

Handover of assets under Article 74a IMAC

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Seizure is only the first step. Under Article 74a IMAC, objects or assets seized as a precautionary measure may be handed over to the competent foreign authority on request, at the end of the mutual assistance proceedings, for the purpose of confiscation or return to the person entitled. Handover may take place at any stage of the foreign proceedings, but it normally requires a final and enforceable decision of the requesting state. Handover is refused if a person who was not involved in the offence has acquired rights to the assets in good faith, or if the assets are needed for Swiss proceedings.¹

The Federal Criminal Court applied these rules in a decision of 31 January 2023 on a request from the public prosecutor at the Tribunale di Roma. The Italian proceedings concerned fraudulent bankruptcy, aggravated fraud against a public body, criminal association, tax fraud and corruption. Italy had obtained a confiscation decree of 12 June 2018, which became final on 28 October 2020, under the preventive procedure of the Italian anti-Mafia code (Legislative Decree No. 159/2011). It asked Switzerland to hand over real estate in St. Moritz. The court upheld the handover. It examined whether the Italian preventive procedure provided sufficient guarantees, including certainty of the evidence and adversarial proceedings. It then held that the property, worth about CHF 1.3 to 1.5 million, was proportionate to illicit proceeds of EUR 43.4 million identified by the Italian courts.² The decision is significant because Italian preventive confiscation does not require a criminal conviction. Switzerland will nevertheless execute it under Article 74a IMAC if the Italian proceedings respected the essential procedural rights of the persons concerned.

1 Swiss confiscation and sharing

Where assets of Italian origin are confiscated in Swiss proceedings, for instance in a Swiss money laundering case involving Lugano accounts, the

question of sharing arises. The Federal Act on the Division of Forfeited Assets of 19 March 2004 (TEVG, SR 312.4) governs both the domestic division among the Confederation and the cantons and the international sharing with foreign states. Domestic sharing applies where the gross amount confiscated reaches CHF 100,000, and the confiscating authority must notify the Federal Office of Justice within ten days of the final decision.³ International sharing is negotiated with the foreign state that contributed to the confiscation, usually on the basis of an equal division of the net amount, unless assets are returned to victims.⁴ Returning assets to an identifiable injured party, under Article 74a IMAC or under Article 70(1) and Article 73 SCC, takes precedence over sharing. For Italian victims, the practical lesson is to assert their claims early in the Swiss proceedings, before the assets are confiscated and shared between the states.

2 European freezing orders and Switzerland

Within the European Union, Regulation (EU) 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders governs these measures among the participating member states, which exclude Denmark and Ireland. It allows an Italian prosecutor to send a freezing certificate to a German or Austrian authority, which must recognize and execute it within strict time limits.⁵ Switzerland is not bound by the Regulation, because it falls outside the Schengen *acquis* that Switzerland applies. An Italian freezing order (*sequestro preventivo* under Article 321 of the Code of Criminal Procedure) therefore reaches a Lugano account only through a request for mutual assistance. At the express request of the foreign state, the competent Swiss authority can order provisional measures, including the freezing of accounts, under Article 18(1) IMAC. Where delay would be dangerous, the Federal Office of Justice can order them as soon as a request is announced, even before the formal request arrives (Article 18(2) IMAC).⁶ The Schengen framework does add some tools, including the direct transmission of requests and police cooperation through the joint centre in Chiasso described in Chapter G.III.

3 Notes

1. Federal Criminal Court, decision RR.2022.173 of 31 January 2023, https://entscheidsuche.ch/docs/CH_BSTG/CH_BSTG_001_RR-2022-173_2023-01-31.pdf, consid. 2, summarizing Art. 74a IMAC. ↩

2. Federal Criminal Court, RR.2022.173 (above), consid. 3.1 and following. The persons concerned are not named in the published decision. ↩
3. Laurence Fontana Jungo, FOJ, circular on domestic sharing under the TEVG, 9 December 2020, <https://www.rhf.admin.ch/dam/rhf/de/data/strafrecht/wegleitungen/rundschreiben-sharing.pdf.download.pdf/rundschreiben-sharing-d.pdf>. ↩
4. TEVG, Art. 11 and 12(3) (equal division between Switzerland and the foreign state as the rule), at droit-bilingue.ch, <https://www.droit-bilingue.ch/de-it/3/31/312.4-11-15.html> and <https://www.droit-bilingue.ch/de-it/3/31/312.4-12-16.html>. ↩
5. Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28 November 2018, p. 1, recitals 56 and 57, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1805>. ↩
6. IMAC, Art. 18(1) and (2), at droit-bilingue.ch, <https://www.droit-bilingue.ch/de-it/3/35/351.1-18-32.html>; Codice di procedura penale, Art. 321(1), at Brocardi.it, <https://www.brocardi.it/codice-di-procedura-penale/libro-quarto/titolo-ii/capo-ii/art321.html>. ↩

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