



negotiations on the participation of the GRECO, in order to contribute to more coordinated anti-corruption policies in Europe.

It invites the Committee of Ministers to instruct the Secretary General of the Council of Europe to ensure that the training programs implemented by Council of Europe bodies include curricula specifically dedicated to the fight against corruption.

Finally, having regard to the growing need for a Europe-wide regulatory framework in respect of lobbying, the high level of expertise of the Council of Europe's specialized bodies, the extensive studies already carried out and the solid data collected by them on lobbying, the PACE invites the Committee of Ministers to launch a feasibility study on lobbying in the light of which further standard-setting work could be considered.

D. Switzerland – Draft Federal Act on the Freezing and Restitution of Ousted Potentates' Assets

by Alexander Troller and Sandrine Giroud¹

Introduction

Contrary to its undeserved reputation as a safe harbour for assets of dubious origin, Switzerland has a long established tradition of facilitating the freezing, confiscation, and restitution of funds diverted by unscrupulous leaders and their accomplices. Several billion dollars of embezzled funds have over the last 25 years been returned to countries such as the Philippines, Nigeria, and Peru.² However, in the wake of the Arab spring, the Ben Ali, Mubarak, and Gaddafi cases highlighted what the Swiss government considers as legal shortcomings. To address them, it recently revealed a draft bill,³ which commentators already describe as a worldwide novelty.

The planned Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means specifically covers the freezing, confiscation, and restitution of assets obtained unlawfully and deposited in Switzerland by foreign potentates who have been or are about to be ousted.

Switzerland's Militant Tradition of Taking Action against Potentates' Assets

The media frenzy surrounding the discovery of potentates' assets in Swiss banks has repeatedly turned into an embarrassment for Swiss officials. Switzerland, however, already features an elaborate preventive, repressive, and mutual legal assistance system which rests on both domestic legislation, international treaties, and militant cooperation with multilateral agencies. Yet, this regime has proven insufficient in particular when faced with so-called failing (or failed) states, i.e. requesting states that are unable to file requests for mutual legal assistance or to cooperate as they should to satisfy mutual legal assistance requirements, because either of a lack of capacity or political will. The Mobutu (DRC) and Duvalier (Haiti) cases are typical illustrations of such Kafkaesque legal nightmares. In the former case, Switzerland had no other legal alternative but to ultimately release long frozen assets to relatives of the former dictator.

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² Swiss Federal Department of Finance, *Assets obtained unlawfully by politically exposed persons (PEPs)*, available at <http://www.efd.admin.ch/dokumentation/zahlen/00579/00607/01470/index.html?lang=en> (last visited 10 July 2013).

³ Press release of the Swiss Federal Department of Foreign Affairs of 22 May 2013, *The Federal Council opens the consultation procedure on the draft of the federal act on the freezing and restitution of potentates' assets*, <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=48933> (last visited 11 August 2013).



Where the country of origin is unwilling or unable to cooperate, the Swiss government currently has no other choice but to rely on the general powers entrusted by the Constitution “to defend Switzerland’s interests”⁴ in order to temporarily freeze the relevant assets. Various experts and scholars criticised invoking such urgent constitutional powers as a fall-back remedy to loopholes in the financial legislation for it lacks a valid legal basis and runs afoul of the rule of law. It also led to several adverse decisions of the Swiss Federal Supreme Court,⁵ which is yet to rule on certain of Duvalier’s assets frozen since 1986.

In light of the Mobutu and Duvalier precedents, the Swiss government has already adopted the Restitution of Illicit Assets Act (“**RIAA**”) on October 1, 2010. Targeting assets of illicit sources deposited in Switzerland by politically exposed persons (“**PEPs**”), the RIAA provides for a subsidiary solution to mutual legal assistance and allows for the freezing, forfeiture, and restitution of assets where the requesting state has failed to satisfy mutual legal assistance requirements for the return of the assets.

Legal Loopholes Illustrated by the Arab Spring

The immediate political response of the Swiss government to the Arab spring in early 2011 took the form of a preventive freezing of assets which the Tunisian, Libyan, and Egyptian heads of state and their entourage had held with Swiss banks. Yet, in the absence of any international sanctions applicable as such in Switzerland, the Swiss government relied once more on special constitutional powers.⁶

The Swiss government claimed, before the international community, that it prevented a potential flight of assets of possibly illegal source. It also pledged to support foreign judicial authorities in prosecuting their now loathed ex-leaders and to answer requests for mutual legal assistance in criminal matters, an offer which Egyptian and Tunisian authorities promptly did.

Criticized anew for ruling by decree based on constitutional powers, the Swiss government instructed the Federal Department of Foreign Affairs in May 2011 to elaborate a formal legal basis for the conservatory freezing of assets of PEPs ousted or about to forcibly lose power.

A Revolutionary Bill – At What Cost for Fundamental Rights?

The aim of the new bill is to streamline the identification, freezing, and restitution of assets embezzled by foreign potentates deposed or about to be ousted. It thereby purports to consolidate Switzerland’s existing legal framework and practice and set a new legal basis for governmental action outside traditional channels of mutual legal assistance, primarily through:

- The provisional freezing of assets of PEPs in view of an anticipated request for mutual legal assistance, provided that (i) the government or part of the government of the country of origin has lost power or is about to be overthrown; (ii) the country of origin is notorious for suffering from a high degree of corruption; (iii) the assets are controlled or beneficially owned by PEPs or closely related parties who are suspected of having acquired such assets by corruption, embezzlement, or other crimes; and (iv) safeguarding Switzerland’s interests calls for such freezing;

4 Article 184(3) of the Swiss Constitution provides that “[w]here safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.”

5 E.g. Decision of the Swiss Federal Supreme Court of 12 January 2010 1C_374/2009 (*Duvalier* case).

6 The Libyan freezing order, issued based on constitutional powers, was replaced on 30 March 2011 by measures adopted under the Federal Act of 22 March 2002 on the Implementation of International Sanctions (the “Embargo Act”) which were also a duplicate of the UN sanctions.



- The provisional freezing of assets of PEPs in case of a failed request for mutual legal assistance when the state of origin qualifies as a failing state, provided that (i) the assets have been frozen in connection with a mutual legal assistance request; (ii) the assets are controlled, or beneficially owned, by PEPs or closely related parties; (iii) the state of origin qualifies as a failing state as already provided by the RIAA; and (iv) safeguarding Switzerland's interests requires that such assets be frozen.

In addition, the bill foresees:

- The limitation of such freezing measures to an initial period of four years, renewable for a period of one year, but with an absolute limit of ten years;
- The obligation for any individual or corporation holding assets of supposed potentates or with knowledge of the existence of such assets to report them to the Swiss government (e.g. banks or other financial intermediaries, but also lawyers or notaries even where their activity is supposedly covered by statutory professional secrecy privileges);
- Targeted measures to support the state of origin in its efforts to obtain the restitution of assets of criminal origin transferred abroad, such as technical assistance by training the foreign authorities or the delegation of Swiss experts in the state of origin, or – more importantly – by transferring information including banking information, to enable the state of origin to prepare or complete a request of mutual legal assistance;
- The independent confiscation of potentates' assets by Swiss authorities in case the state of origin qualifies as a failing state (as already provided for under the RIAA);
- The exclusion of third parties' rights on the assets unless such right is (i) a right in rem (ii) which has been acquired in good faith in Switzerland or abroad but has then been recognized by a judgment enforceable in Switzerland;
- The restitution of potentates' assets by financing programs of public interest.

The bill is truly revolutionary by specifically targeting assets of ousted rulers or leaders about to be deposed. An open cause of concern is that it would allow the freezing and confiscation of assets where mutual assistance may not be granted as a result of the state of origin's failure to meet basic procedural requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR"), or of the International Covenant on Civil and Political Rights of 16 December 1966 ("ICCPR"), otherwise standard requirements under mutual legal assistance proceedings. Another exception to these basic procedural rules is the power that would be granted to Swiss officials to communicate information, in particular banking information, to the state of origin by circumventing applicable mutual assistance rules whenever this may help the state of origin to file or complete a request for mutual legal assistance.

Conclusion

Largely a political process, the proposed bill openly sidesteps well accepted procedural safeguards in another attempt at boasting Switzerland's reputation as a poster child in the global fight against impunity. The criticism expressed by scholars and prosecution authorities alike translates a widespread unease at the circumvention of prerogatives which other democracies leave with their criminal prosecution authorities and courts. This notwithstanding, the political sensitivity of the subject and the support to be expected by media for the new bill may well result in a mere rubber-stamping by parliament, expected to occur in the course of 2014.



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