

## White Collar Crime - Switzerland

### Proposed legislation on freezing and restitution of ill-gotten assets of potentates

Contributed by **CMS von Erlach Henrici Ltd**

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#### Introduction

In response to the political events in North Africa, commonly known as the 'Arab Spring', on May 22 2013 the Swiss government proposed new legislation which is intended to create a legal basis for the freezing of assets presumed to have been obtained illegally by foreign political leaders and the restitution of such assets to the countries of origin, outside the framework of international mutual legal assistance proceedings.<sup>(1)</sup>

The bill targets politically exposed persons and their families who have abused their positions to acquire assets unlawfully, notably through corruption, and who are seeking to hide such assets abroad.<sup>(2)</sup> Due to its strong position as a financial centre, Switzerland has often had to deal with potentates' moneys over the past 20 years, and thus was a pioneer in developing rules to govern the handling of such matters. Cases that have attracted international attention include Ferdinand Marcos (Philippines), Sani Abacha (Nigeria) and Vladimiro Montesinos (Peru). According to information provided by the Department of Foreign Affairs, to date Switzerland has returned to the respective countries of origin no less than Sfr1.7 billion that had been embezzled by politically exposed persons.

While emphasising that it is determined to take a leadership role at international level to promote closer cooperation between financial centres, the Swiss government is aware that it is vital to tackle the problem of potentates' assets first at a domestic level. The draft act – the first of its kind worldwide – aims to provide a comprehensive set of measures for the Swiss authorities to trace, block and return efficiently such assets to the people who are entitled to them.

#### Key elements

The bill seeks to codify the practice developed by Swiss authorities in connection with the handling of potentates' moneys since the 1980s and to consolidate the existing pieces of legislation on this issue, including the Federal Act on the Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means 2010, which was intended to regulate the restitution of assets diverted by former Haitian dictator François Duvalier.<sup>(3)</sup>

However, the most significant feature of the proposed act is that Switzerland shall support the efforts of foreign jurisdictions to recover the proceeds of their leaders' criminal conduct as a matter of foreign policy rather than a judicial matter. Account freezes and the exchange of information, including the information relating to banking relationships, shall not require an order by a court or other judicial body (eg, a prosecuting authority), but will be ordered by the Federal Council and administered by the Department of Foreign Affairs.

#### ***Freeze of assets in anticipation of international mutual legal assistance proceedings***

The bill provides that the Federal Council shall have the power to freeze assets located in Switzerland to support possible future mutual legal assistance proceedings in favour of the country of origin, subject to the following cumulative requirements:

- The government or part of the government of the country of origin has lost its power, or such loss of power is imminent;
- The country of origin is notorious for a high degree of corruption;
- The assets are subject to the control of, or beneficially owned by, politically exposed persons or parties related to or associated with such persons, and such persons

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are suspected of having acquired such assets by corruption, conversion or other offences; and

- The interests of Switzerland require that the assets be blocked.<sup>(4)</sup>

The freezing of assets may be ordered for an initial term of no longer than four years. Provided that the country of origin shows good-faith efforts to initiate and further judicial assistance proceedings intended to repatriate assets, the Federal Council may order the continuation of the measure on an annual basis. However, the maximum term shall be 10 years.

#### ***Freeze of assets in case of failure of mutual legal assistance proceedings***

In order to avoid potentates or their associates regaining control of illegal assets despite the initiation of judicial assistance proceedings (eg, as a result of the non-functioning of the home judiciary), the Federal Council shall be empowered to order the freezing of assets with a view to the confiscation of such assets by Switzerland, provided that:

- the assets were provisionally blocked by Switzerland within the framework of mutual legal assistance proceedings initiated at the request of the country of origin;
- the assets are controlled or beneficially owned by politically exposed persons or parties related to such persons;
- the country of origin is not in a position to meet the prerequisites of mutual legal assistance as set out by applicable Swiss or international laws due to the collapse or insufficiency of such country's judicial system, or Switzerland would be prevented from admitting the request for assistance because the proceedings in the country of origin are incompatible with the principles of due process as guaranteed by the European Convention on Human Rights or the United Nations International Covenant on Civil and Political Rights; and
- the release of the assets would infringe the interests of Switzerland.

Any freezing of assets ordered in view of Swiss confiscation proceedings shall remain in force until a final court decision on the confiscation has been rendered, but in any event not longer than 10 years.

#### ***Reporting duties of financial institutions***

Financial institutions and other parties who hold or manage assets or know about assets which are presumed to fall within the scope of a freezing order shall be under a duty to report such assets to the Department of Foreign Affairs immediately. Moreover, such institutions and parties must provide all information and records required by the department to enforce the act.<sup>(5)</sup>

#### ***Measures to support efforts of country of origin to repatriate assets***

The Swiss authorities shall disclose all information so obtained, including information about banking relationships, to the country of origin in order to enable that country's authorities to lodge a formal request for mutual legal assistance with Switzerland or to supplement a request that has already been filed but which was found to be inadmissible by the Swiss authorities.

If approved by the legislature, this provision would mark a significant change of paradigm. Under the existing laws on international cooperation in criminal matters, the Swiss authorities are prohibited from disclosing confidential information (eg, information on a banking relationship) in the absence of an official foreign request, admissible as to form and substance. In order to meet the substantive requirements of Swiss law, a request for information must provide a statement of facts in sufficient detail for the Swiss authorities to be able to ascertain whether the conduct under investigation abroad would constitute a punishable act pursuant to Swiss law had it been committed in Switzerland.<sup>(6)</sup> Moreover, at present mutual assistance in criminal matters is a domain reserved to the judicial authorities; the competences of administrative bodies in this field are limited. Thus, the disclosure of information requires that:

- the requesting state has initiated judicial proceedings on its own initiative;
- such proceedings have produced preliminary results allowing the requesting state to submit a reasonably substantiated request for assistance; and
- the Swiss judicial authorities have formally opened assistance proceedings on the basis of such foreign request.

The proposed bill stipulates that Switzerland should not transmit information unless the country of origin:

- has rendered plausible that it is able and willing to enter into a formal relationship of judicial cooperation with Switzerland; and
- confirms in writing that it will not use any information so transmitted for purposes other than the drafting or further substantiation of a formal request for judicial

assistance.

However, these protective measures will obviously be of limited value given that, in practice, the country called on to give such covenants will be a 'failed' state.

### **Confiscation of assets**

The Federal Council may direct the Treasury Department to file a claim with the Federal Administrative Court for confiscation.<sup>(7)</sup> Confiscation shall be ordered by the court if there is proof that:

- the assets at issue are controlled or beneficially owned by a politically exposed person or a related party;
- the assets were acquired unlawfully; and
- the assets had been blocked by order of the Swiss government with a view to their confiscation.

### **Presumption of unlawfulness**

Like the Federal Act on the Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means, the proposed Federal Act on the Freezing and Restitution of Unlawfully Acquired Assets of Politically Exposed Persons provides for a presumption that assets were unlawfully acquired if:

- the total wealth of the person who has control of the assets at issue increased extraordinarily in connection with the politically exposed person's exercising of his or her office; and
- the country of origin was notoriously corrupt during the term of the politically exposed person's office.

The presumption may be overruled by proving that the assets were acquired lawfully.

### **Legal remedies**

Measures decreed by the Swiss government or the Department of Foreign Affairs shall be subject to appeal to the Federal Administrative Court pursuant to the Federal Act on Administrative Procedure. However, the proposed bill expressly prohibits the appellate court from reviewing such measures as to their appropriateness in terms of proportionality.

### **Comment**

The restitution of assets stolen by political leaders is of great importance, and the government's initiative to create a strong and comprehensive legal basis in order to facilitate such restitution should be welcomed. Nevertheless, the prosecution of criminal conduct, including the investigation and confiscation of proceeds from such conduct, should be left to the criminal justice system. The principle of the rule of law requires that any acts in this field be free from political influence and considerations of opportunity.

While it may be appropriate to vest governmental bodies with a general authority to direct the freezing of potentates' ill-gotten assets, and thus to take protective measures to prevent such assets from being moved out of the judiciary's reach, all further matters – in particular, information exchange, the investigation of the origins of assets, the confiscation of such assets and the adjudication of any legal controversies associated therewith – should remain subject to the exclusive jurisdiction of the criminal prosecution authorities and the criminal courts.

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### **Endnotes**

- (1) The official press release is available at [www.news.admin.ch/message/index.html?lang=en&msg-id=48933](http://www.news.admin.ch/message/index.html?lang=en&msg-id=48933).
- (2) The official name of the proposed law is the Federal Act on the Freezing and Restitution of Unlawfully Acquired Assets of Politically Exposed Persons.
- (3) SR 196.1, entered into force on February 1 2011.
- (4) Swiss interests previously considered as justifying the freeze of assets of potentates included:
  - the protection of the Swiss financial centre against the reputation of being a safe haven for dictators to hide moneys; and
  - the prevention of transactions that would undermine sanctions imposed by the United Nations or other relevant international or supranational organisations.

(5) The measures contemplated in the proposed law are considered to be matters of foreign policy rather than of international judicial cooperation. Accordingly, the bill assigns the powers to decree any freezes to the government (not the courts) and designates the Department of Foreign Affairs as the body competent to administer any related matters. However, reporting to the department will not release financial institutions from their duty to report suspicious transactions and funds to the Swiss money laundering reporting office in accordance with anti-money laundering rules. As a result, Swiss governmental agencies on the one hand, and judicial authorities on the other, may be dealing with the same case in parallel. While the proposed act contains (rudimentary) rules on the exchange of information and coordination between Swiss administrative and judicial bodies, it does not specify whether decisions of judicial bodies (eg, by a prosecuting magistrate to release funds for lack of evidence as to such funds' illicit origins) shall have binding effect on the government or the department. Consequently, the proposed bill seems to allow the government to overrule judicial decisions for political considerations.

(6) See Articles 28 and 64 of the Federal Act on International Mutual Assistance in Criminal Matters.

(7) The proposed bill confers no particular powers on the Treasury Department to investigate whether assets are controlled by a politically exposed person or have been acquired unlawfully. Moreover, it is doubtful whether such administrative body has the skills and resources to conduct the required investigations in an efficient manner, even more so as it is ineligible to employ judicial assistance to obtain information from sources abroad.

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