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Recent Swiss Case Law

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Recent Swiss case law:

International judicial assistance refused by Switzerland to Russia:

Decision of the Swiss Federal Supreme Court of 13 August 2007 1A. 15/2007

In a decision dated 13 August 2007, the Supreme Court rejected a request for judicial assistance formulated by Russia.

The request for assistance (dated 15 August 2005, but which was subsequently amended and expanded) was formulated in the context of an investigation against persons who were suspected of breach of trust, racketeering and non-execution of a judgment.

The directors of the bank Menatep are said to have fraudulently acquired, in 1994, 20% of the shares of the Russian company OAO Apatit, a stake which was previously owned by the State, through the company Volna. The company Yukos Universal Ltd, 100% owned by Menatep, was allegedly used for money laundering activities.

The Attorney General of Switzerland accepted the request for legal assistance and undertook a number of searches of residences, held hearings and blocked significant amounts of assets.

The Attorney General issued two decisions executing the request for judicial assistance, both of which were reversed by the Supreme Court.

The Supreme Court considered that the relevant facts of the case were presented by the Russian Authorities in a confused manner, that many aspects of the investigation were tax related, and that the Council of Europe had declared, regarding the proceedings undertaken against the leaders of the Yukos Group, that the Swiss Authorities had to examine the facts presented by the requesting authority more thoroughly.

The Supreme Court also noted that the Parliamentary Assembly of the Council of Europe set out in its resolution n° 1416 (of 2005) that the circumstances surrounding the arrest of the leaders of Yukos gave the impression that the arrests were not made in conformity with the fundamental principles of a democratic state. The resolution also referred to a decision of the European Court of Human Rights, related to the Russian procedure, which shed light on the manipulation of the criminal procedure in order to intimidate various individuals.

Furthermore, the Supreme Court noted a number of violations of the rights of the defendants, the dispossession of the leaders of Yukos' through massive recoveries of taxes, the financial help given by one of the accused to an opposition group as

well as intimidation campaigns led by State entities. All of these elements led to the conclusion that the action of the Russian State was not limited to the simple pursuit of criminal justice, but that the proceedings also had the political objective for the powers in Russia to fight against the superiority of the rich oligarchs.

Pursuant to article 2 of the Swiss Federal Law on International Criminal Assistance, a request of international cooperation is not admissible when the foreign proceeding is not in conformity with the principles established in the European Convention of Human Rights and the International Covenant on Civil and Political Rights, or when the foreign proceeding has a political motivation.

In the light of the above, the Supreme Court considered that, by virtue of art. 2 of the Swiss Federal Law on International Criminal Assistance, the Swiss Authorities could not entertain Russia's request for judicial assistance.

Aeroflot Case:

In 1999, the Office of the Attorney General of Switzerland (OAG) granted judicial assistance to the Office of the Attorney General of the Russian Federation in a criminal proceeding against various persons for fraud and money laundering in the context of the "Aeroflot" case. The OAG initiated an investigation in the spring of 2002 against a Swiss citizen for money laundering, participation in a criminal organisation, and participation and complicity in patrimonial offences and misuse of corporate assets.

The fiduciary agent, a Swiss financial advisor and lawyer in the canton of Bern who was domiciled in Cyprus, was suspected of having set up commercial structures and of having established business relations in Switzerland. These structures and relations allegedly allowed the accused in Russia to enrich themselves to the detriment of Aeroflot. According to the evidence uncovered by the investigators, the proceeds of these activities were to be laundered by purchasing buildings in France and then renting them to offshore companies.

Decision of the Swiss Federal Supreme Court of 11 juillet 2008

In July 2008, the Swiss Federal Criminal Court sentenced the Bernese lawyer involved in the Swiss aspect of the Aeroflot case to a suspended sentence of 21 months in prison.

He was convicted of complicity in the misuse of corporate assets.

The lawyer was sentenced to pay 90 days worth of fines at 1000 Swiss Francs per day. The legal costs, amounting to 300 000 Swiss Francs, were also to be borne by him. He was however acquitted of the charges of money laundering and embezzlement.

According to the judgment, the Bernese lawyer played a strategic role in the 1990s for the Russian billionaire Boris Berezowski.

The verdict concludes that he played a key role in the setting up of the Andava group, a group of companies the only objective of which was to prejudice Aeroflot. Thanks to the contracts binding it to the airline, the group had the benefit of guaranteed revenues.

Aeroflot would however only get a financial advantage from the operations in the event of the collapse of the Rouble. In total, close to 50 million Swiss Francs were misappropriated from the Russian company.

In Russia, the three former leaders of the airline, including its Vice-Chairman, were convicted of embezzlement. The Russian businessman Boris Berezowski, who lives in exile in London, was sentenced in November 2007 to six years in jail for embezzlement.

Salinas Case:

In 1995, following a request for judicial assistance formulated by Mexico, the OAG initiated criminal proceedings against Raul Salinas for money laundering and embezzlement of public funds.

The initiation of the investigation was based on suspicion that the Salinas clan had facilitated the transfer of Colombian cocaine to the United States. It was alleged that the Salinas clan received significant amounts in return, which were in part transferred to Swiss banks.

The federal criminal proceeding did not lead to any significant results and was suspended in 1998. The Salinas case was thereafter entrusted to the Genevan criminal authorities, which indicted Raul Salinas and Mme. Castanon for violations of the Law on Narcotics and Money Laundering. The investigations appear to have backed up the suspicion that the Salinas clan, composed of Carlos Salinas, the President of the United States of Mexico between 1988 and 1994, and his brother Raul Salinas, as well as of other members of their family and army officers, had set up a structured organisation the objective of which was to facilitate the transfer to North America, through the territory of Mexico, of cocaine produced in Colombia. In exchange for their services, the Salinas clan allegedly collected substantial proceeds, a part of which was transferred to Switzerland by Raul Salinas.

The Swiss investigation did not however prove the illegal origin of the funds. As a result, in May 2002, the Attorney General ordered the OAG to hand over the prosecution to the Mexican authorities.

The 110 million dollars which were sequestered however remained frozen in Switzerland.

On 19 December 2007, Mexico finally demanded the restitution of the funds.

The Mexican authorities proved the criminal origin of 74 million dollars, an amount which was returned to Mexico. The evidence presented by Mexico appeared to the Court to have been solid, and it considered that the treaty of judicial assistance between Switzerland and Mexico was a sufficient guarantee of the reliability of the evidence. The Swiss judicial authorities were able to determine where the funds went outside of Mexico.

Forty-five million dollars were therefore returned to the rightful owners, the claims of which had been previously recognised by the Swiss civil courts.

Switzerland also received its share of the funds : 2,2 million Swiss Francs were awarded to the Confederation and 1,1 million to the Canton of Geneva to reimburse the costs incurred in the almost thirteen year long proceeding.

Misleading the judicial authorities:

In February 2005, Switzerland detained a Russian businessman in view of his extradition. On 25 February 2005, a business colleague of the detained Russian businessman called the Federal Office of Justice to inform it that a Russian prosecutor was currently in his office in Switzerland and was requesting the payment of USD 50'000.- in order for Russia to abandon its request for extradition of his colleague. On the same day, an associate of the lawyer defending the detained Russian businessman informed the person in charge of the mutual judicial assistance request at the Federal Office of Justice that he had himself been informed that a Russian federal prosecutor was in the office of his client's colleague and had requested a payment of USD 50'000.- in order for Russia to abandon its request for extradition.

This information spread through the Federal Office of Justice, the Office of the Attorney General of Switzerland, and the Office of the Federal Police.

On the same day, the Federal Police interrogated the colleague of the detained Russian businessman. During the interrogation, he first stated that a lawyer had been in his office, then that it was an agent of the Russian secret services, and finally stated that it was a Russian federal prosecutor. He also gave the agents of the Federal Police an undated and unsigned document explaining the steps to be undertaken in order for the Russian authorities to withdraw their request of extradition.

During the second interrogation, he confirmed his first declarations and stated that a Russian person, whom he believed to be a prosecutor, also came to his office on 28 February and 1 March 2005. He also handed over to the police a receipt of the payment of the USD 50'000.-.

In subsequent interrogations, he however denied having stated that a Russian federal prosecutor had been in his office.

A criminal proceeding was initiated on 18 April 2005 for prohibited acts executed on behalf of a foreign state (Art. 271 Swiss Penal Code) and coercion (Art. 181 Swiss Penal Code).

The investigations however quickly revealed that no Russian prosecutor in Switzerland had in fact asked for money in order for Russia to withdraw the request for extradition. This was simply invented by the colleague of the detained Russian businessman in order to undermine the execution of the request for extradition.

The criminal proceeding therefore concentrated no longer on the offenses of prohibited acts executed on behalf of a foreign state and coercion, but on false accusations and misleading the judicial authorities.

The prosecution before the Federal Criminal Court ultimately focused solely on misleading the judicial authorities.

The Federal Criminal Court considered that the colleague of the detained Russian businessman was guilty of misleading the judicial authorities.

The Court found that the accused had reported to the authorities a punishable act which he knew had not been committed.

In order for the elements of this offence to be fulfilled, it must be proved that the accused reported a punishable offence under Swiss criminal law. The accused does not have to know that the false facts that he intentionally denounces constitute an offence. The recklessness of the declaration (*dol eventual)* is sufficient.

In the present case, the Court considered that the accused falsely reported the offence of executing prohibited acts on behalf of a foreign state (Art. 171 CP), bribery of a foreign public official (Art. 322septies CP) and coercion (Art. 181 CP), all of which were offences which had supposedly been committed by a Russian federal prosecutor.

On this basis, the colleague of the Russian detained businessman was sentenced to 90 days of a pecuniary sentence at 80.- Swiss Francs per day, plus all judicial costs amounting to 10'910.- Swiss Francs.