Civil Liability for Money Laundering in Switzerland: New Case Law in the Field of Asset Recovery comes to the Aid of Victims of Financial Crime

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Introduction

In cases of fraud and other financial crimes, the chances of obtaining full redress from the main defendants are more often than not quite limited. Recovery efforts therefore frequently focus (also) on the criminals' auxiliaries: on banks, fiduciaries, and law firms. The deep pockets of these auxiliaries make them an attractive recovery target. Due to their more indirect role in the crime, it is however regularly far from obvious whether the victim has a legal basis to establish the (ancillary) liability of an involved bank, fiduciary or lawyer. A recent judgment of the Swiss Federal Supreme Court comes to the aid of victims of financial crimes with a Swiss connection, as it extends and clearly defines the limits of civil liability for money laundering in Switzerland.

In its decision 6B_1202/2019 of 9th July 2020, the Swiss Federal Supreme Court held that the victims of fraud and other financial crimes have a claim to compensation not just against the author of the predicate crime, but also against the money launderer whose acts thwarted the state's possibilities to confiscate and return the ill-gotten funds to the victim. The money launderer's civil liability had been recognised in case law and legal scholarship even prior to this judgment. The precise legal requirements for this type of liability and its extent were, however, hitherto unclear. To understand the

full significance of the new judgment, it is worthwhile to start with a review of the general principles of Swiss tort law and the earlier case law of the Swiss Federal Supreme Court before turning to the most recent developments.

Money laundering: criminal offence and tortious act

The earlier case law had based the civil liability for money laundering on the general principles of tortious liability as set out in article 41 of the Swiss Code of Obligations (CO). Pursuant to this provision, compensation is owed subject to four cumulative conditions: (i) a loss, (ii) an unlawful act, (iii) a causal nexus between the unlawful act and the loss suffered, and (iv) the tortfeasor must have been at fault.

The first hurdle which tort claims against money launderers need to overcome relates to the second of these four conditions, the notion of "unlawfulness". Due to a peculiarity of Swiss tort law, an act is only considered unlawful if it either infringes an absolute right of the victim (physical integrity, property, freedom, etc.) or – and this is the relevant bit for present purposes– if the act breaches a legal norm which has as its specific aim to protect the victim against the kind of loss caused by the tortious act. Now, money laundering is obviously a criminal, and thus unlawful, act under Swiss criminal law. Yet, the primary rationale of the criminalisation of money laundering by article 305bis of the Swiss Criminal Code (CC) is not to protect the victims of financial crimes against a loss, but to protect the state's public interest in the confiscation of the proceeds of crime. In principle, it is therefore far form obvious that a victim can rely on article 305bis CC for his tort claim against a money launderer.

In a first important judgment, decision 129 IV 322 of 8th September 2003, the Swiss Federal Supreme Court cleared this hurdle. The court found that the objectives of prohibiting money laundering go beyond the state's public interest of effective confiscation: seizure and confiscation are also geared towards the restitution of the misappropriated funds to the victim. From this, the court concluded that in prohibiting money laundering, the Criminal Code also protects interests proper to the victim provided that the predicate crime harmed private interests, which is the case for most or even all economic crimes. Therefore, victims of fraud and misappropriation can invoke article 305bis CC in bringing tort claims against money launderers.

In a second judgment, decision 133 III 323 of 18th April 2007, the Swiss Federal Supreme Court added one caveat: To have acted unlawfully for the purpose of article 41 CO the money launderer

must have acted with (at least indirect) intention of thwarting confiscation (dolus eventualis being sufficient); "negligent" money laundering remains lawful and, accordingly, does not trigger the money launderer's civil liability.

The legal uncertainties remaining

While this earlier cases law laid the foundation for asset recovery efforts against the launderers of ill-gotten gains, some crucial aspects concerning the applicable notions of loss and causal nexus remained unclear. Prior to decision 6B_1202/2019 of 9th July 2020, some scholars notably argued that the victim could, in principle, recover his or her loss only from the author of the predicate crime (e.g. fraud or misappropriation), and only exceptionally from the money launderer. Prima facie this view enjoys a good degree of plausibility because the predicate crime is the immediate cause of the victim's loss: it is the fraudulent obtainment or the misappropriation of the victim's funds, not the subsequent concealment by the money launderer, which causes the victim a loss. The victim's principal damages claim should therefore be directed against the author of the predicate crime, or so one may argue. The adherents of this view want to grant the victim a recourse against the money launderer only exceptionally, namely in case the acts of money laundering (i.e. the hiding of the ill-gotten funds) lead to a subsequent bankruptcy order against the author of the predicate crime. They hold that only in the case of the main criminal’s bankruptcy will the money launderer have caused the victim a loss, as such bankruptcy will lead to a sharp drop in value of the victim's damages claim against the main criminal. This drop in value of the principal damages claim is the loss recoverable from the money launderer. It is a loss separate from the loss caused by the predicate crime. Obviously, proof of such a loss is next to impossible in practice.

The new decision of the Swiss Federal Supreme Court

In its new judgment, the Swiss Federal Supreme Court explicitly rejects this interpretation of the money launderer's liability (see decision 6B_1202/2019, paragraph 4.2.2). In doing so, the court ruled that the loss for which the money launderer is liable is in principle the same loss as the one caused by the predicate crime. The money launderer perpetuates this loss by his acts of concealing the funds obtained by the predicate crime. He is liable for this loss to the extent that the act of concealment thwarted the confiscation of the misappropriated funds by the criminal prosecutors. We could term this the "uniform loss"-view (the court used the German term:"einheitlicher Schaden") as opposed to the “two losses”-view

upheld by the authors referred to above. According to the uniform loss-view, if the bank of the fraudster enables a transfer of funds from the fraudster's account, knowing of or at least suspecting their criminal origin and perceiving the risk of thwarting future confiscation, it will be held liable to the extent of the transferred amount. Thus, where the fraudster receives an amount of CHF 1 million in his account by fraud, and the bank – knowing of the fraud – later enables the wiring of CHF 0.5 million in circumstances that thwart their confiscation, it will become liable to the victim of fraud in that amount.

Not only is the decision remarkable for approving the "uniform loss"-view, it is also worthwhile to note that the Swiss Federal Supreme Court for the first time hints at its willingness to ground the money launderer's liability not based on the general principles of tort law set out in article 41 CO, but on the less well-known liability of what the law calls a "facilitator" (German: "Begünstiger"; French: "receleur"). This type of liability applies for instance to a vendor who knowingly accepts and re-sells stolen goods and thereby perpetuates the loss caused by the thief. The liability is set out in article 50 section 3 CO. Pursuant to this provision, the facilitator incurs civil liability if the following cumulative conditions are satisfied: (i) a predicate tort (ii) causing (iii) a loss, (iv) the perpetuation of this loss by a subsequent act of the facilitator, (v) the unlawfulness of the perpetuation, and (vi) the facilitator must have been at fault.

Most of these conditions will obviously be established in the case of a criminal conviction for money laundering: the predicate tort and loss, the unlawfulness of the facilitator's act and his intention will invariably have been recognised by the criminal court which convicted the facilitator for money laundering. The recent judgment is important in confirming that the loss relevant for article 50 section 3 CO is the same loss as the one caused by the predicate crime, and then perpetuated by the facilitator.

The new case law is likely to lead to an increase in legal claims against banks and other providers of auxiliary services used by fraudsters, as it introduces a more reasonable burden to prove their ancillary liability.

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