 128 of the CO).

A few contractual claims are subject to other statutes of limitations such as two years for a customer's general claim for defects in a contract for work (article 371(1) of the CO).

In general, the limitation period commences as soon as the debt is due (article 130 of the CO). The limitation period is interrupted if the debtor acknowledges the claim and, in particular, if the debtor makes interest payments or partial payments, or if debt enforcement or judicial proceedings are initiated by the creditor (article 135 of the CO). The effect of such interruption is that a new limitation period commences as of the date of the interruption (article 137 of the CO).

A claim for damages based on tort becomes time-barred one year from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it (but the timeframe will be extended to three years as of 1 January 2020), or 10 years after the date on which the loss or damage was caused, whichever is earlier. If the action for damages is derived from an offence for which criminal law provides for a longer limitation period, that longer period also applies to the civil law claim (article 60 of the CO).

If a claim has been acknowledged by public deed or confirmed by a court judgment, the new limitation period is always 10 years (article 137(2) of the CO).

There is, however, no statutory limitation regarding the enforcement of a judgment (Swiss or foreign).

Jurisdiction

4 | In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

Civil courts mainly have jurisdiction for contentious civil matters, court orders in non-contentious matters and court orders in matters of debt collection and bankruptcy law, as well as arbitration (article 1 of the SCCP).

The court examines ex officio whether the procedural requirements of a claim are satisfied. This includes, in particular, the subject matter, territorial jurisdiction of the court seized (articles 59 and 60 of the SCCP) as well as the immunity defence. A party can, however, object to the jurisdiction of the court as a preliminary matter. The court can thereupon decide to clarify this issue before entering into the merits of the case as a means to simplify the proceedings (article 125 SCCP).

If the court decides that it lacks jurisdiction, it closes the proceedings by deciding not to consider the merits of the case (article 236 of the SCCP). This decision is subject to either appeal (article 308 of the SCCP) or objection (article 319 of the SCCP), depending on the circumstances of the case. Conversely, the court may confirm its jurisdiction either in the final judgment on the merits or by way of an interim decision (although rare in practice) if a contrary appellate decision could end the proceedings and thereby save substantial time or cost. The interim decision can be challenged separately, but cannot later be challenged as part of the final judgment (article 237 of the SCCP).

CIVIL ASSET RECOVERY – PROCEDURE

Time frame

5 | What is the usual time frame for a claim to reach trial?

The trial phase is dedicated to the adjudication of the matter on its admissibility and merits. The trial phase must be preceded by a conciliation procedure (article 197 of the SCCP) subject to certain exceptions as foreseen by articles 198 and 199 of the SCCP. There is no conciliation in summary proceedings, and for certain actions arising from the DEBA. For financial disputes over 100,000 Swiss francs, the parties can jointly waive the conciliation phase, and if the defendant's place of residence is abroad or unknown, the claimant has the right to unilaterally waive conciliation.

For cases subject to a preliminary conciliation attempt, as a rule, a conciliation hearing is scheduled within two months of receiving the request for conciliation (article 203 of the SCCP). If no agreement is reached, the conciliation authority delivers an authorisation to proceed on the merits (ie, to proceed to the trial phase before court (article 209 of the SCCP)). In such a case, the claimant must file the claim on the merits within three months of receiving the authorisation to proceed (article 209(3) of the SCCP).

Once the action on the merits is filed, the time frame to reach a final decision on the claim largely depends on the complexity of the case. Approximately one or two years is a minimum for reaching final judgment at first instance.

Admissibility of evidence

6 | What rules apply to the admissibility of evidence in civil proceedings?

Under civil procedural rules, each party is entitled to have the court accept evidence that he or she offers in the required form and time frame (article 152 of the SCCP).

As to the form, the SCCP provides an exhaustive list of admissible means of evidence, which encompasses witness testimony, documents, expert opinions, inspection, written statements from official authorities or individuals (if witness testimony appears to be unnecessary), and interrogation of the parties (article 168 of the SCCP). Documentary evidence comprises audio recordings, films, electronic files and the like (article 177 of the SCCP).

Illegally obtained evidence is only considered by the court if there is an overriding interest in finding the truth (article 152(2) of the SCCP).

Witnesses

7 | What powers are available to compel witnesses to give evidence?

Witnesses, as third parties, have a duty to cooperate in the taking of evidence. In particular, they have the duty to make a truthful witness statement, produce physical records (with the exception of correspondence with lawyers provided that such correspondence concerns the professional representation of a party or third party) and allow an examination of their person or property by an expert (article 160 of the SCCP).

In certain cases, witnesses may, however, refuse to cooperate. Witnesses have an absolute right to refuse to cooperate if they have a family link or a close personal relationship to one of the parties (article 165 of the SCCP). In other specific cases, witnesses only have a qualified right to refuse to cooperate, which must be justified (article 166 of the SCCP). This relates, for instance, to cases where in establishing facts, witnesses would expose themselves or a close associate, as specified by law, to criminal prosecution or civil liability, or where a witness is bound by professional secrecy (eg, lawyers and clerics).

Furthermore, confidants of other legally protected secrets may refuse to cooperate if they credibly show that the interest in keeping the secret outweighs the interest in establishing the truth (article 166(2) of the SCCP). This provision could apply, for instance, to bankers who are otherwise bound by banking secrecy (article 47 of the Swiss Federal Act on Banks and Saving Banks). If a witness refuses to cooperate without justification, the court may impose a disciplinary fine of up to 1,000 Swiss francs, threaten sanctions under article 292 of the Swiss Criminal Code (SCC) (see question 12), order the use of compulsory measures or charge the third party the costs caused by the refusal (article 167 of the SCCP). There is, however, no such sanction as contempt of court under Swiss law.

Publicly available information

8 | What sources of information about assets are publicly available?

There are several publicly available sources that provide information on assets located in Switzerland. In particular:

- the commercial register provides information on companies (eg, share capital, legal seat, address, corporate purpose). Each canton maintains its own commercial register, which is freely accessible. A summary version of the commercial register is available online;
- the Swiss Official Gazette of Commerce, in addition to gathering some of the information published in every cantonal commercial register, provides information regarding bankruptcies, composition agreements, debt enforcements, calls to creditors, lost titles, precious metal control, other legal publications, balances and company notices;
- the land register records every single plot of land in Switzerland, with the exception of those in the public domain. Each canton maintains its own land register, which can be consulted upon the showing of a legitimate interest (eg, for purposes of contractual negotiations for the purchase of a property);

- the Swiss aircraft registry contains the records of all Swiss-registered aircraft and provides detailed information regarding the owner and the holder, the type of aircraft, its year of construction, the serial number, the maximum take-off mass and the fee according to its noise level;
- the debt enforcement and bankruptcy register records all debt collection proceedings filed against a debtor, and can be consulted upon request by anyone showing a prima facie legitimate interest;
- an unofficial will register that records wills and other testamentary dispositions. This register is, however, not exhaustive and only contains information that has been provided freely;
- in certain cantons (eg, Zurich, Bern, Fribourg, Saint-Gall, Vaud, Valais and Neuchâtel), it is possible, under specific conditions, to access information contained in a person's tax certificate; and
- judgments rendered by criminal and civil courts on the merits are accessible to the public (article 54 of the SCCP) either on the website of the relevant court in anonymized format or for consultation at the same (in which case a copy thereof can be provided after having been anonymised depending on the practice of the court).

There is no register of bank accounts in Switzerland. Swiss banking secrecy protects the privacy of banks' clients. However, banking secrecy is not unlimited and can be lifted in the context of criminal proceedings (see question 21), among others.

Cooperation with law enforcement agencies

9 | Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

A civil court may obtain information in writing from all 'official authorities' (article 190 of the SCCP). There is no list of entities falling under the definition of official authorities, but it should be interpreted broadly as encompassing every entity financed or subsidised by a public agency. Courts are, moreover, obliged to provide mutual assistance to each other (article 194 of the SCCP). A party to civil proceedings may request the civil court in charge of the matter to order the adverse party or another authority to provide specific information. Moreover, a civil court may be requested to take evidence at any time (ie, even before the initiation of proceedings) if the law grants such right to do so and the applicant credibly shows that the evidence is at risk or that it has a legitimate interest (article 158 of the SCCP).

As mentioned in question 8, information may be obtained from the Debt Collection Office regarding the debt enforcement and bankruptcy register records, as well as from civil courts. Moreover, a party to a civil dispute that is also a party to criminal proceedings on the same facts, if granted the right to access the criminal file, can use such information in the context of civil proceedings.

Third-party disclosure

10 | How can information be obtained from third parties not suspected of wrongdoing?

Third parties are subject to the same rules as witnesses for the taking of evidence, as described under question 7.

CIVIL ASSET RECOVERY – REMEDIES AND RELIEF

Interim relief

11 | What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

The law distinguishes between non-monetary and monetary claims. Although enforcement of the former is regulated by the SCCP, enforcement of the latter is regulated by the DEBA. Interim relief, both before a claim has been filed or during the proceedings, can be requested by way of interim measures for non-monetary claims, and attachment for monetary claims.

Courts can order any interim measure suitable to prevent imminent harm in support of a non-monetary claim (article 262 of the SCCP). In particular, such interim relief can take the form of an injunction, an order to remedy an unlawful situation, an order to a registry or third party, a performance in kind or the remittance of a sum of money (if provided by law). In practice, interim measures that are often requested are the registration of property rights in a public register, such as the land register. Interim measures can also be requested to prevent a party from disposing of assets such as company shares or movable property. In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated, the court may order the interim measure immediately and without hearing the opposing party (ie, ex parte) (article 265 of the SCCP). Moreover, although pretrial discovery is alien to civil procedure, the SCCP allows the taking of evidence before the initiation of legal proceedings exclusively in cases where the law grants the right to do so and evidence is at risk, or where the applicant has a justified interest (article 158 of the SCCP).

In the context of a monetary claim, assets could be frozen by way of attachment proceedings (article 272 et seq of the DEBA). Such attachment is granted ex parte and must thereafter be validated. In support of its application, the applicant must do the following prima facie:

- show a claim against the debtor;
- identify assets of the debtor in Switzerland that can be attached; and
- show that one of the specific grounds for attachment, as set out by law, exists (eg, if the debtor does not live in Switzerland and the claim has sufficient connection with Switzerland or is based on a recognition of debt, or if the creditor holds an enforceable title – judgment or award – against the debtor).

Non-compliance with court orders

12 | How do courts punish failure to comply with court orders?

If the court order provides for an obligation to act, to refrain from acting or to tolerate something, the enforcement court may do as follows:

- issue a threat of criminal penalty under article 292 of the SCC;
- impose a disciplinary fine not exceeding 5,000 Swiss francs;
- impose a disciplinary fine not exceeding 1,000 Swiss francs for each day of non-compliance;
- order a compulsory measure, such as taking away a movable item or vacating immovable property; or
- order performance by a third party (article 343 of the SCCP).

Moreover, failure to comply with an official order issued by a court under the threat of criminal penalty for non-compliance in terms of article 292 of the SCC is a criminal offence and gives rise to a fine.

Courts can accompany their orders directly with the above-mentioned execution measures. Such measures can also be requested separately by one of the parties to the enforcement court if the other fails to comply with a court order.

Obtaining evidence from other jurisdictions

13 | How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Requests for judicial assistance for the taking of evidence abroad must follow the legal framework applicable between Switzerland and the requested state (eg, bilateral or multilateral treaties such as the 1954 Hague Convention on Civil Procedure or the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters). In Switzerland, in the absence of a specific international instrument, such requests must be addressed to the Swiss Federal Office of Justice, which then transfers the requests abroad (article 11 of the PILA).

Assisting courts in other jurisdictions

14 | What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

Swiss courts will assist foreign courts in relation to proceedings of asset recovery (eg, service, taking of evidence, recognition and enforcement of foreign awards, interim measures) within the legal framework applicable between Switzerland and the requesting state. Save for the existence of other bilateral or multilateral agreements between the two states (eg, the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters), by default, Switzerland will apply the 1954 Hague Convention on Civil Procedure to foreign requests for service and the taking of evidence (article 11a(4) of the PILA).

Service of judicial or extrajudicial documents from abroad in Switzerland, as well as the taking of evidence in support of foreign proceedings, is considered as being the exercise of public authority on Swiss territory. Accordingly, the execution of such measures on Swiss territory, without passing through the channel of judicial assistance, constitutes a violation of territorial sovereignty and is a crime under Swiss law (article 271 of the SCC).

Causes of action

15 | What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

Under the law, a civil asset recovery action may be brought to court on the basis of many different causes of action (eg, contract law, tort law, inheritance law, property law).

In particular, contract-based claims may be filed for breach of contract (article 97 of the CO). If there is no contract between the parties, and if a person unlawfully causes a loss or damage to another, a tort-based action may be lodged (article 41 of the CO). This applies particularly to cases of fraud. Proprietary claims are also possible, notably in the event the owner has been deprived of its ownership (article 641 of the Swiss Civil Code (CC)). In insolvency and bankruptcy law, if the debtor has transferred assets or favoured certain creditors to the detriment of others, an avoidance action may be brought (article 285 et seq of the DEBA).

Remedies

16 | What remedies are available in a civil recovery action?

Remedies available under the law generally depend on the cause of action.

In the context of a contract, the claimant may request that the defendant be ordered to perform the contract in accordance with its precise terms (specific performance) (article 107(2) of the CO). Instead of asking for specific performance, the claimant may also choose to claim damages (article 97 of the CO). Other remedies are available for specific contracts (eg, contracts for work). Similarly, the remedy available for tort-based actions is damages.

The law provides for restitution in the event of unjust enrichment (article 62 et seq of the CO). In general, the claim for unjust enrichment is considered subsidiary to other, more specific, claims. Restitution is also the remedy available to the owner of an object deprived of its ownership (article 641 of the CC).

The law provides for an account of profits under specific circumstances. For instance, in the case of a contract of agency without authority, the principal is entitled to appropriate any resulting benefits where the agency activities were not carried out with the best interests of the principal in mind, but with those of the agent's (article 423(1) of the CO). An account of profits is also foreseen in relation to profits realised by the infringement of personality rights (article 28a(3) of the CC).

Judgment without full trial

17 | Can a victim obtain a judgment without the need for a full trial?

In certain circumstances, the law allows a judgment to be issued without a full trial. For instance, civil proceedings can continue and a judgment by default can be rendered even if the defendant is in default (articles 147, 206, 223 and 234 of the SCCP). In other specific cases, the trial is conducted pursuant to simplified or summary proceedings. Simplified proceedings apply, inter alia, to small cases (ie, where the value in dispute is below 30,000 Swiss francs) (articles 243 to 247 of the SCCP). Summary proceedings go even further in terms of simplification and expediency. They apply, in particular, to urgent requests and requests for interim measures (articles 248 to 270 of the SCCP). They also apply to 'clear-cut cases', which are non-contentious matters or matters where the facts can be immediately proven, or where the legal situation is straightforward and non-disputable (article 257 of the SCCP).

Post-judgment relief

18 | What post-judgment relief is available to successful claimants?

The successful claimant of a monetary claim can launch debt collection proceedings under the DEBA, which also allows for attachment proceedings depending on the circumstances (see question 11).

For a non-monetary claim, if the judgment provides for an obligation to act, to refrain from acting or to tolerate something, the successful claimant may request the court for execution measures as set out in question 12. If the judgment relates to a declaration of intent, the enforceable decision takes the place of the declaration. If the declaration concerns a public register, such as the land register or the commercial register, the court making the decision must issue the required instructions to the registrar (article 344 of the SCCP).

Enforcement

19 | What methods of enforcement are available?

As mentioned, the successful party can request execution measures in support of a non-monetary claim, such as the issuance of a threat of a criminal penalty under article 292 of the SCC or performance by a third party (article 343 of the SCCP) (see questions 12 and 18). Moreover, the successful party may demand damages, if the unsuccessful party does not follow the orders of the court or conversion of the performance due into the payment of money.

In turn, monetary claims can be enforced under the DEBA. Eventually, the proceedings set forth by the DEBA will lead to the seizure of any of the unsuccessful defendant's assets as well as garnishes (article 89 et seq of the DEBA), and their auctioning (article 125 et seq of the DEBA). The seizure of a real estate property will be automatically registered in the land register (article 101 of the DEBA).

Funding and costs

20 What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

The law does not prohibit litigation funding arrangements. Although a rather limited phenomenon in practice, funding of civil litigation may be available through specialised litigation financing companies. The law further allows lawyers and their clients to negotiate fee arrangements to a certain degree. Though pure contingency fee arrangements are prohibited, arrangements according to which an incentive may be paid depending on the success of the case are allowed under certain conditions, namely, when:

- a proper base remuneration is guaranteed regardless of the proceedings' outcome and which should cover actual costs incurred,
- the incentive does not exceed the base remuneration to avoid undermining the lawyer's independence or being perceived as an undue advantage; and
- the arrangement is agreed prior to the beginning of the mandate or at the end of the proceedings (as opposed to within the course of the mandate).

In principle, the court will charge the procedural costs, which encompass court costs and party costs as determined by cantonal tariffs (article 95 et seq of the SCCP), to the unsuccessful party (article 106 of the SCCP). Party costs include the reimbursement of necessary outlays, the costs of professional representation and, in justified cases, compensation for personal efforts if a party is not professionally represented. In general, cantonal tariffs are established based on the value in dispute, the complexity of the matter and the time spent. Unnecessary costs are, however, charged to the party that caused them (article 108 of the SCCP). In practice, the party costs awarded by the courts to the successful party do not cover the full cost of the litigation, which usually acts as a barrier for malicious proceedings. Courts have, however, no power to issue costs management orders.

CRIMINAL ASSET RECOVERY – LEGAL FRAMEWORK

Interim measures

21 Describe the legal framework in relation to interim measures in your jurisdiction.

The SCCrP provides for interim measures, in particular, in relation to the remand and preventive detention of the suspect, as well as to the seizure of assets or items under specific conditions (articles 224 et seq and 263 et seq of the SCCrP).

Such interim measures can only be ordered as follows:

- if it is permitted by law;
- if there is reasonable suspicion that an offence has been committed;
- if the aims cannot be achieved by less stringent measures; and
- if the seriousness of the offence justifies the measure (article 197(1) of the SCCrP).

According to article 263(1) of the SCCrP, items or assets belonging to a suspect, accused or third party may be seized, if it is expected that such items or assets will, as follows:

- have to be confiscated or used for the purpose of a claim for compensation (see questions 23 and 29);
- be used as evidence;
- be used as security for procedural costs or monetary penalties; or
- have to be returned to the persons suffering harm.

Furthermore, except in the case of a seizure ordered to secure procedural costs and monetary penalties, or claim for compensation, there must be a nexus between the items or assets seized and the offence committed. Fishing expeditions are not allowed under the law.

During preliminary proceedings (which start when the police begin an inquiry or the prosecutor opens an investigation), the seizure is ordered by the cantonal or the federal prosecutor, depending on the offence under investigation (article 22 et seq of the SCCrP). During trial proceedings (which start with the receipt by the court of the indictment rendered by the prosecutor), jurisdiction for seizure lies with the court (article 198(1) of the SCCrP).

A seizure is usually ordered on the basis of a written warrant (a 'seizure order') containing a brief statement of grounds (article 263(2) of the SCCrP). In cases of banking assets, the competent authorities can order the bank not to disclose the seizure to the suspect or accused, or any third-party holder of the seized bank account for a certain period. Swiss banking secrecy is lifted in the context of criminal proceedings.

The continued fulfilment of the conditions underlying a seizure order must be regularly examined by the criminal authorities. The longer the seizure is maintained, the stricter the review of such conditions will be. In the case of seizure of assets for the purpose of a future confiscation, it must appear prima facie that the assets should be confiscated (ie, that there exist sufficient grounds to suspect that an offence has been committed and that the assets seized have been used for, or are the proceeds of, this offence). To maintain a seizure of assets over a prolonged period, these suspicions must heighten and there must be a high likelihood of the existence of a causal link between the seized assets and the offence. If the conditions are no longer met, the seizure order must be revoked and the property or assets handed over to the person entitled to them (article 267(1) of the SCCrP). According to case law and doctrine, the persons affected by the seizure can request the seizure order to be revoked when there is a change in the circumstances of the case and, in particular, if the length of the proceedings becomes disproportionate.

Once a seizure order, or an order refusing to revoke the seizure, has been rendered, the suspect or accused, as well as third parties whose rights have been directly affected by the order, can file an objection within 10 days after they have been served with or informed of the order (articles 393 and 396 of the SCCrP). Such an objection is, however, subject to the demonstration of a legitimate interest in the quashing or amendment of the order (article 382(1) of the SCCrP). For assets held with a bank, only the account holder has such legitimate interest and thus the right to appeal, to the exclusion of the beneficial owner of assets.

Proceeds of serious crime

22 Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

Criminal authorities have the duty (ex officio or upon a criminal complaint) to investigate and, if necessary, to prosecute offences under their jurisdiction. In particular, they must identify, trace and seize the proceeds of offences depending on whether the seriousness of the offence justifies the measure (see question 21).

Additionally, pursuant to law provisions against money laundering, financial intermediaries or even, in certain circumstances, dealers (ie,

natural persons and legal entities that deal with goods commercially, and in doing so accept cash) must immediately file a report with the Money Laundering Reporting Office Switzerland (MROS) if they know or have reasonable grounds to suspect the following of the assets:

- they are the proceeds of a felony or a serious tax offence within the meaning of article 305-bis(1-bis) of the SCC;
- they are connected to an offence of money laundering or of participation or support to a criminal organisation;
- they are subject to the power of disposal of a criminal organisation; or
- they serve to finance terrorism (articles 9(1) and 9(1-bis) of the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (AMLA)).

Financial intermediaries are prohibited from informing the persons concerned or third parties that they have filed a report (article 10a of the AMLA).

The MROS has the power to forward the report to the competent prosecution authority for further investigation. It shall inform the financial intermediary concerned within 20 working days whether it will pass on the report to a prosecution authority (article 23 of the AMLA).

Financial intermediaries only seize the assets once apprised by the MROS that their report has been forwarded to the competent prosecution authority (article 10 of the AMLA). Prior to this information and during the analysis conducted by the MROS, financial intermediaries shall execute customer orders relating to the assets reported (article 9a of the AMLA). Upon transmission of the report by the MROS to the prosecution authority, this authority then becomes the competent authority for the seizure of the assets (article 10(2) of the AMLA).

Confiscation – legal framework

23 | Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

Confiscation is regulated by article 69 et seq of the SCC, which provides for the confiscation, irrespective of the criminal liability of any person, of the following:

- assets that have been acquired through the commission of an offence or that were intended to persuade the offender in the commission of an offence, or as payment thereof; and
- assets of a criminal organisation (ie, assets that are subject to the power of disposal of a criminal organisation, in particular, assets of a person who participated in or supported a criminal organisation).

Assets other than those belonging to a criminal organisation can only be confiscated as follows:

- if they are directly and immediately connected to the commission of an offence;
- if they are still available; and
- if they have not been passed on to the person harmed for the purpose of restoring the prior lawful position (article 70 of the SCC).

Regarding the calculation of the value of the benefit unlawfully obtained, see question 29.

As to the confiscation of assets acquired by a third party, see question 27.

The right to order the confiscation of assets is limited to seven years since the commission of the offence. However, if the prosecution of the offence is subject to a longer limitation period (article 97 of the SCC), this period applies (article 70(3) of the SCC).

Confiscation procedure

24 | Describe how confiscation works in practice.

Confiscation can be ordered within pending criminal proceedings with the final decision (article 267(3) of the SCCrP), or outside any criminal proceedings.

In the first case, the prosecutor has the competence to order confiscation by way of any decision ending the proceedings, such as a no-proceedings order (article 310 of the SCCrP), a ruling of abandonment of proceedings (article 320 of the SCCrP) or a summary penalty (article 352 of the SCCrP)). Similarly, the court has the competence to order confiscation within its final decision (article 351(1) of the SCCrP). When the requirements for the confiscation are fulfilled, the criminal authority must order the confiscation. The confiscation order is subject to appeal or objection depending on the nature of the decision that has been rendered (articles 322(2), 354 et seq and 399 of the SCCrP).

In the case of separate confiscation proceedings (ie, when a decision is made on the confiscation of property or assets outside criminal proceedings because, among other things, the Swiss authorities do not have jurisdiction over the offence (articles 376 to 378 of the SCCrP, see question 33)), they must be carried out at the place where the items or assets to be confiscated are located (article 37(1) of the SCCrP). The confiscation order can be challenged within 10 days by the person affected by the confiscation (articles 377(4) and 354 et seq of the SCCrP). Following the opposition, the court will render a decision or order, which can be further challenged within 10 days (article 393 et seq of the SCCrP).

Finally, in cases where confiscation is ordered within pending criminal proceedings or in separate confiscation proceedings, official notice must be given of the confiscation in order to protect the third parties' right on confiscated assets. If the person harmed or third parties are identified only after the final decision has entered into force, the assets or items confiscated may be restored to them provided that they claim their rights on the assets within five years of the date on which official notice is given (article 70(4) of the SCC).

Agencies

25 | What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

Generally, prosecutors have jurisdiction to investigate, trace and seize the proceeds of crime and to confiscate said proceeds, whereas the courts limit their role to the confiscation of assets. As to the competence and duties of financial intermediaries and the MROS, see question 22.

CRIMINAL ASSET RECOVERY – CONFISCATION

Secondary proceeds

26 | Is confiscation of secondary proceeds possible?

Pursuant to case law and doctrine, prosecutors or courts are allowed to confiscate secondary proceeds (assets or items). However, there must be a paper trail that demonstrates a nexus between the secondary proceeds to be confiscated and the offence committed. If the proof of such nexus cannot be provided, authorities would have to, should the requirements be fulfilled, uphold a claim for compensation (see question 29).

Third-party ownership

27 Is it possible to confiscate property acquired by a third party or close relatives?

Confiscation is not permitted if a third party (ie, any natural person or legal entity) has acquired the assets (after the commission of the offence), he or she has done so in ignorance of the grounds for confiscation and provided such person has paid a sum of equal value, or confiscation would cause him or her to endure disproportionate hardship (article 70(2)of the SCC). However, regardless of the foregoing, the assets are subject to confiscation if the third party (eg, a corporation) received the assets directly from the offence.

Expenses

28 Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

There is no specific provision under the law on the recovery by criminal authorities of the costs of tracing and confiscating assets. Such costs can, however, be considered part of the procedural costs and can be borne by the accused if he or she is convicted or, absent any conviction, if he or she unlawfully and wrongfully caused the opening of criminal proceedings (articles 426(1) and 426(2) of the SCCrP), or paid by means of seized assets (article 268 of the SCCrP).

Value-based confiscation

29 Is value-based confiscation allowed? If yes, how is the value assessment made?

Value-based confiscation is permitted if the assets subject to confiscation are no longer available (ie, in particular if there is a breach in the paper trail between the proceeds to be confiscated and the offence committed). In such a case, the court may uphold a claim for compensation by the state in respect of a sum of equivalent value (article 71 of the SCC). The amount of compensation must be equivalent to the value of the assets, would the assets still be available for confiscation. To calculate the amount of compensation, the question of whether the gross or the net income shall be taken into consideration is controversial. Courts usually apply – and under certain exceptions – the criterion of the gross income in relation to illicit trade. The value must be determined at the time the assets became unavailable.

Burden of proof

30 On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

As a rule, the burden of proof in a confiscation procedure lies with the criminal authorities. However, regarding the assets of a person who participated in or supported a criminal organisation, it is presumed that the assets are subject to the power of disposal of the organisation, and can thus be confiscated, until the contrary is proven (article 72 of the SCC).

Using confiscated property to settle claims

31 May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

If the assets have not been passed on to the person harmed for the purpose of restoring the prior lawful position, and are hence subject to confiscation, confiscated property or compensatory claims may be used in the satisfaction of civil claims for damages, or moral satisfaction arising from an offence, up to the amount set by a court or agreed in a settlement, and subject to the following conditions:

- the person claiming compensation has suffered harm as a result of a felony or a misdemeanour;
- the person is not entitled to benefits under an insurance policy;
- it is anticipated that the offender will not pay damages or satisfaction; and
- the person harmed assigns the corresponding element of the claim to the state (article 73(1) and (2) of the SCC).

Confiscation of profits

32 Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?

Under article 70 of the SCC, all financial advantages obtained through the commission of a criminal offence can be confiscated. For instance, in case of a company's profit obtained after a corrupt public procurement process, such profit must be confiscated. Even if it is considered that the corporation is not criminally liable and hence is a third party, article 70(2) of the SCC does not apply when the company profited directly from the corrupt public procurement process (see question 27). Finally, as already underlined, the question of whether the gross or the net income shall be taken into consideration is controversial (see question 29).

Non-conviction based forfeiture

33 Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

The SCCrP provides specific procedural rules allowing for a confiscation decision to be made independently of criminal proceedings (articles 376 to 378). First, property or assets that will probably be confiscated in independent proceedings are seized (article 377(1) of the SCCrP). If the requirements for confiscation (article 69 et seq of the SCC) are fulfilled, the prosecutor orders their confiscation and gives the person concerned the opportunity to file observations (article 377(2) of the SCCrP). Conversely, if the requirements are not fulfilled, the prosecutor must order the abandonment of the proceedings and return the property or assets to the entitled person (article 377(3) of the SCCrP).

The prosecutor or the court must also decide whether to accept the application made by the person suffering harm for the confiscated property or assets to be used for his or her benefit (article 378 of the SCCrP).

For legal challenge, see question 24.

Finally, within criminal proceedings, the prosecutor can order a confiscation within a no-proceedings order or a ruling of abandonment of proceedings (see question 24).

Management of assets

34 After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

As a rule, the holder of the assets or items that have been seized must hand them over to the competent criminal authority (article 265(1) of the SCCrP). As an exception, in certain circumstances, the following persons can refuse to hand over seized property:

- the suspect or accused;
- the persons who have the right to remain silent or to refuse to testify; and
- the corporate undertakings, if by doing so they could incriminate themselves (article 265(2) of the SCCrP).

The authority must safeguard the property and assets appropriately (article 266(2) of the SCCrP). It cannot use the assets as its own. Property that is subject to rapid depreciation or that requires expensive maintenance, as well as securities or other assets with a stock exchange or market price, may be sold immediately in accordance with the DEBA, and the proceeds of sale seized (article 266(5) of the SCCrP). The investment of seized assets is further regulated by the Federal Ordinance on the Investment of Seized Assets.

In practice, private managers of assets continue to manage them under the surveillance of the prosecutor. If tax must be paid or costs have been incurred, the prosecutor must give its consent before the payments are made.

CRIMINAL ASSET RECOVERY – CROSS-BORDER ISSUES

Making requests for foreign legal assistance

35 Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

Requests for international legal assistance concerning provisional measures must follow the legal framework applicable between Switzerland and the requested state (eg, bilateral and multilateral agreements such as the 1959 European Convention on Mutual Assistance in Criminal Matters, the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and the 1985 Convention Implementing the Schengen Agreement). Absent any applicable agreement, the request must follow the rules set up by the law of mutual legal assistance in criminal matters of both countries (ie, in Switzerland, the Federal Act on International Mutual Assistance in Criminal Matters (IMAC)).

Complying with requests for foreign legal assistance

36 Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

In an international context, Swiss authorities may grant a foreign state request for interim measures (eg, the seizure of assets) to preserve an existing situation, to safeguard threatened legal interests or to protect jeopardised evidence, provided that proceedings under the IMAC do not clearly appear inadmissible or inappropriate (article 18(1) of the IMAC).

Upon the request of a foreign state, seizure of assets is usually ordered by the prosecutor after delegation from the Federal Office of Justice (article 198(1)(a) of the SCCrP). Moreover, if any delay would jeopardise the proceedings and if there is sufficient information to determine whether all the conditions are met, the Federal Office of Justice may order the seizure of assets as soon as a request is announced. However, such measures are revoked if the requesting state does not make the request of mutual legal assistance within the deadline set by the Federal Office of Justice (article 18(2) of the IMAC).

The seizure of assets on Swiss territory is considered to be within the exclusive jurisdiction of Swiss public authorities, and the execution of such measure on Swiss territory without passing through the channel of legal assistance constitutes a violation of Swiss territorial sovereignty, and is a criminal offence (article 271(1) of the SCC).

Usually, provisional measures remain in force until a final decision on the request for legal assistance is rendered. If objects and assets are to be handed over to the requesting state based solely on a final and enforceable order of that state (article 74a(3) of the IMAC), assets will remain seized until such order is issued or the requesting state notifies the competent executing authority that such an order may no longer be issued, in particular owing to the lapse of time (article 33a of the Federal Ordinance on International Mutual Assistance in Criminal Matters).

Switzerland enacted specific rules regarding the seizure, confiscation and restitution of illicit assets of politically exposed persons (PEPs) located in Switzerland, which provides for a subsidiary solution to mutual legal assistance, such as the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (FIAA). The FIAA provides, in particular, the preventive administrative seizure of assets of PEPs for the purposes of mutual legal assistance as follows:

- when the government of the state of origin has lost power or a change in power appears inexorable;
- when the level of corruption in the state of origin is notoriously high;
- when the assets are likely to have been acquired through corruption, misappropriation or other crimes; and
- when the safeguard of Switzerland's interests requires such seizure.

The FIAA further provides for the continuous administrative seizure of assets of PEPs already seized within mutual legal assistance proceedings for the purposes of confiscation. This applies in case of failure of mutual legal assistance because the state of origin qualifies as a failing state (ie, it is unable to satisfy the requirement of mutual legal assistance proceedings owing to the total or substantial collapse or failures of its national judicial system) or proceedings in the state of origin may not meet the basic procedural requirements of the European Convention on Human Rights or the International Covenant on Civil and Political Rights. Frozen assets can further be confiscated if a PEP's assets are of illicit origin, which is presumed when the wealth of the PEP has increased inordinately, facilitated by the exercise of a public function, and the level of corruption in the state of origin or surrounding the PEP in question was notoriously high during his or her term of office.

Treaties

37 To which international conventions with provisions on asset recovery is your state a signatory?

Switzerland is party to several international conventions with provisions on asset recovery, in particular, the following:

- the 1959 European Convention on Mutual Assistance in Criminal Matters;
- the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;
- the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the 1999 European Criminal Law Convention on Corruption;
- the 1999 UN Convention for the Suppression of the Financing of Terrorism;
- the 2000 UN Convention against Transnational Organized Crime; and
- the 2003 UN Convention against Corruption.

CRIMINAL ASSET RECOVERY – PRIVATE PROSECUTIONS

Private prosecutions

38 Can criminal asset recovery powers be used by private prosecutors?

Not applicable.

UPDATE AND TRENDS

Emerging trends

39 Are there any emerging trends or hot topics in civil and criminal asset recovery in your jurisdiction?

The recognition of foreign bankruptcy proceedings in Switzerland was significantly simplified as a result of the revision of the chapter on cross-border insolvencies of the PILA (effective as of 1 January 2019). Prior to that date, foreign proceedings were recognised in Switzerland only provided they were held in states that, according to the principle of reciprocity, would recognise Swiss bankruptcies, which often resulted in lengthy and costly proceedings. The reciprocity criterion has now been abandoned. In addition, while only foreign bankruptcy proceedings held at the debtor's domicile or registered seat were formerly recognised in Switzerland, bankruptcy proceedings carried out at the place where the debtor has the 'centre of his or her main interests' (COMI) are now also recognised. Finally, the revised PILA limits the need for a Swiss ancillary bankruptcy to cases where creditors would need protection in Switzerland. Therefore, absent any claim falling within the scope of a Swiss ancillary bankruptcy, foreign insolvency liquidators may directly carry out any asset recovery measure deemed appropriate in Switzerland, insofar as they are permitted by the law of the state in which the foreign bankruptcy proceedings are held (subject to compliance with the Swiss rules pertaining to the protection of the principle of Swiss sovereignty (eg, article 271(1) of the SCC)).

The Swiss government is further revising the Swiss rules on money laundering with a view to impose stricter obligations on financial intermediaries (including lawyers and notaries, which may qualify as 'advisers') especially as to their duty to report their possible suspicious findings to the MROS. While the context of growing international pressure for transparency by the Financial Action Task Force (FATF/GAFI) evidently requires improvement, it is to be feared that tightening the rules will merely result in overburdening the MROS, which is already facing a massive influx of (often unjustified) denunciations from overcautious financial intermediaries (ie, 31 per cent more denunciations in 2018 than in 2017).

The conditions for exemption from punishment against reparation (article 53 of the SCC) have also been tightened. This provision is sometimes favoured by local prosecution authorities to deal with complex white-collar crime cases as it permits avoiding the burden of bringing an investigation or trial to the end, while obtaining monetary reparation from the offender. Used in Geneva in the *HSBC* and *Addax* cases or more recently, in the *Teodorin Obiang* case, the use of this provision was frequently criticised as being the sole privilege of wealthy companies or individuals intending to escape criminal liability by paying a monetary reparation, thus circumventing the punitive rationale of the law. Since 1 July 2019, the scope of application of this provision has been (i) limited to non-serious offences (ie, offences that are subject to a suspended sentence of up to one-year imprisonment or a suspended financial penalty or a fine (compared to a suspended sentence of up to two years of imprisonment previously)) and (ii) subject to the (new) condition that the accused has admitted the facts (similarly to other negotiated procedures, such as the simplified procedure (articles 358 to 362 of the SCCrP) and the penalty order (articles 352 to 356 of the SCCrP)).

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