

## SWITZERLAND

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# Draft Federal Act on the Freezing and Restitution of Potentates' Assets

In the wake of the Arab Spring, the Swiss government has decided to take yet another step to tackle the haunting issue of potentates' assets.<sup>1</sup>

In spite of its undeserved reputation as a safe haven for potentates' assets, Switzerland has a long established tradition of facilitating the freezing, confiscation and restitution of assets diverted by unscrupulous political leaders as well as their relatives and associates. Over the last 25 years, several billion dollars of embezzled funds have been returned to their countries of origin.<sup>2</sup> Recently, however, the *Ben Ali*, *Mubarak*, and *Gaddafi* cases revealed what the Swiss government considers to be legal shortcomings which it intends to address by way of a new piece of legislation.

Described as 'the first of its kind in the world', the preliminary draft of the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means (FRAPA) aims at regulating comprehensively the freezing, confiscation and restitution of assets which foreign potentates, ousted or about to be deposed, have obtained by unlawful means and deposited in Switzerland. The consultation procedure regarding FRAPA was launched on 22 May 2013.

## Swiss tradition of taking action against potentates' assets

Potentates – or so-called '*kleptocrats*' – are defined as heads of state, high public officials, or other politically exposed persons (PEPs) who illegally enrich themselves by misappropriating public funds. Assets acquired through corruption or other criminal acts are typically diverted and sent out of their home country for safekeeping in international financial centres.

The Swiss government considers that the issue of potentates' assets is damaging to the reputation and interests of the country and has an established tradition of acting towards the restitution of such assets to their country

of origin. Switzerland can already rely on an elaborate system based on prevention and mutual assistance which rests on five pillars:

- preventing corruption;
- identifying the asset holder and the origin of the funds (so-called 'Know Your Customer' rules);
- reporting and freezing of assets in case of suspicion of money laundering;
- mutual assistance in criminal matters (either based on a treaty or on the Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (IMAC)); and
- returning assets obtained by illegal means. Mutual assistance in criminal matters has already allowed Switzerland to return to the relevant country of origin approximately US\$1.7bn embezzled by PEPs such as Ferdinand Marcos (Philippines), Sani Abacha (Nigeria) and Vladimiro Montesinos (Peru).

A generally effective tool, mutual assistance in criminal matters, however, failed to solve particularly complex matters, as shown by the *Mobutu* (Democratic Republic of Congo – DRC) and *Duvalier* (Haiti) cases. These matters involved so-called 'failing' (or 'failed') states, that is, requesting states that are unable to file requests for mutual legal assistance or to cooperate as required, either because of a lack of capacity (Haiti) or political will (DRC). In the *Mobutu* case, Switzerland had ultimately no other legal alternative but to release the long frozen assets to relatives of the former dictator.

Where the country of origin of the diverted assets is unable or unwilling to file a request for mutual assistance or to cooperate under applicable mutual assistance channels, the Swiss government, in order to temporarily freeze such assets, currently has no choice but to rely on its general powers entrusted by the Swiss federal Constitution 'to defend Switzerland's interests'.<sup>3</sup> Invoking urgent constitutional powers as a fallback solution to possible loopholes in financial legislation



has been criticised by various experts and scholars as lacking a valid legal basis and running afoul of the rule of law. It also led to several adverse decisions of the Swiss Federal Supreme Court,<sup>4</sup> which is yet to rule on 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 1 October 2010. To address situations of illicit PEP's assets deposited in Switzerland, RIAA provides for a subsidiary solution to mutual legal assistance and allows for the freezing, forfeiture, and restitution of assets in cases where the requesting state has failed to provide sufficient legal grounds to have the assets returned.

### Shortcomings illustrated by the Arab Spring

The violent and popular uprisings in Tunisia and Egypt in early 2011 prompted the Swiss government to take preventive measures by freezing assets which the Tunisian, Libyan and Egyptian heads of state, PEPs and their entourage, held with Swiss banks. Again, constitutional powers had to be invoked.<sup>5</sup> The Swiss government also made use of these special powers to freeze assets of Laurent Gbagbo, former president of Ivory Coast.

Through these urgent measures, the Swiss government claimed to have prevented the possible flight of assets suspected to have been obtained by illegal means. It also pledged to support foreign judicial authorities in the opening of domestic criminal proceedings and encouraged them to request Switzerland for assistance in criminal matters, which Egypt and Tunisia in particular promptly did.

Faced again with criticism for using yet another decree based on constitutional powers, the Swiss government instructed in May 2011 the Federal Department of Foreign Affairs to elaborate a formal legal basis for the conservatory freezing of assets of PEPs ousted or about to lose power.

### Solutions suggested by the Swiss government

The aim of FRAPA is to streamline the identification, the freezing and the restitution to their state of origin of assets embezzled by PEPs deposed or about to be ousted. FRAPA consolidates current Swiss practice and legal basis, such as RIAA, and provides a legal basis for governmental action outside the framework of mutual legal assistance proceedings.

FRAPA's key features are:

- The provisional freezing of assets of PEPs in view of an anticipated request for mutual legal assistance, the aim being to prevent in the meantime the dissipation of assets, provided that:
  - the government or part of the government of the country of origin has lost power or is about to be overthrown;
  - the country of origin is notorious for a high degree of corruption;
  - 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
  - safeguarding Switzerland's interests requires the freezing of such assets;
- The provisional freezing of assets of PEPs in case of failure of a mutual legal assistance request when the state of origin qualifies as a 'failing' state (as already provided by RIAA), provided that:
  - the assets have been frozen in connection with a mutual legal assistance request;
  - the assets are controlled, or beneficially owned, by PEPs or closely related parties;
  - the state of origin is unable to satisfy the Swiss procedural requirements for mutual legal assistance because of the collapse of its entire judicial apparatus – or of a substantial part thereof; and
  - safeguarding the interests of Switzerland requires that such assets be frozen;
- 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 PEPs or with knowledge of the existence of such assets to report to the Swiss government;
- 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 PEPs' assets by Swiss authorities, that is, in the absence of a valid request of mutual legal assistance or of a foreign judgment of confiscation from the state of origin, in

particular where the state of origin qualifies as a 'failing' state (as already provided for under 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 recognised by a judgment enforceable in Switzerland; and
- The restitution of potentates' assets by financing programmes of public interest.

FRAPA goes beyond the boundaries of international assistance in several respects. At the risk of political opportunism, the proposed law specifically targets the freezing of assets of PEPs who are still in power but appear as though they are about to be ousted. More worryingly, FRAPA further allows for the freezing and confiscation of assets where mutual assistance may not be granted because the state of origin may not meet the basic procedural requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR), or the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR), an otherwise standard and well accepted requirement under mutual legal assistance proceedings.<sup>6</sup> Another exception to these basic procedural standards is the power granted to Swiss authorities to transfer information, in particular banking information, to the state of origin by circumventing applicable mutual assistance rules where this may help the state of origin to file a request for mutual legal assistance or to complete a request for mutual legal assistance already filed with Swiss authorities. Finally, in addition to sidestepping current procedural safeguards, the suggested mechanism would largely be a political process granting Swiss authorities the discretion to take measures in view of preserving Switzerland's reputation as a respectable financial centre and a proponent of the global fight against impunity.

## Conclusion

FRAPA is yet another piece of Switzerland's legislative innovations against the laundering of proceeds of international corruption and the looting of public assets by potentates with the aim to preserve its financial centre's reputation. Yet, it raises fundamental questions as to the political nature of the decision-making process, the procedural rights of defendants and the claims of affected third parties, such as the victims of potentates, to name only a few.

While leading European countries such as Germany, France, Spain or the United Kingdom have so far generally refused to confiscate assets through mere administrative proceedings in the absence of a request for mutual assistance, in particular where basic procedural safeguards as set out by the ECHR or the ICCPR are not met, Switzerland is about to take drastic action which would go largely beyond the traditional framework of mutual legal assistance at the risk of ignoring basic fundamental procedural rights.

FRAPA's consultation procedure runs until 12 September 2013, after which a final draft will be submitted for parliamentary approval. It remains to be seen whether the suggested innovations and their related legal issues, as already criticised by several experts, will lead to a heated debate or be merely rubber-stamped by the Swiss legislator.

## Notes

- 1 The authors would like to thank their colleague Alexander Troller for his thoughtful review and comments.
- 2 Swiss Federal Department of Finance, *Assets obtained unlawfully by politically exposed persons (PEPs)*, [www.efd.admin.ch/dokumentation/zahlen/00579/00607/01470/index.html?lang=en](http://www.efd.admin.ch/dokumentation/zahlen/00579/00607/01470/index.html?lang=en) (last visited 10 July 2013).
- 3 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.'
- 4 For example, Decision of the Swiss Federal Supreme Court 1C\_374/2009 of 12 January 2010 (*Duvalier* case).
- 5 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.
- 6 Article 2(a) of the IMAC.



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# Anti-Corruption Committee News

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