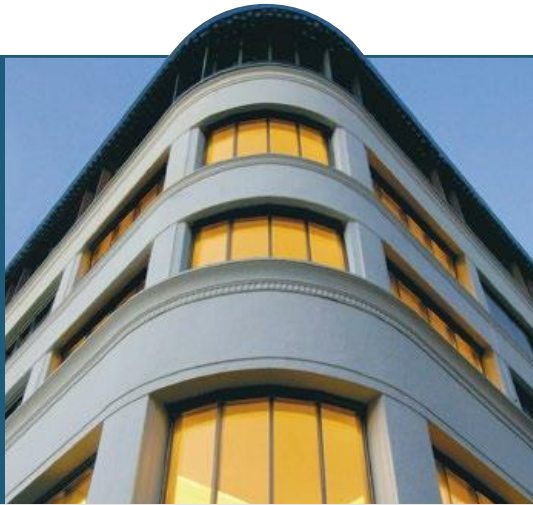


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How Private Prosecutions can be Used as a Weapon in Civil Fraud Case

Dr Marc Henzelin LL.M

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Private prosecutions in Switzerland

- Swiss law does not provide for private prosecutions as such but offences which are prosecuted ex officio and other which are only on the basis of criminal complaint
- Exclusive competence of prosecution by prosecution authorities (Prosecutors; police under the authority of a Prosecutor; in Switzerland, one Federal Prosecution Service and 25 Cantonal Prosecution Services)
- Obligation to commence and conduct proceedings in case of crimes and most misdemeanours (art. 7 CrimePC)

Conceivable scenarios

1. A civil claim for damages in the framework of a criminal proceeding (art. 122 ff. CrimPC)
 - The Swiss legal system allows victims of criminal offences, under certain conditions, to take part in criminal proceedings; possibility for the Tribunal to sever the procedures
2. Allocation by the State to the aggrieved party (art. 73 SCC)
 - The aggrieved party may require the court to grant in compensation for his damage the amount of the fine paid by the offender and objects and assets that have been forfeited; usually post judgment procedure
3. Parallel criminal / civil proceedings

1. Civil claim for damages in the framework of a criminal proceeding (art. 122 ff. CrimPC)

- The same judge who decides on the conviction and sentencing of the accused will also decide on the civil damages
- In order to be admitted as a civil party and to claim damages in the framework of a criminal proceeding, the civil party has to satisfy three conditions, namely :
 - 1) a harm (prima facie; ≠ damages or financial interests);
 - 2) a criminal offence (not to be proven); problem of “cases predominantly of civil nature”);
 - 3) a causal connection between the criminal offence and the harm suffered.

1. Civil claim for damages in the framework of a criminal proceeding (art. 122 ff. CrimPC)

- Advantages of being a civil party in a criminal proceedings
 - Does not have to initiate civil proceedings; free to proceed;
 - Burden of proof - at least of the illicit conduct - on the prosecution authorities;
 - Access to evidence of the criminal file;
 - Can request investigative measures and pressure prosecution authorities to bring the case to court
- Risks
 - The judge / Court can enjoin the civil party to act in another procedure
 - The judge / Court can put costs on the civil Party in case of acquittal (427 CCP)

2. Allocation to the aggrieved party by the State (art. 73 SCC)

- If it is anticipated that the offender will not pay damages or satisfaction, the damages can be recovered from:
 - a. the monetary penalty or fine paid by the offender;
 - b. objects and assets that have been forfeited, or the proceeds of their sale after deduction of expenses;
 - c. compensatory claims;
 - d. the amount of the good behaviour bond.
- The judge orders such an award at request and only if the person harmed assigns the corresponding claim to the State
- Can be requested in the course of the criminal proceedings or after the confiscation / forfeiture order (time limit: 5 years)

3. Parallel criminal / civil proceedings

- Use of files from the criminal case in parallel civil proceedings in Switzerland or in a foreign country
 - No “investigation secrecy” in Switzerland (unless France): the **parties** (i.a. private claimant) and the **persons involved in the proceedings** (under certain conditions) may access the documents related to the criminal proceedings (101.1 CCP) and copies of the documents may be taken (102.3 CCP);
 - **Third parties** (such as a seized person, witnesses etc., even journalists) may do so if they have an interest «worthy of protection» (101.3 CCP)

3. Parallel criminal / civil proceedings

- Parallel proceedings depends on :
 - The willingness of the claimant – more favourable forum (ex: Switzerland / US if higher damages in US - libel in the UK)
 - (Lack of) jurisdiction of the Swiss Courts over the claim for civil damages and no confiscation
 - Under Swiss private international law, the fact that a party has been recognized as a civil party in criminal proceedings does not create *per se* a ground for jurisdiction over a civil claim for compensation before the Court seized of the criminal proceedings.
 - Risk: the Prosecutor or Court may refuse to proceed if there is a parallel criminal proceeding in another country (art. 7 para. 3 CCP)

3. Parallel criminal / civil proceedings

- Right to access the documents can be restricted if (108.1 CCP):
 - a. there is justified suspicion that a party is **abusing his or her rights**
 - b. this is required for the **safety** of persons or to safeguard public or private interests in preserving **confidentiality**

3. Parallel criminal / civil proceedings

- Access of third parties: Swiss Supreme Court 1B_33/2014

Third parties do not have to prove that their rights have been directly affected (as persons involved in the proceedings must do, acc. to 105.2 CCP) – para. 2.3

Legitimate interest: a possible influence that files from a criminal case can have on a pending civil procedure is in principle considered as an interest worthy of protection – para. 3.3

Overriding interest : a party's interest to restrict access to the criminal files in order not to lose an advantage in a parallel procedure is not considered as sufficient – para. 3.4

3. Parallel criminal / civil proceedings

- Possible issues regarding the use of documents in parallel proceedings
 - Breach of professional secrecy for lawyers (321 CC)
 - Collecting evidence for a foreign court as an unlawful activity on behalf of a foreign state (271 CC)
 - Shortcut of international mutual assistance in criminal or civil matters

Contact

LALIVE

35, rue de la Mairie

1207 Geneva

Tel. +41 58 105 20 00