Corporate cross-border corruption sanctioned in Switzerland

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Companies which engage in cross-border corruption from Switzerland can be prosecuted and sanctioned, despite different settlements reached abroad on virtually the same facts, confirm Swiss authorities in their latest decision on 18 November.

The Office of the Swiss Federal Attorney General ("OAG") recently issued a public statement about a summary penalty order of 18 November 2021, convicting the Swiss companies SBM Holding Inc. SA, Single Buoy Moorings Inc. and SBM Production Contractors Inc. SA (the "Defendants") for failing to take all adequate and necessary internal organisational measures to prevent the bribery of public officials in Angola, Equatorial Guinea and Nigeria (Art. 102 para. 2 Swiss Criminal Code ["SCrC"] in conjunction with Art. 322septies SCrC).

By way of background, the Defendants are the financial corporate operations centre of the SBM Offshore group, which specialises in the design, construction and supply of maritime systems and equipment for the petroleum and gas industry. The summary penalty order is the latest decision by Swiss authorities in this matter; in judgment SK.2020.8 of 6 July 2020, the Criminal Chamber of the Federal Criminal Court already convicted a former executive of the SBM Offshore group and of SBM Holding Inc. SA by way of simplified procedure (Swiss equivalent to plea bargaining) for bribing foreign public officials in Angola (Art. 322septies SCrC). The summary penalty order is also connected with settlements cut primarily by SBM Offshore N.V. with foreign prosecution services, notably in the Netherlands in 2014, in the United States of America in 2017 and in Brazil in 2018. It is a materialisation of the OAG's strategic orientation to prosecute and sanction companies engaging in cross-border corruption from Switzerland, despite settlements reached abroad for virtually the same underlying facts.

The defendants were ordered to pay a fine of CHF 4.2 million and a compensatory claim of CHF 2.8 million for bribes paid to Nigeria officials. Under Swiss law, assets that are the result of a criminal offence must be confiscated (Art. 70(1) SCrC) to deprive anyone from the benefits of a crime ("crime must not pay"). It is only possible to confiscate assets that originate either directly or, with supporting paper trail, indirectly from an offence. If the tainted assets are no longer available, for example because they were dissipated or concealed, the defendant should not be treated more favorably than the one who kept them. As a result, the criminal authorities must in these circumstances order a compensatory claim (Art. 71 SCrC). This measure allows the State to freeze and ultimately to foreclose upon any assets of the defendant that are of legal source in the amount of the unavailable criminal proceeds.

The confiscation or compensatory claim must however not result in a double recovery for the State at the expense of the defendant (Swiss Federal Supreme Court ["SC"] Case 145 IV 235, para. 3.2.2). In the case at hand, this legal principle prompted the OAG to refrain from ordering compensatory claims in relation to the bribes paid by the Defendants in Angola and Equatorial Guinea because the related profits realised by the SBM Offshore group had already been disgorged as part of the amounts paid under the settlements reached in the Netherlands and the United States of America.

This summary penalty order resonates with a recent SC decision 6B_379/2020 of 1 June 2021 issued in Swiss domestic criminal proceedings against an intermediary suspected of having facilitated corrupt payments to employees of the Brazilian State-owned company Petrobras, in order to win a tender for public contracts (Lava Jato operation). Here, the intermediary had also reached a settlement with the Brazilian prosecution authorities prior to the conclusion of the Swiss investigations. Under this Brazilian agreement, the intermediary was sentenced to 8 years imprisonment and to a monetary sentence of BRL 70'000'000 for having bribed a Petrobras public official (who was also convicted) and for money laundering. The OAG discontinued the Swiss prosecution in consideration of the sentences already ordered in Brazil, but nevertheless ordered the intermediary to pay a compensatory claim of USD 9'980'000.

The Swiss Federal Criminal Court dismissed the intermediary's appeal who brought the case before the SC. The SC reversed the lower decision and remanded the case to the lower court on three main grounds, two of which are of relevance here:

1. Assets received in performance of a contract obtained in exchange of bribes may only be confiscated (or, if they are no longer available, a compensatory claim can only be ordered) if the criminal authorities establish that the defendant would not have been attributed said contract, but for the bribes. As this would be proving a negative, a strict proof is not required. In addition, confiscation and compensatory claims are not strictly speaking criminal sanctions. Because of this special nature, they must be ordered irrespective of the defendant's guilt or innocence, as long as an offence was committed. For the same reason, the presumption of innocence is also inapplicable in this context. As a result, the defendant has a corresponding procedural duty to provide or point to evidence that rebuts the prosecution's case and excludes a contemplated confiscation of compensatory claim (SC Case 6B_595/2014 of 13 May 2015).

   In this case, the SC ruled that when bribes are proven to have been paid, it strongly suggests that they have had a causal link on the awarding of a contract, and that the defendant must therefore bring forward convincing elements to disprove this quasi presumption. The lower instance had however not dealt with the arguments brought forward by the defendant in this respect, which led the SC to reverse the decision and remand the case for further consideration.

2. Swiss criminal authorities must abide by the general principle of good faith in all their dealings (Art. 3 para. 2 let. a Swiss Code of Criminal Proceedings).

   Here, the OAG and the Swiss Federal Criminal Court heavily relied on the intermediary's guilty plea enshrined in the Brazilian settlement to mount their own case. However, they did not take into account the BRL 70'000'000 that the intermediary paid in this context to the Brazilian State when deciding whether a Swiss compensatory claim should be ordered. The SC wonders whether this one-sided use of the Brazilian settlement is compliant with the principle of good faith and instructs the lower court to address this question.

These two decisions are good examples of the issues that frequently arise in the Swiss criminal proceedings whose main focus is on the confiscation of assets relating to (alleged) bribery acts entirely or predominantly committed abroad. They pose new challenges in terms of international coordination.

LALIVE - Joanna Didisheim and Benoît Mauron