

Centre for Civil and Political Rights
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HOW TO RETURN STOLEN ASSETS:

The Swiss policy pathway

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Preface

Widespread corruption undermines governance, justice, and accountability mechanisms, and inhibits the enjoyment of civil, political, and socioeconomic rights. Corruption remains both a driver of human rights abuse and a barrier to States' implementation of human rights obligations. The interdependency of corruption and human rights violations requires not only more awareness around corruption matters in existing human rights mechanisms, but also more consciousness regarding human rights violations in the review mechanism of the United Nations Convention Against Corruption (UNCAC) and, on the flip side, more recognition of corruption issues in review by UN human rights mechanisms. Given these entry points, better implementation of the UNCAC will undoubtedly lead to a better implementation of human rights treaties.

Without an effective and comprehensive anti-corruption framework regulating the process of asset recovery and return, and taking into account related human rights concerns, there are two risks associated with the return of corrupt assets. First is the risk that misappropriation and/or re-laundering of returned assets will jeopardise the integrity of the return. Second is the risk that the permissive environment that permitted the original offence will remain unchanged, allowed to continue with impunity, and thus prevent redress for victims of corruption and result in acts of corruption going unpunished.

Restitution of illicit assets is a challenging process with many political, legal, and administrative obstacles. For a rights-based approach to asset recovery to occur, asset returning and receiving states must uphold their responsibilities as duty-bearers ensuring that fundamental human rights are respected throughout the asset recovery and return process, in particular the right to a fair trial and remedies for victims of corruption. The procedure through which the assets are seized and returned is just as important as the disbursement of funds themselves.

A well-functioning and effective asset recovery system has favourable impacts on the prevention of widespread corruption and should be used as one of several corruption-prevention mechanisms. The more stolen asset return is aligned with standards of integrity, transparency, and accountability, the harder it becomes to divert assets or carry out corrupt acts. In this regard, the asset return process may support the establishment and enforcement of rule of law and prevent further corrupt practices in the country of asset origin. And, of course, fewer acts of corruption mean fewer corruption-related human rights violations.

A rights-based approach to asset recovery implies the inclusion of the victim population affected by the theft of the assets in question; as well as support for a free and independent civil society and media. Crucial actors who provide monitoring and scrutiny in tackling impunity, victims of corruption ensure that perpetrators are held responsible.

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In July 2016, the Swiss authorities adopted the Foreign Illicit Assets Act (FIAA) to operationalize Chapter V of the UNCAC. FIAA recognises the need for negotiations regarding the modality of asset return with the country from which those assets were stolen, to ensure that the returned assets are used in the interests of the victim population and to improve the rule of law in the country of asset origin. This crucial and revolutionary provision thus fulfils UNCAC Chapter V asset recovery provisions while also serving the interests of victims of corruption.

This report examines how the Swiss policy of asset recovery works, outlines recommendations for further developing the Swiss model, and explores whether the FIAA framework could be used as an EU-wide legal model for processes of foreign asset recovery.

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Executive summary

- 1) The current Swiss asset recovery policy is the result of developments which started at the end of the 1980's and culminated with the adoption of the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, or FIAA) in 2016, complying with chapter V of the United Nations Convention against Corruption (UNCAC).
- 2) Once assets diverted by a former foreign politically exposed person have been frozen, the main objective is to confiscate these assets either through an independent Swiss criminal procedure, or as part of a procedure initiated in the country of origin of the assets. In this second eventuality, Switzerland will provide mutual legal assistance to the requesting State.
- 3) If the independent criminal procedure in Switzerland is successful, the confiscated assets may be returned to the State of origin based on an *ad hoc* international agreement as described by the Federal Act on the Sharing of Confiscated Assets (SCAA). If the independent procedure in the country of origin is successful, the assets are handed over to the foreign State requiring assistance from Switzerland according to the Mutual Assistance Act (IMAC).
- 4) If neither an independent criminal procedure, nor a mutual assistance procedure is successful, the Foreign Illicit Assets Act (FIAA) allows for an alternative freezing and confiscation procedure that can result in the confiscated assets being returned to the impacted State. To the extent possible, non-governmental organisations will be included in the restitution process.
- 5) Changes could be made to further improve the Swiss foreign asset recovery policy in the perspective of Human rights and to protect victims of corruption.

List of laws

CrimPC	Swiss Criminal Procedure Code (Law Nr. 312.0) ¹
FIAA	Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act) (Law Nr. 196.1) ²
IMAC	Federal Act on International Mutual Assistance in Criminal Matter (Law Nr. 351.1) ³
SCAA	Federal Act on the sharing of confiscated assets (Law Nr. 312.4) ⁴
SCC	Swiss Criminal Code (Law Nr. 311.0) ⁵
TEU	Treaty on European Union ⁶
TFEU	Treaty on the Functioning of the European Union ⁷

¹ <https://www.admin.ch/opc/en/classified-compilation/20052319/index.html>

² <https://www.admin.ch/opc/en/classified-compilation/20131214/index.html>

³ <https://www.admin.ch/opc/en/classified-compilation/19810037/index.html>

⁴ <https://www.admin.ch/opc/fr/classified-compilation/20011886/index.html>

⁵ <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>

⁷ <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF>

The Swiss foreign asset recovery policy and FIAA

I. Short historical summary

10. The issue with foreign assets whose legality of acquisition is questionable began to emerge with the 1986 regime change in the Philippines. After its long-term, notoriously corrupt ruler Ferdinand Marcos was ousted, the Swiss government (Federal Council) reacted swiftly and ordered the freezing of 685 million USD of his assets held in Switzerland based on an emergency provision laid down in the Constitution⁸. The funds were successfully returned to the Philippines.
11. Between 1990 and 2010, multiple cases followed and a major difficulty started to emerge systematically: the States affected by cases of major assets misappropriation by former senior officials often lacked the expertise and/or the political will to follow the procedures established for asset recovery in the Swiss federal law on International Mutual Assistance in Criminal Matters (IMAC). This was especially true with regard to complex criminal proceedings like those involving crimes related to assets misappropriated by previous dictators and kleptocrats and their relatives. With the possibility to freeze assets time-limited by fundamental rights⁹, there was a serious risk that the Swiss authorities would eventually be compelled to give the assets back to former kleptocrats' families and associates, causing potential lasting damages among other things to the reputation of Switzerland as a clean and reliable financial centre.
12. Especially problematic was the Duvalier case, named after the Haitian dictator Jean-Claude "Baby Doc" Duvalier, who was toppled in February 1986 but escaped to Europe with a huge fortune. After the failure of a first international judicial assistance procedure in Switzerland, the Swiss assets linked to the Duvalier family were frozen by the Swiss government in 2002. However, the Haitian State was unable to achieve a successful request for mutual assistance until 2008. By then the time limits set in the law with regard to the mutual assistance in criminal matters were reached and the Swiss Supreme Court (Federal Supreme Court) was bound to reject the request¹⁰, which meant giving the assets back to the Duvalier clan. Confronted with this catastrophic prospect, the Supreme Court asked the Swiss government and parliament to act¹¹. Indeed, the Swiss parliament

⁸ Art. 102 of the Constitution of 1874. Today Art. 184 par. 3 of the Constitution of 1999 : *Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.*

⁹ Especially Art. 26 of the Swiss Constitution (Guarantee of ownership).

¹⁰ ATF 136 (2010) IV 4 (= TF, 1C_374/2009, du 12th January 2010).

¹¹ ATF 136 (2010) IV 4, c. 7.

(Federal Assembly) adopted a tailor-made federal law on 1st October 2010 (whose nickname was "lex Duvalier" as it was inspired by the Duvalier case)¹².

13. Following the adoption of this law and the occurrence of new cases of asset misappropriation in the wake of the demise of Ben Ali in Tunisia, Mubarak in Egypt, Khadhafi in Libya and Yanukovych in Ukraine, for example, the Swiss Ministry of Foreign Affairs (FDFA) was entrusted with drafting a legal basis aimed at allowing the Federal Council to freeze a broad range of assets without the need to rely directly on the emergency provisions of the Swiss Constitution. The government finally settled for a new comprehensive law, which should incorporate the Duvalier law and allow for the administrative freezing of assets without a mutual assistance in criminal matters being a prerequisite.
14. The bill was tabled on 21st May 2014. It was supported by all Swiss Member States with major financial establishments, i.e. the cantons of Geneva, Zurich and Ticino¹³, and by almost all political parties¹⁴. It was however opposed by the main Swiss political party with a 25-30% share of the electorate¹⁵, and also by some representatives of private banks¹⁶.
15. In the course of the parliamentary process, the bill was slightly amended, with the main proposed change being the introduction by the lower Chamber of a stringent time limitation with regard to the confiscation of assets based on Swiss criminal statutes of limitations¹⁷. This discrepancy was rejected by the upper Chamber and eventually dropped, allowing the government bill to become law as proposed. The new Foreign Illicit Assets Act (FIAA) came into force on 1st July 2016. Based on it, the Federal Council immediately issued orders¹⁸ concerning Tunisia¹⁹ and Ukraine²⁰.
16. Although not mentioned in the Swiss government proposal, or in parliamentary debates, it is possible that international pressure on Switzerland as an international financial hub had an impact on the willingness of some Swiss political forces to accept a far-reaching bill influenced by diplomatic considerations. The same could be true with regard to the recommendations of the Financial Action Task Force (FATF/GAFI) in relation to the fight against money laundering and terrorist financing.

¹² <https://www.admin.ch/opc/fr/classified-compilation/20100418/201102010000/196.1.pdf>

¹³ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5138 (parliamentary object n. 14.039).

¹⁴ BO 2015 N, p. 995ff.

¹⁵ BO 2015 N, p. 996f.

¹⁶ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5138.

¹⁷ BO 2015 N p. 1012ff; for the results of the vote see:

https://www.parlament.ch/poly/Abstimmung/49/out/vote_49_12017.pdf

¹⁸ German: "Verordnung"; French "ordonnances"; Italian: "Ordinanza".

¹⁹ <https://www.admin.ch/opc/fr/classified-compilation/20160292/index.html>.

²⁰ <https://www.admin.ch/opc/fr/classified-compilation/20160294/index.html>.

II. Structure of the Swiss policy and scope of FIAA

17. The legal structure of the Swiss asset recovery system is threefold, with two main paths to the return of misappropriated assets and a supplementary one. We will focus in this paper on the first two.
18. If a Swiss prosecution authority has opened an investigation based on the Swiss Criminal Code (SCC), it is not necessary to resort to the special provisions of FIAA. Indeed, in such a case, the legal tools provided for by SCC and the Swiss Criminal Procedure Code (CrimPC) may be used. These include the seizure of assets according to Art. 263/1/c and d of the CrimPC and the confiscation of assets based on Art. 70 SCC. However, even in such a case, a general freezing of assets as provided in Art. 3 FIAA, discussed below, can also be useful. The confiscated assets under the authority of Art. 70 SCC are then returned under the authority of Art. 11 to 14 SCAA.
19. If no independent criminal proceedings are initiated in Switzerland, the assistance proceedings follow the rule of the federal law on International Mutual Assistance in Criminal Matters (IMAC); its aim is the handing over of assets seized by Switzerland to the State requesting assistance on the basis of Art. 74a IMAC²¹.
20. If neither an independent criminal procedure, nor a request for mutual assistance in a criminal matter based on proceedings initiated in the state where the assets originated is successful, FIAA provides for alternative confiscation and restitution procedures.
21. FIAA applies to assets located in Switzerland belonging to foreign politically exposed persons²², i.e. individuals who are or have been entrusted with prominent public functions by a foreign country, and to their close associates, i.e. natural persons known to be in close association with them by reason of family, personal or business relationship²³.

III. Operating rules of the Swiss asset recovery system

22. Once assets of a politically exposed person appear to be located in Switzerland, the first step will be the process of freezing such assets²⁴. Then a criminal procedure has to be opened, either independently based on Switzerland claiming jurisdiction, or based on an international mutual assistance request by another State. Finally, the confiscation and return of the assets must be ordered.

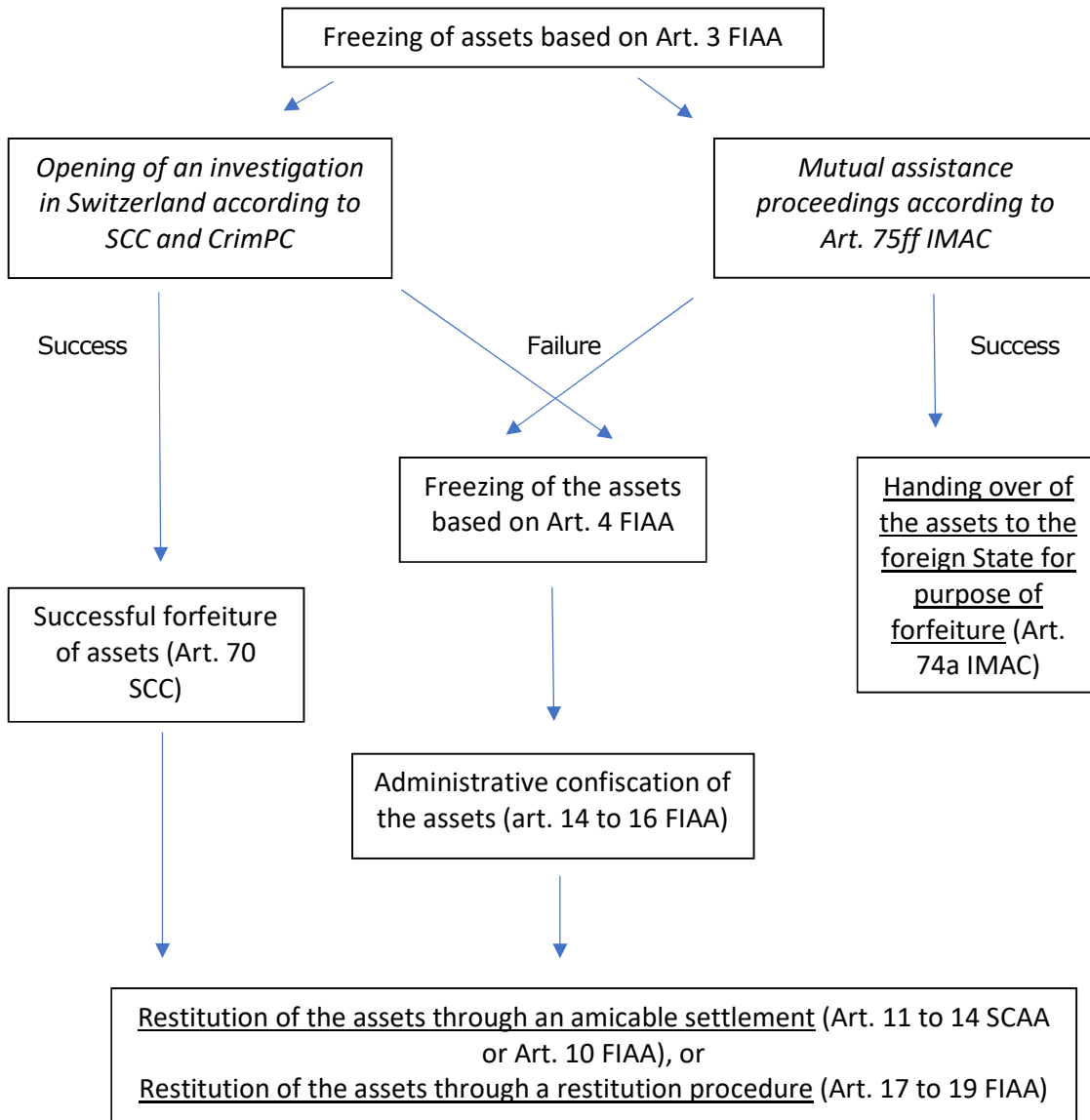
²¹ In accordance with chapter V of the United Nations Convention against Corruption (UNCAC), which prioritizes the interests of the requesting State.

²² *Stratégie de la Suisse concernant le blocage, la confiscation et la restitution des avoirs de potentats* (« Asset Recovery »), Federal Department of Foreign Affairs – Directorate of International Law, 2014, p. 3.

²³ As to the definitions see also Art. 2 lit. a and b FIAA.

²⁴ As stated by the Supreme Court, a seizure based on CrimPC or IMAC is indeed limited to specified already discovered assets, unlike a freezing (based on Art. 3 FIAA), which applies to all assets located in Switzerland: ATF 141 (2015) I 20, c. 6.1.2).

23. These different steps, freezing of assets, criminal proceedings, confiscation and return will be described hereafter, first with a chart, then in detail.



IV. Freezing of assets and criminal proceedings

24. Once a foreign politically exposed person falls from grace, the way is open for the Swiss government to act right away to freeze the potential assets they have deposited or invested in Switzerland. This is however only a possibility and not an obligation for the

Federal Council²⁵. All kind of assets are affected by a freezing order. They include not only assets belonging to the former official concerned or his/her close associates, but also the assets of which they are beneficial owners, and the assets belonging to legal entities under their control²⁶.

25. Such a preventive freezing requires however that four separate conditions be met: the government or certain members of the government of the country of origin have lost power, or a change in power appears inevitable (1); the level of corruption in the country of origin is notoriously high (2); it appears *likely* that the assets were acquired through acts of corruption, criminal mismanagement or other felonies (3); and the safeguarding of Switzerland's interests requires the freezing of the assets (4)²⁷. The conditions to reach in order to consider that the assets were likely acquired through a felony are easy to meet; the existence of mere indications is enough²⁸. As the aim of Art. 3 FIAA is to give a legal basis to the provisional freezing of assets²⁹, the same possibility formerly granted to the government by Art. 184/3 of the Swiss Constitution should no longer be available.
26. The freezing order as such is not subject to a direct appeal³⁰. But there is no doubt that such a decision has major impact on the persons concerned and on their right to ownership. Consequently, access to a court must be granted according to Art. 6/1 ECHR³¹. A person listed in a freezing order can therefore ask for their removal according to Art. 20 FIAA. If such a removal is denied, the affected person can lodge an appeal with the Federal Administrative Court³², and from there to the Federal Supreme Court. Given that Art. 3 FIAA is merely a codification of the previous practice of the Swiss government based directly on Art. 184/3 of the Swiss federal Constitution, the Swiss courts will probably continue to defer to the Swiss Federal Council's decisions when reviewing a challenge to a freezing order³³.
27. The objective of a freezing order based on Art. 3 FIAA is to prevent assets from being transferred to non-cooperative jurisdictions. As explained above, Art. 3 reaches a large category of assets, far more than those where evidence of the criminal origin has already been produced³⁴.
28. A freezing order of the government does not only lead to the freezing of all assets of the persons listed in the order³⁵ located in Switzerland. It also creates a duty to report and

²⁵ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5152.

²⁶ Art. 3/1 FIAA.

²⁷ Art. 3/2 FIAA.

²⁸ FAC (Federal Administrative Court), B-2093/2018, of 11th June 2019, c. 3.3.1; FAC, B-3901/2018, of 13th May 2019, c. 4.1.1; FAC, B-2682/2015, of 7th April 2017, c. 3.2.2.

²⁹ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5153.

³⁰ Art. 21/3 FIAA, which codifies the previous case law: ATF 139 (2013) II 384, c. 2.3.

³¹ ATF 139 (2013) II 384, c. 2.3; ATF 132 (2006) I 229, c. 6.1; BGE 125 (1999) II 417, c. 4d; Radha Ivory, *Corruption, Asset Recovery and the Protection of Property in Public International Law: The Human Rights of Bad Guys*, Cambridge Press, 2014.

³² Art. 21/1 and 2 FIAA.

³³ See: ATF 141 (2015) I 20, c. 5.1.1.

³⁴ ATF 141 (2015) I 20, c. 6.1.1 and 6.1.2.

³⁵ See Art. 5 FIAA.

provide information for every person who holds or manages one or more of these assets or is even simply aware of the existence of such an asset due to its professional activity³⁶. This reporting duty thus concerns especially the Swiss banks and land registers. The nationwide competent office is the Money Laundering Reporting Office Switzerland (MROS-CH), even if the procedure has nothing to do with money laundering. If needed, the MROS can request information or documents from any person or institution that may hold or manage assets covered by a freezing order³⁷.

29. Once the assets located in Switzerland have been frozen (or in theory even before), criminal proceedings must be opened in Switzerland. In most cases, it will not be an independent Swiss criminal investigation. Instead, Swiss authorities will wait for the affected State to lodge a request for mutual assistance in criminal matter according to Art. 75a IMAC, as happened in the Marcos and Duvalier cases, and more recently with regard to Ben Ali and Mubarak³⁸.
30. The experience of the last thirty years shows that this is in practice the most difficult step, as most of States victimized by their former high-ranking officials have little or no previous experience dealing with such complex criminal cases having to comply with principles of a fair criminal procedure³⁹ and may still be under partial control of some former officials of the ousted kleptocrat⁴⁰.
31. To enhance the likelihood of the mutual assistance proceedings being successful in such cases, FIAA has introduced two new tools. The first one is the possibility for the Swiss Ministry of Foreign Affairs and the Swiss Ministry of Justice and Police to provide the country of origin with technical assistance⁴¹. For example, they may send qualified experts to assist local authorities or finance technical support of specialised lawyers or NGOs⁴². The second tool, which is a major innovation of FIAA,⁴³ is the possibility to spontaneously transfer confidential information to the country of origin to allow it to prepare a request for mutual legal assistance from Switzerland, or to complete an insufficiently substantiated request⁴⁴. This transmission is thus not subject to the usual limits of Art. 67a IMAC. The information should be transmitted by the MROS-CH in the form of a report and in accordance with the "Egmont principles", which are the standard of cooperation between the Financial Action Task Force (FATF) members. However, it is

³⁶ Art. 7 FIAA.

³⁷ Art. 7/3 and 4 FIAA.

³⁸ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5129.

³⁹ Which is needed in order for Switzerland to grant mutual assistance according to Art. 2 IMAC.

⁴⁰ See also: MEYER, *Das neue Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte ausländischer politisch exponierter Person (SVRG)*, in: ZStrR 134/2016 – 291, p. 295.

⁴¹ Art. 12 FIAA.

⁴² FF 2014 5121 (Federal Council report on the draft FIAA), p. 5172, which mentions the International Center for Asset Recovery (ICAR) in Basel or the Stolen Asset Recovery Initiative (StAR) of the World Bank.

⁴³ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5135.

⁴⁴ Art. 13 FIAA.

not necessary for an affected State to be part of the FATF in order for the Swiss MROS to provide information⁴⁵. The identity of the source of the intelligence is not revealed⁴⁶.

32. No information is provided if the country of origin is experiencing a failure of state structures, if the life or physical well-being of the persons concerned would be threatened as a result, or if national interests or public security and order will be prejudiced⁴⁷.
33. An initial freeze of assets may last for a maximum of ten years and must be renewed every year⁴⁸ after an initial period of four years⁴⁹. However, this upper limit does not mean that the measure is not subject to scrutiny until the limit is reached. To the contrary, the proportionality of the freezing measure must constantly be verified with the requirement level regarding the intensity with which the Swiss authorities seek to resolve the case and the importance of the public interests involved becoming incrementally higher as time goes by⁵⁰.
34. Except for the method of mutual cooperation arising from a proceeding in the state where the assets originated, the only way to confiscate assets is through an independent Swiss criminal procedure. The importance of this alternative must not however be overestimated as it often requires a high degree of cooperation with the country of origin of the assets, which means that the same above-mentioned issues are likely to arise. This difficulty may however be avoided if there is sufficient evidence in Switzerland that key steps of the criminal behaviour were committed on Swiss territory. This is especially true with regard to money laundering offenses and cases of private bribery.
35. Notwithstanding these difficulties, there are examples of successful independent Swiss criminal proceedings regarding bribery and money laundering.

Criminal Proceedings against Companies since 2011 (with amounts of fines):

- Alstom, 2011, Bribery, CHF 39 million, Fine: CHF 2,5 million)
- Stanford Group, 2014, Money laundering, CHF 12,3 million, Fine: CHF 1 million)
- Nitrochem, 2016, Bribery, CHF 860'000.-, Fine: CHF 750'000.-
- Odebrecht et Constructora Norberto Odebrecht, 2016, Bribery and Money laundering, CHF 121,4 million, Fine: CHF 4,5 million
- Kba-Notasys, 2017, Bribery, CHF 35 million, Fine: one symbolic CHF franc

⁴⁵ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5174.

⁴⁶ Art. 13/2 FIAA and Art. 32/3 Anti-Money Laundering Act.

⁴⁷ Art. 13/2 FIAA and 13/3 FIAA.

⁴⁸ The freezing of the assets of Ben Ali and Viktor Ianoukovitch was for example extend for one year on 13 December 2019.

⁴⁹ Art. 6/1 FIAA.

⁵⁰ ATF 141 (2015) I 20, c. 6.2.4; ATF 132 (2006) I 229, c. 11.6; FAC, B-2093/2018, of 11th June 2019, c. 4.6.3; see also: FAC, B-2682, of 7th April 2017, c. 8.2.3.

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- Dredging International Services (Cyprus), 2017, Bribery, CHF 38 million, Fine: CHF 1 million
- Gunvor, 2019, Bribery, CHF 94 million, Fine: CHF 4 million

Companies not fined but compensatory payment:

- Siemens, 2013, Turbomachinery, 2013, CHF 10,5 million
- Braskem, 2016, CHF 94,5 million
- Smith & Nash, 2017, CHF 2 million

Individual persons with amounts returned:

- Obiang, Equatorial Guinea, 2019 (partial confiscation without conviction)
- Abacha II, Nigeria, 2017 (USD 321 million)
- Kazakhstan II, 2012 (USD 48 million)
- Angola II, 2012 (USD 43 million)
- Kazakhstan I, 2007 (USD 115 million)
- Salinas, Mexico, 2008 (USD 74 millions)

V. Confiscation and return of assets

36. Once the assets are frozen, the next step is their confiscation.

37. A confiscation based on Art. 70 SCC can either be ordered as part of a judgement closing a criminal case or, if such case does not come to an end⁵¹, in a stand-alone proceeding according to Art. 377 CrimPC. The latter may occur for example if the suspect died, or if the prosecution of the predicate offense is no longer possible because of the general statutes of limitation of SCC, when the specific time limitation with regard to forfeitures according to Art. 70/3 SCC has not expired⁵². A confiscation is thus possible even if no criminal procedure may be opened or closed successfully in Switzerland⁵³. However, the Swiss criminal authorities must have jurisdiction to prosecute⁵⁴.

⁵¹ ATF 144 IV 1, c. 4.1.1 and 4.1.2; PC-CPP, 2nd ed. 2016, ad. Art. 376 CrimPC, n. 6.

⁵² PC-CPP, 2nd ed. 2016, ad. Art. 376 CrimPC, n. 3.

⁵³ Art. 376 CrimPC; see also: ATF 132 (2006) II 178, c. 4; TF, 6B_490/2011, of 14th May 2012, c. 4.3.

⁵⁴ BGE 141 (2015) IV 155, c. 4.1; ATF 134 (2008) IV 185, c. 2.1; ATF 132 (2006) II 178, c. 5.1; TF, 6B_52/2012, of 11th March 2013, c. 3.2.

38. Art. 70 SCC allows the confiscation of all assets acquired through the commission of an offence or intended to be used in the commission of an offence or as reward for it; the leitmotiv is that the crime should not pay⁵⁵. Every asset obtained as a result of a criminal offense shall be confiscated⁵⁶; the prosecutor must thus prove that a criminal offense took place⁵⁷ and the causal link between this offense and the procurement of the involved assets; the fact that the assets directly obtained as a consequence of a criminal offense have been converted in another type of assets (for example that a sum in a bank account was "transformed" into a house), is no hurdle to a confiscation as long as there is a paper trail demonstrating it⁵⁸. The possibility to confiscate criminal assets is limited in time. The time limit to confiscate is seven years. However, if the prosecution of the (predicate) offence is subject to a longer limitation period⁵⁹, this period also applies to the right to order forfeiture⁶⁰. According to Art. 70/5 SCC, if the amount of the assets to be forfeited cannot be ascertained or may be ascertained only by incurring a disproportionate level of trouble and expense, the court may make an estimate. If the assets subject to confiscation are no longer available, Art. 71 SCC allows a criminal court to grant the State a claim for compensation in respect of a sum of equivalent value (equivalent claim).
39. In cases of mutual legal assistance, according to Art. 74a IMAC, objects or assets subject to a precautionary seizure may be handed over to the competent foreign authority after conclusion of the mutual assistance proceedings for the purpose of forfeiture⁶¹. The only important difference is that in such a case, some assets may be handed over to a foreign State only to be confiscated and not in order for a foreign court to grant "compensation claim"⁶². In principle a decision to hand over assets to a foreign States requires a final and executable decision from this requesting State⁶³.
40. However, Switzerland does not grant mutual legal assistance if the main criminal procedure in the State introducing the request does not observe some minimal standards. A request is refused if the foreign criminal procedure does not comply with the procedural requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, if a criminal procedure aims at prosecuting a person on account of his political opinions, his belonging to a certain social group, his race, religion, or nationality, or if it suffers another serious defect regarding the rule of law⁶⁴. The purpose of Art. 2 IMAC is to prevent Switzerland from providing assistance,

⁵⁵ ATF 145 (2019) IV 237, c. 3.2.1; BGE 144 (2018) IV 285, c. 2.2; ATF 144 (2018) IV 1, c. 4.2.1; BGE 141 (2015) IV 155, c. 4.1.

⁵⁶ BGE 144 (2018) IV 285, c. 2.8.2; ATF 144 (2018) IV 1, c. 4.2.2; BGE 141 (2015) IV 317, E. 5.3.2; BGE 141 (2015) IV 305, c. 6.3.2.

⁵⁷ BGE 141 (2015) IV 155, c. 4.1.

⁵⁸ ATF 129 (2003) II 453, c. 4.1; BGE 128 (2002) I 129, c. 3.1.2; TF, 1B_22/2017, of 24th March 2017, c. 2; BGer, 6B_180/2016, of 28th October 2016, c. 4.4.1; TF, 1B_127/2009 of 11th September 2009, c. 3.

⁵⁹ See: Art. 97, 98 and 101 SCC.

⁶⁰ Art. 70/3 SCC.

⁶¹ ATF 129 (2003) II 453, c. 4.1.

⁶² ATF 133 (2007) IV 215, c. 2.2.1.

⁶³ Art. 74a/3 IMAC; UNSELD, *Akzessorische Rechtshilfe, Auslieferung und Vollstreckungshilfe bei Fiskaldelikten*, in: ZStV n. 167-311, 2011, p. 316.

⁶⁴ Art. 2 IMAC.

through mutual assistance to proceedings which would not guarantee the person prosecuted a minimum standard of protection or which would violate standards recognised as belonging to the international public order⁶⁵. As a potential denial of an assistance request implies a value judgment on the internal affairs of the requesting State (in particular on its governmental institutions and its compliance with the fundamental rights and the independence, especially regarding impartiality of its judiciary), the Swiss authorities exercise particular caution in this regard and the person prosecuted by a foreign State has to show that there is a plausible objective risk of serious human rights violations in the requesting State, which could tangibly affect him/her⁶⁶.

VI. Administrative confiscation, the third route

41. If neither an independent criminal procedure in Switzerland, nor a mutual assistance procedure in criminal matters is successful, the primary path of the Swiss assets recovery system is closed. According to the rules of criminal law, the assets seized should consequently be given back to the suspected kleptocrat, which may prove particularly harmful to the reputation of the Swiss authorities and the Swiss financial sector. This was the situation the Swiss foreign Ministry faced in the "Duvalier case" in January 2010.
42. To avoid such an embarrassing failure, Art. 4 FIAA grants the Swiss government the power to continue the asset freeze in the event a mutual assistance procedure fails. This possibility stems directly from the "lex Duvalier" of 2010, which was created to this end.
43. Such a freezing order requires that the affected State introduce a request for assistance aiming at the seizure of the assets (as proof of its wish to reclaim the "stolen" assets) (1), that the safeguarding of Switzerland's interests requires the freezing of the assets (2) and either that it is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment of its judicial system (failure of state structures) (3a), or that the cooperation with the country of origin proves to be impossible because there are reasons to believe that proceedings in the country of origin do not satisfy the essential principles of procedure foreseen in Article 2 IMAC⁶⁷ (3b)⁶⁸. Finally, the freezing of assets based on Art. 4 FIAA is limited to a maximum of ten years from the date the freezing order issued pursuant to Art. 4 FIAA becomes enforceable⁶⁹.
44. It is not clear if Art. 4 FIAA may also be used to freeze assets once an independent criminal procedure was opened in Switzerland but failed. In our opinion, an asset freezing should

⁶⁵ ATF 130 (2004) II 21, c. 8.1; ATF 129 (2003) II 268, c. 6.1; ATF 125 (1999) II 356, c. 8a; ATF 123 (1997) II 161, c. 6a.

⁶⁶ ATF 130 (2004) II 21, c. 8.1 [Taiwan]; ATF 129 (2003) II 268 [Nigeria], c. 6.1; ATF 125 (1999) II 356 [Ukraine], c. 8a; ATF 122 (1996) II 373, c. 2a [Turkey].

⁶⁷ This possibility is a major novelty of FIAA in comparison with the "Duvalier law": FF 2014 5121 (Federal Council report on the draft FIAA), p. 5135f.

⁶⁸ Art. 4/2 and 3 FIAA.

⁶⁹ Art. 6/2 FIAA.

also be ordered in such a case if the foreign State has shown enough interest in the procedure by introducing a request for mutual legal assistance related to the assets.

45. Once an order to continue to freeze the assets based on Art. 4 FIAA issues, the door is open to the back-up plan of the Swiss authorities to confiscate and return the “stolen” assets, i.e. it becomes possible to order the administrative confiscation of the assets based on Art. 14 and 15 FIAA.

According to Art. 14 FIAA, the Swiss Finance Ministry may ask the Federal Administrative Court⁷⁰ for the confiscation of the frozen assets if these assets are subject to the power of disposal of a foreign politically exposed person or a close associate (including beneficial ownership) (1), were frozen based on Art. 4 FIAA (2) and are of illicit origin (3)⁷¹.

46. As compared to a criminal confiscation, a confiscation based on Art. 14 FIAA has two major considerable advantages. First, it is not subject to any limitation in time⁷². Second, provided that two conditions (see below) are fulfilled, the assets are rebuttably presumed to be of illicit origin, reversing the burden of proof⁷³.

47. Indeed, this reversal of the burden of proof requires that the wealth of the individual concerned increased inordinately (1), and that the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office (2)⁷⁴. A causal link between an “inordinate increase” and the exercise of a public function need not be concretely proved⁷⁵; it is enough to be able to establish that there is a significant disproportion, inconsistent with ordinary experience and the prevailing circumstances in the country, between the income legitimately earned by the person with the power of disposal over the assets and the growth in that person’s wealth⁷⁶. If the presumption of illicit origin applies, it is nevertheless possible for the person affected to avoid a confiscation if they establish that the assets in question were with an “overwhelming probability” acquired legitimately⁷⁷.

48. A confiscation may be avoided, at least in part, if a third party has acquired in good faith rights in rem⁷⁸ on the frozen assets⁷⁹, which means that they couldn’t know of their criminal origin⁸⁰, or if a Swiss authority asserts that it has legally obtained some rights related to the assets⁸¹, for example property taxes. The impossibility for third parties to

⁷⁰ See also Art. 35 lit. d of the Federal Administrative Court Act.

⁷¹ Art. 14/1 and 2 FIAA.

⁷² Art. 14/3 FIAA.

⁷³ Art. 15 FIAA.

⁷⁴ Art. 15/1 FIAA.

⁷⁵ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5181.

⁷⁶ Art. 15/2 FIAA.

⁷⁷ Art. 15/3 FIAA.

⁷⁸ As with regard to 74a IMAC: BGE 123 (1997) II 595, c. 6b/aa; TF, 1C_571/2014, of 4th December 2014, c. 2; TF, 1C_166/2009, of 3rd July 2009, c. 2.3.4.

⁷⁹ In practice, such cases may happen with regard to estates, which were sold prior to the initial freeze of the assets, or in relation with luxury goods, like jewelry.

⁸⁰ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5183.

⁸¹ Art. 16 FIAA.

see their claim fulfilled, except with regard to rights in rem, is especially favourable to the impacted foreign State claiming the assets. At the same time, however, it means that most of the claims of third parties of good faith like employees or local businesses may go unfulfilled, which was not the case prior to FIAA⁸².

49. If successful, a confiscation based on Art. 14 FIAA transfers the rights on the frozen assets to the Swiss Federal State⁸³.

VII. Return of Assets

50. As to the return of assets confiscated following an independent Swiss criminal procedure, the principle is that the State confiscating the assets, i.e. Switzerland, is awarded the totality of them. However, Art. 11 to 14 of the Federal act on the sharing of confiscated assets of 2004 (SCAA) provides for the possibility to reaching a sharing agreement between Switzerland and the foreign State⁸⁴ and in principle only if the foreign States involved guarantees reciprocity⁸⁵.

51. If such a sharing agreement is a possible scenario, the Swiss Federal Office of Justice has to undertake negotiations with the foreign State, with the objective of an apportionment of at least 50% of the assets to Switzerland⁸⁶. However, a departure from the 50/50 key in favour of the foreign State is possible on reasoned grounds⁸⁷. A departure would be consistent with Art. 57(4) UNCAC. Art. 11 to 14 IMAC allow in particular to depart from this 50/50 key where assets are the result of misappropriation practices from foreign officials⁸⁸. However, the foreign State has in any case no legal right to a share of the assets if no specific agreement is concluded⁸⁹. Most of the recent sharing agreements were concluded by Switzerland with OECD States and less with developing countries⁹⁰.

52. If assets are seized based on Art. 74a IMAC with the aim of handing them over to another State as part of a mutual assistance in criminal matters procedure, the assets are, should the request be accepted, entirely handed over with Switzerland only retaining them, or part of them, in limited listed circumstances⁹¹: the victim is resident in Switzerland and the assets have to be returned to him/her (1), an authority asserts rights over them (2), a person not involved in the offence and whose claims are not guaranteed by the requesting State shows probable cause that he/she has acquired rights in rem over these

⁸² In the judgment ATF 132 (2004) I 229, the Supreme Court for example allowed for ex-employee of Mobutu Sese Seko to be paid on part of the frozen assets, which had later to be given back to the heirs of the former dictator.

⁸³ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5179.

⁸⁴ Art. 11 and 13 SCAA.

⁸⁵ Art. 11/2 SCAA.

⁸⁶ Art. 12/2 and 3 SCAA.

⁸⁷ Art. 12/3 SCAA.

⁸⁸ FF 2001 1438 (Federal Council report on the draft SCAA), p. 454.

⁸⁹ Art. 11/3 SCAA and Art. 1/4 IMAC.

⁹⁰ OECD, Working Group on Bribery in International Business Transactions, Implementing the OECD anti-bribery convention, Phase 4 Report: Switzerland, 2018, n. 114, p. 52f.

⁹¹ FF 2001 1438 (Federal Council report on the draft SCAA), p. 458.

assets in good faith (3) the assets are necessary for pending criminal proceedings in Switzerland or appear, because of their nature, to be subject to forfeiture in Switzerland (4)⁹².

53. When assets are confiscated on the basis of Art. 14 FIAA, the procedure differs widely. Art. 17 and 18 FIAA provide for a specific restitution procedure, aiming at awarding the assets such that the living conditions of the inhabitants of the country of origin are improved or that the rule of law in the country of origin is strengthened⁹³ through the financing of programmes of public interest⁹⁴.
54. If possible, this should be made through an agreement negotiated directly by the Swiss government, which may include provisions on the control and monitoring of the use made of the returned assets⁹⁵. The list of provisions in Art. 18/3 FIAA is not exhaustive⁹⁶ and it seems thus possible to hand over assets to the origin State in exchange for the adoption of anti-corruption reforms for the benefit of the populations affected by the economic crimes.
55. In case where such an agreement cannot be reached, the government determines the process of restitution and may return the confiscated assets through local or international NGO's with the help of international organisations⁹⁷, like in particular the World Bank or the international Committee of the Red Cross⁹⁸. It may indeed prove difficult to find organisations able to use efficiently some very large amount of money, potentially millions, on a geographically constrained area⁹⁹. As explained earlier, SCAA does not apply here since the return does not follow a Swiss judgment¹⁰⁰ and unlike the situation under Art. 12 SCAA, Switzerland only retains a lump-sum not exceeding 2.5% of the value of the confiscated assets as Procedural costs¹⁰¹.
56. As to the return method itself, the recent experiences made with regard to return processes seem to indicate that one of the way to handle the issue is to set up a dedicated independent financial structure, like a foundation, which includes representatives from the Swiss and the affected government as well as representatives of non-governmental organisations. It allows an effective allocation of the confiscated funds and should thus be favoured at least when substantial amounts of funds are involved. For example, in the Kazakhstan I case approximately 115.8 million CHF were successfully restored to the Kazakhstani civil society by means of an independent foundation named BOTA. On the contrary, restitutions through the governments may prove risky as shows the Kazakhstan II case. In this case, approximately 48 million CHF were returned to the Kazakhstani

⁹² Art. 74a/4 IMAC.

⁹³ Art. 17 FIAA.

⁹⁴ Art. 18/1 FIAA.

⁹⁵ Art. 18/2 and 3 FIAA.

⁹⁶ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5186.

⁹⁷ Art. 18/4 FIAA.

⁹⁸ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5152.

⁹⁹ MEYER, *op cit.* 40, in: ZStrR 134/2016 – 291, p. 320.

¹⁰⁰ Art. 2/1 SCAA.

¹⁰¹ Art. 19 FIAA.

government under the stewardship of the World Bank. The funds then benefited the Youth Corps program, which shows some potential worrisome links to local political actors and has so far shown no significant result¹⁰². The World Bank is currently conducting an audit on the program in order to verify if irregularities were committed¹⁰³.

57. The huge discrepancy between the two ways of restitution described above may however be at least partly offset using the possibility granted by Art. 10 FIAA. This norm allows for the conclusion of an amicable settlement by the Swiss government regarding the full or partial restitution of assets that were frozen under Art. 3 or 4 FIAA at any time of the proceedings. Contrary to Art. 12 SCAA, such an agreement should follow the same principle as the ones based on Art. 18 FIAA and thus make possible a restitution through international organisations or NGO's instead of a handing-over directly to the foreign State, with no guarantee as to the ultimate allocation of the assets.

VIII. Criminal enforcement of FIAA

58. FIAA provides for specific criminal offenses in relation with the violation of a freezing order and the violation of the duty to inform based on Art. 7 FIAA.
59. Any natural person who wilfully infringes upon a freezing order by releasing frozen assets without authorisation is liable to a custodial sentence not exceeding three years or to a monetary penalty (up to CHF 540'000.- depending on her/his resources)¹⁰⁴. If the violation is committed through negligence, the penalty is a fine up to CHF 250'000.-¹⁰⁵.
60. Any natural person who wilfully violates his/her duty to report and to provide information as set out in Article 7 FIAA is liable to a fine not exceeding CHF 250'000.-¹⁰⁶. Where the violation is committed through negligence, the penalty is a fine not exceeding CHF 100'000.-¹⁰⁷.
61. FIAA also provides to sanction a company where one of the above-mentioned offences was committed in business operations. However, this path is only opened if the identification of the natural person(s) who committed the offences requires investigative measures that are disproportionate to the penalty incurred and that a fine of a maximum of CHF 50'000.- is under consideration¹⁰⁸. Albeit this possibility to prosecute a company exists, it is clear in the light of this low maximum threshold that the aim of this norm is to

¹⁰² <https://projects.worldbank.org/en/projects-operations/project-detail/P127966?lang=en> , retrieved on the 10.12.2019.

¹⁰³ <https://www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=43469>.

¹⁰⁴ Art. 25/1 FIAA.

¹⁰⁵ Art. 25/2 FIAA.

¹⁰⁶ Art. 26/1 FIAA.

¹⁰⁷ Art. 26/2 FIAA.

¹⁰⁸ Art. 27 FIAA.

facilitate the work of the prosecution authority in cases of minor infringements and not to deter criminal corporate behaviour¹⁰⁹.

Suggested changes to the Swiss policy of asset recovery

62. As explained above, FIAA is the culmination of decades of evolution of Swiss asset recovery policy.
63. Taken as a whole, the Swiss asset recovery policy, and FIAA in particular, is unquestionably a success. It is comprehensive, results-oriented and, at the end of the day, quite effective¹¹⁰. As of 2014, Switzerland was able to return approximately 1.7 billion CHF¹¹¹. It is one of the few areas where Switzerland has opted to act proactively instead of reacting under pressure. Such a strategy allows it to shape international policies instead of being shaped by them.
64. It is however important to look at the Swiss asset recovery policy for what it is : a foreign policy tool¹¹² that aims on the one hand to preserve the reputation of Switzerland and of the Swiss financial sector in particular and, on the other hand, to allow for a responsible use of at least part of the funds that were stolen by kleptocrats to benefit their citizens. It is an opportunity for Switzerland to be part of global efforts to fight corruption, which is also in its interest.
65. In spite of its qualities, there are in our opinion still some room for improvement with regard to six aspects of the Swiss asset recovery policy. Four are major and two minor.
66. First, there is quite evidently a discrepancy issue regarding the attribution policies between the return following a criminal procedure and following an administrative confiscation based on Art. 17 to 19 FIAA. This difference may be understood when Switzerland acts upon a request from criminal authorities of another State governed by the rule of law. In such a situation, it seems fair to hand over the assets except for case types listed in Art. 74a/4 IMAC. However, the difference in treatment between the return of assets confiscated on the basis of Art. 70 SCC and 12-14 SCAA, which is completely voluntary, and mandatory restitution based on FIAA, seems unjustified. This could, for example, be changed by adding a new paragraph 3 to Art. 2 SCAA with the following content:

¹⁰⁹ See: FF 2014 5121 (Federal Council report on the draft FIAA), p. 5195.

¹¹⁰ See also: MEYER, *op cit.* 40, in: ZStrR 134/2016 – 291, p. 322f.

¹¹¹ *Stratégie de la Suisse concernant le blocage, la confiscation et la restitution des avoirs de potentats* (« Asset Recovery »), Federal Department of Foreign Affairs – Directorate of International Law, 2014, p. 6; FF 2014 5121 (Federal Council report on the draft FIAA), p. 5130.

¹¹² See also: MEYER, *op cit.* 40, in: ZStrR 134/2016 – 291, p. 323.

3. If assets confiscated in accordance with Swiss substantive criminal law would have fulfilled the conditions to be confiscated in accordance with Art. 14 and 15 FIAA, their apportionment and return is subject to Art. 17 to 19 FIAA.

67. Such a modification would not only affect forfeited assets *stricto sensu* (art. 70 SCC), but also, if the assets subject to forfeiture are no longer available, a claim for compensation by the State in respect of a sum of equivalent value (Art. 71 SCC), as SCAA applies to both¹¹³.
68. On 20th June 2019, the upper chamber of the Swiss Federal parliament requested that the Swiss government propose one or more changes in the legislation to extend the application of Art. 17 to 19 FIAA¹¹⁴. The above-mentioned change would precisely follow this parliamentary mandate.
69. Secondly, Art. 27 FIAA regarding criminal penalties, which may be imposed on companies for violations of FIAA committed in business operations should be overhauled. Indeed, the priority given to the prosecution of legal entities rather than the actual natural persons who committed the offense makes it inefficient. And the maximum fine of CHF 50'000 a company faces where the employee does ignore the law is inadequate. The effect is that only small businesses for which CHF 50,000 is a significant amount need be concerned about a violation whereas large companies do not have to be. This issue is not specific to FIAA as the maximum penalty for a company with regard to cases of bribery, money laundering, support of a criminal organisation or financing terrorist is only a fine of CHF 5 million¹¹⁵. These are utterly inappropriate sanctions which cast doubt on the credibility of the Swiss polices related to these areas¹¹⁶.
70. In its Switzerland Phase 4 Report of 2018, the OECD Working Group on Bribery also deemed the current provisions of Swiss criminal law with regard to legal persons inappropriate and recommended an increase of the maximum statutory fine and improvements aimed at making the sanctions against legal persons more effective, proportionate and dissuasive in general¹¹⁷. The penalties could also be more than a monetary fine, such as losing license to operate. Or a suspension of it.
71. Art. 27 FIAA should consequently be rewritten with credible sanctions, which fit the size of the company/undertaking involved. It could be made as part of a general overhaul of the sanction regime against a company or other undertaking with regard to criminal

¹¹³ Art. 1 SCAA.

¹¹⁴ Parliamentary object n. 19.3414: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20193414>.

¹¹⁵ Art. 102/2 SCC.

¹¹⁶ For example, the sentence against UBS in France with regard to a case of major tax fraud was a fine of approximately CHF 5.2 billion. In Switzerland such a case would have been punished with a maximal, and essentially meaningless, fine of CHF 5 million.

¹¹⁷ OECD, Working Group on Bribery in International Business Transactions, Implementing the OECD anti-bribery convention, Phase 4 Report: Switzerland, 2018, n. 97 to 100, p. 45f, and recommendations n. 9a and 9b, p. 78.

business law. With regard specifically to Art. 27, it could for example be formulated as follows:

Art. 27 Offences in business operations

If the offence committed falls under Articles 25 FIAA or 26 FIAA, the undertaking is penalised irrespective of the criminal liability of any natural persons, provided the undertaking has failed to take all the reasonable organisational measures that are required in order to prevent such an offence.

In such cases, the undertaking is liable to a fine not exceeding CHF 10'000'000.- or 4 % of its total worldwide annual turnover of the preceding financial year, whichever is higher.

72. Thirdly, one could add to this enhancement of the sanctions with regard to economic crimes provisions, such as those in France,¹¹⁸ for well-established NGO's in the field to be part of criminal proceedings in Switzerland with the status of party and not only being in the position of reporting an offense. Indeed, this is at the moment clearly not possible according to the case law of the Swiss Supreme court¹¹⁹.

73. For example, two new paragraphs to new article 105 CrimPC could be established with the following content.

Art. 105 Other persons involved in the proceedings

1 and 2 {...}

3 Non-profit organisations of international or national importance authorised by their articles of association to be active in the fight against corruption may be entitled to the procedural rights of a party, subject to the following requirements:

a. It was established at least ten years prior to the filing of the appeal.

b. The criminal procedure related to one or more of the following offenses: Art. 322^{septies} SCC (Bribery of foreign public officials), Art. 322^{octies} SCC (Bribery of private individuals), Art. 322^{novies} SCC (Accepting private bribes), or Art. 305^{bis} SCC (money laundering), when the predicate offense is one of the first above-mentioned ones.

4 The Federal Council designates the organisations that have the right to appeal.

74. Fourth, neither SCAA nor FIAA provides for a possibility to apply the rules regarding the restitution of the confiscated assets to the monetary penalties (including the fines) imposed by a Swiss court as a result of independent criminal proceedings in Switzerland. Admittedly, Art. 73 SCC allows for such a possibility but only under relatively restrictive prerequisites. In particular, the person making a request for such a victim allotment must

¹¹⁸ Art 1 loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière

¹¹⁹ BGE 144 (2018) IV 240, c. 2.5.

be someone having a civil claim based on the criminal offense committed¹²⁰. It could thus be a foreign State in certain circumstances (e.g. proved bribery of foreign public officials) but it could not be civil society.

75. This could be changed with the adoption of a new Art. 73a SCC implementing that fines paid to the Swiss Federal State or to a Swiss canton shall be returned to the country of origin, i.e. the country where the predicate offense was committed, if the criminal procedure is related to one or more of the following offenses: Art. 322^{septies} SCC (Bribery of foreign public officials), Art. 322^{octies} SCC (Bribery of private individuals), Art. 322^{novies} (Accepting private bribes), or Art. 305^{bis} SCC (money laundering), when the predicate offense is one of the first above-mentioned ones.
76. As a result of such a legal modification, it would in particular be possible to use the product of monetary penalties against wealthy individuals and large corporations for the benefit of civil society of states where the criminal offense was at least in part committed, in the same vein as the possibility provided by Art. 18/4 FIAA. However, to encourage careful prosecution of the above-mentioned offenses, a provision could stipulate that the monetary penalties would be partly awarded to the Swiss Confederation or the Canton where the prosecution took place.
77. Fifthly, a minor positive change could be made in regard to the transparency of the restitution agreements based on Art. 18 FIAA (or 10 FIAA) by making all such agreements freely available on a website. The government did not include such an obligation in its draft bill because it seemed a "superfluous administrative work"¹²¹. This is not persuasive, especially under consideration of the significant amount of money potentially involved. Nevertheless, a right to consultation may already currently be invoked under the Freedom of Information Act (FoIA)¹²².
78. Finally, even if the language of Art. 18 FIAA could already be interpreted to allow Switzerland to request a State affected by a misappropriation scheme to adopt anti-corruption reforms, this type of clause is not expressly mentioned in the list set out in para 3 of Art. 18 FIAA. Expressly enshrining this possibility in the law would thus be more transparent and reinforce the probability for such clauses to be included in future hand-over agreements.

FIAA as model for the EU and its Member States?

79. EU currently has no common policy regarding foreign corruption, let alone a common asset recovery policy. In contrast to the Swiss situation (123), the boundaries of competence of the European Union detailed in constitutional European law (i.e. the Treaty on European Union [TEU] and Treaty on the Functioning of the European Union [TFEU])

¹²⁰ ATF 145 (2019) IV 237, c. 5.1 and 5.1.1.

¹²¹ FF 2014 5121 (Federal Council report on the draft FIAA), p. 5186.

¹²² Ibidem.

are ensured by the European Court of Justice. There is thus a need to find a constitutional norm that could grant the EU the competence to adopt an act like the FIAA.

80. The most obvious candidates to such a legal basis are Art. 82 TFEU, which provides for a Union competence with regard to international criminal law (coordination) and mutual cooperation in criminal matters and Art. 83 TFEU, which provides for a restrictive competence of the Union in the scope of material criminal law.
81. As to material criminal law, Art. 83/1 TFEU grants a legislative competence to the Union but limits this competence to the definition of criminal offences and sanctions in the areas of particularly serious crime including terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime, provided that the criminal offense involved has a cross-border dimension. Such a competence could thus be a proper basis for a comprehensive act like FIAA with regard to freezing of funds, financial assets or economic gains¹²³, confiscation and, possibly, restitution of assets, if these assets are linked to one of the criminal offenses listed above, especially corruption and money laundering. The Council¹²⁴ may even unanimously adopt a decision expanding this list according to Art. 83/1(3) TFEU. The main problem with Art. 83 TFEU is that it only grants the Union to fight crime with a cross-border dimension. However, it could in our opinion convincingly be argued that most of the cases of asset recovery are cross-border.
82. With regard to unilateral cooperation measures, like the ones provided for by Art. 12 and 13 FIAA, Art. 83 TFEU does not seem appropriate as a legal basis. In relation to such measures (and excluding the ways of an international agreement), one could first consider using Art. 83/2/d TFEU as a legal basis. It means however that a unanimous¹²⁵ decision would be required in order to grant the Union the competence to enact unilateral cooperation measures like the one of FIAA. This appears to be a significant hurdle as some Member-States are known to be very reluctant to the adoption of any common European law regarding criminal law, especially Poland and Hungary, and, although a bit more temperate, Sweden and the Netherlands¹²⁶.
83. The other possibility would be to use Art. 212 TFEU as a legal basis. This article grants the Union the competence to carry out economic, financial and technical cooperation

¹²³ Art. 75 TFEU grants the Union such a competence with regard to terrorism and related activities.

¹²⁴ The Council is the upper legislative of the Union representing the Member States; it consists of a representative of each Member State at ministerial level (Art. 16 TEU). With regard to criminal law, the configuration of the Council involved is the Justice and Home Affairs Council (JHA), which brings together the justice and home affairs ministers.

¹²⁵ Abstentions by Member- States does not prevent the adoption by the Council of acts which require unanimity according to Art. 238/4 TFEU.

¹²⁶ See for example the project of the common European Public Prosecutor, which had to be pushed through the enhanced cooperation Procedure without the above-mentioned Member-States, Ireland, Malta and Denmark participating in it (although the Netherlands and Malta later joined the EPPO and Sweden is considering joining it too).

measures, including assistance, in particular financial assistance, with third countries other than developing countries. This article seems sufficient to enact technical assistance measures of the sort that is provided by Art. 12 FIAA. On the contrary, it does not appear to us that a norm allowing the transmission of criminal information like the ones included in the scope of Art. 13 FIAA could be based on Art. 212 TFEU, as such transmissions are closely related to criminal proceedings.

84. In any case, Art. 83/1 TFEU and Art. 82/2 TFEU only allow for the adoption of directives, i.e. framework laws binding in principle upon Member-States only¹²⁷, while Art. 212 TFEU does not constrain the European legislator in this regard¹²⁸. The ordinary legislative procedure¹²⁹ is applicable regardless of the legal basis involved (but only after a unanimous decision in case of Art. 82/2/d TFEU).
85. Conversely, the competences clauses of the Union related to the common foreign policy are marred by the same weakness as the old freezing order of the Swiss federal Council based on Art. 184/3 of the Swiss federal Constitution, i.e. they provide for a sufficient legal basis in order to freeze the assets but not in order to confiscate them, let alone to hand them over. Moreover, the procedure is neither expedient nor convenient.
86. The current legal situation is indeed the following: the European Council¹³⁰ on the basis of Art. 26 TEU or the Council¹³¹ on the basis of Art. 29 TEU adopts unanimously¹³² a decision defining the approach of the Union to a particular matter of a geographical or thematic nature. Based on this decision, the Council may adopt another "implementation" decision by a qualified majority on the basis of Art. 212/2 TFEU and freeze the assets of a natural or legal person, among other restrictive measures. The provisions related to the subsidiary general competence of the Union in relation to foreign policy¹³³ does not grant the Union the competence to adopt legislative acts¹³⁴ in contrast with the general competences of the Union and its specific competences with regard to foreign policy included in the TFEU. Consequently, the Union cannot resort to them a legal basis for a coherent comprehensive asset recovery policy¹³⁵.
87. The last legal basis possibility is the "flexibility clause" of Art. 352 TFEU, allowing the Union to enact any legal act to attain the objectives listed in the TEU or TFEU with the frameworks of competences, which they catalogue if the specific competence provisions are not sufficient. However, in such a case unanimity in the Council is required, which is a major challenge to overcome. This is all the more true given that some Member States

¹²⁷ Art. 288(3) TFEU.

¹²⁸ Art. 212/2 TFEU.

¹²⁹ See Art. 294 TFEU.

¹³⁰ Which is the Council formation composed by all the head of States of the Member States.

¹³¹ The Council configuration composed of all the foreign ministers is deemed to be the Foreign Affairs Council (FAC).

¹³² See Art. 31 TEU. Abstention does not count as a "no".

¹³³ Art. 24/1 TEU.

¹³⁴ Art. 31/1 TEU.

¹³⁵ Other opinion: PAVLIDIS, *Recouvrement des avoirs illicites: un nouvel instrument européen sur le modèle de la loi suisse*, in: *Swiss Review of International and European Law*, 2019, p. 28f.

require their national parliament to give its priori consent prior to the use of the “flexibility clause”.

88. Indeed, the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which establishes minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters¹³⁶ is based on Art. 82/2 and 83/1 TFEU¹³⁷. Unfortunately, this directive does not apply to bribery from foreign officials¹³⁸. However, it demonstrates in our opinion that Art. 83/1 and 82/2 TFEU grant the EU the competence to enact a directive compelling the Member States to adopt a legislative act based on the Swiss FIAA model.
89. It follows from the foregoing that, as a result of the restrictions of the scope of the competence of the Union induced by Art. 83/1 TFEU and the requirement to legislate by means of directives, the Member States will in any case have a key role should a common asset recovery policy be put in place. Based on the current state of the Union constitutional law, it seems indeed impossible to enact a single, full comprehensive act like FIAA at EU level.
90. With regard to current state of the Union Member State’s asset recovery policies, a comprehensive and detailed overview would require more research from local legal experts. In short, it seems that Germany recently completely overhauled its legislation with regard to criminal seizure and confiscation, implementing the Directive 2014/42/EU in the process¹³⁹, but that it does not provide for specific provisions of the like of FIAA. As to the United Kingdom, it seems to have put in place quite a comprehensive policy with regard to the freezing of assets stemming from criminal activities and criminal confiscation or civil forfeiture of them based on the Proceeds of Crime Act 2002 and the Criminal Finances Act of 2017 and considers further improving its criminal legislation.¹⁴⁰ However, this policy does not seem to entail specific tools with regard to the restitution of the forfeited assets to the countries of origin like the ones of Art. 12 and 13 FIAA (support measures) and 17 to 19 FIAA (assets restitution). Instead, the United Kingdom relies on

¹³⁶ Art. 1/1 Directive 2014/42/EU.

¹³⁷ See also the Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation order of 21st December 2016 [2016/0412 (COD)], based on Art. 82/1/a TFEU.

¹³⁸ Art. 3/a and 5/2/a Directive 2014/42/EU; PAVLIDIS, *Recouvrement des avoirs illicites: un nouvel instrument européen sur le modèle de la loi suisse*, in: *Swiss Review of International and European Law*, 2019, p. 26.

¹³⁹ Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung, of 13th April 2017 (<https://www.bundesgerichtshof.de/DE/Bibliothek/GesMat/WP18/V/Vermoeqensabschoepfung.html?nn=10731926>).

¹⁴⁰ See Asset Recovery Action Plan of July 2019, from the UK Home Office, especially the Section 1, p. 11 to 13, with regard to the possible enhancement of the legislation: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815900/20190709_Asset_Recovery_Action_Plan_FINAL_Clean.pdf.

share arrangements on either an ad-hoc basis or through the negotiation of legal assistance treaties.¹⁴¹

91. On the opposite, a more far-reaching novelty is currently subject to parliamentary proceedings in France. The proposed modification of the French Criminal Procedure Code would allow the State Agency for the Management and Recovery of Seized and Forfeited Assets¹⁴² to set up a fund to collect revenue from the confiscation of movable or immovable property held directly or indirectly by foreign politically exposed persons convicted in France pursuant to Articles 321-1 to 321-5 and 324-1 to 324-4 of the Criminal Code (offences related to the handling of stolen goods or money laundering committed in the exercise or in connection with the exercise of their functions, to the prejudice of a foreign State). The funds would aim at improving the living conditions of the population and strengthen the rule of law and combating corruption in the country or countries where the above-mentioned offences took place¹⁴³. The proposed modification was adopted on 2nd May 2019 by the French Senate (upper legislative Chamber) and transmitted to the National Assembly (lower legislative Chamber) on the next day for consideration in the competent legislative committee. Especially interesting in this regard is that the French legislative act explicitly mentions Art. 17 to 19 FIAA as a model¹⁴⁴. Having made a public commitment to legislate on these issues, the Macron administration appointed in June 2019 a commission to study the best options for stolen assets repatriation. After more than five months of work and a visit to the Swiss Ministry of Foreign Affairs Task Force Asset Recovery, the Commission reported at the end of the year 2019. Departing from the proposition adopted by the French Senate, yet directly referring to FIAA, the commission suggests transferring the confiscated funds to a special budget-line at the French Development agency, which will then use the funds to support social projects in the country where the diverted funds originated.

¹⁴¹ Asset Recovery Action Plan of July 2019, n. 56f., p. 19.

¹⁴² Agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC).

¹⁴³ Proposition de loi relative à l'affectation des avoirs issus de la corruption transnationale of 6th November 2018 (<http://www.assemblee-nationale.fr/15/propositions/pion1921.asp>).

¹⁴⁴ Report n. 405 (2018-2019) of the Senate finance committee of 27 March 2019 (<http://www.senat.fr/rap/l18-405/l18-4051.pdf>).