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Switzerland: Trends and Developments

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Trends and Developments

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What (and Who) is a De Facto Foreign Public Official? Recent Swiss Case Law Reaches A Verdict

The main anti-corruption development in Swiss case law in 2022 concerns the definition of a de facto foreign public official.

In Decision BB.2022.3 of 18 July 2022, the Lower Appeals Chamber of the Federal Criminal Court (FCC) reasserted the conditions under which a family member of a high-ranking official (in this instance, Gulnara Karimova, daughter of Islam Karimov, President of Uzbekistan from 1991 until his death in 2016) may be considered as a de facto foreign public official under Article 322septies of the Swiss Criminal Code (SCC) (punishing foreign bribery). From a procedural perspective, this decision also brings to light the tools used by Swiss authorities in prosecuting the laundering of proceeds of foreign bribery and raises the issue of the limits of relying on foreign decisions and criminal orders in that context.

Decision BB.2022.3 was issued in the context of a criminal investigation initiated on 5 July 2012 by the Office of the Attorney General of Switzerland (OAG) against several Uzbek nationals for forgery of documents (Article 251 of the SCC) and money laundering (Article 305bis of the SCC), which it subsequently extended to include Gulnara Karimova for money laundering (Article 305bis of the SCC) and disloyal management (Article 158 of the SCC).

By criminal order of 22 May 2018, the OAG found one of the Uzbek nationals guilty of the offenses of forgery of documents (Article 251 of the SCC) and money laundering (Article 305bis of the SCC) and sentenced her to a monetary penalty. In the same decision, it also ordered the forfeiture of the assets deposited in several bank accounts, including USD373 million in a Swiss bank account in the name of a Gibraltar company named Takilant Ltd, of which Gulnara Karimova was allegedly the ultimate beneficial owner.

Under Article 352 of the Swiss Criminal Procedure Code (SCPC), the public prosecutor may issue a criminal order if the person under investigation has accepted responsibility for the offence in the preliminary proceedings – or if that responsibility has otherwise been satisfactorily established – and the public prosecutor regards any of the following sentences as appropriate:

- a fine;
- a monetary penalty of no more than 180 daily penalty units; or
- a custodial sentence of no more than six months.

Forfeiture orders may be issued as part of the criminal order.

Criminal orders are not public and are not subject to judicial review unless one of the parties (or a person affected by the order) objects to the order – in which case, the order becomes the indictment before the criminal court of first instance.

Even though the legislator had intended to use another procedure (the accelerated procedure)

for plea bargaining, it should be noted that – in practice – criminal orders are very often used in white-collar crime proceedings to conclude settlements between the public prosecutor and the person under investigation. In that context, the facts admitted by the accused are often negotiated with the public prosecutors.

In contrast, the accelerated procedure of Article 358ff of the SCPC may be instituted provided that:

- the accused admits the matters essential to the legal appraisal of the case and recognises, if only in principle, the civil claims; and
- the public prosecutor requests a custodial sentence of up to five years.

In the accelerated procedure, the criminal court of first instance must assess the evidence at hand and be convinced that the offences were indeed committed and the sentencing is reasonable. Judgments issued in accelerated procedures are public, even though the name of the parties are usually redacted.

In the case in question, Takilant – which had not participated in the negotiation of the 22 May 2018 criminal order – objected to the criminal order inasmuch as it ordered the forfeiture of its bank account, and the proceedings continued before the Criminal Chamber of the FCC.

In order to assess whether the forfeiture order should be confirmed, the Criminal Chamber had to determine whether Takilant's assets were the proceeds of money laundering (Article 305bis of the SCC). In that context, the alleged predicate offence was bribery of a foreign public official under Article 322septies (namely, that – in her capacity as a de facto public official for the Republic of Uzbekistan – Gulnara Karimova had extorted bribes from international telecommunications companies to allow them to enter into the Uzbek telecommunications market between 2004 and 2012).

It its 86-page order SK.2020.49 dated 17 December 2021, the Criminal Chamber found that Gulnara Karimova should be considered a de facto foreign public official.

The criteria to apply, according to the Criminal Chamber (recital 4.2.1, page 40), were as follows:

- "a de facto public official is a person who performs a task assigned to the State, without a legal link between the two. He derives the power he exercises over the state decision-making process from the personal link, particularly of kinship, which unites him to the political authority, which favours or at least tolerates this situation";
- "[t]his power of appreciation stems from the privileged relationship he has with the person who directs the public body concerned"; and
- "[t]his situation may arise particularly in authoritarian (or, a fortiori, totalitarian) regimes where the rule of law is deficient and power is monopolised by one person (the autocrat) or a group of individuals (the oligarchs)".

In reaching its conclusion that Gulnara Karimova was a de facto public official, the Criminal Chamber essentially relied on foreign criminal investigations (notably, in Sweden, the Netherlands, France and the USA) – as well as criminal orders issued by the OAG against other Uzbek nationals.

However, the Criminal Chamber only confirmed part of the forfeiture order (USD293.6 million) and ordered the restitution to Takilant of

USD69.2 million, which were not demonstrated to be proceeds of passive foreign bribery.

Takilant appealed against the 17 December 2021 order to the Lower Appeals Chamber of the FCC.

In a decision dated 18 July 2022, the Lower Appeals Chamber admitted the appeal and referred the case back to the Criminal Chamber.

The Lower Appeals Chamber found that the Criminal Chamber had made too broad an interpretation of the concept of a de facto public official, in that it went beyond the two precedents upon which it had relied – namely, SK.2014.24 of 1 October 2014 and SK.2018.38 of 28 August 2018. These were criminal judgments issued in the context of accelerated proceedings, which respectively concerned:

- the son of Libya's former ruler Muammar Khadafi; and
- the nephew of the Democratic Republic of the Congo's President Joseph Kabila.

In both precedents, the head of states' relatives held both de facto and de iure functions in the State apparatus and were in a position to effectively influence the decisions in question.

According to the Lower Appeals Chamber, this was not the case for Gulnara Karimova: "The notion of the performance of a public task by [Gulnara Karimova] in the field of telecommunications is not established to the satisfaction of the law, so that the latter's status as a de facto public official is not established either."

The following excerpts are from the Lower Appeals Chamber's summary of The Criminal Chamber's findings.

- "As for the concept of de facto public official, the Criminal Chamber accepted it, based on several foreign judgments and decisions. Thus, according to the recitals of the Criminal Chamber order dealing with the acts in question (regardless of their probative value), the de facto public official status of [Gulnara Karimova] would allegedly derive from the fact that, through her family relationship with the then President of Uzbekistan, she had influence over the telecommunications market. Her power was based on her privileged relationship with her father (recital 4.2.3.1.2, page 43). As for the other acts and passages of these acts cited, they merely state that [Gulnara Karimova] had the status of a de facto public official, was a "member of the government" or a "civil servant", without explaining why. [Gulnara Karimova] also held "various official functions within the Uzbek state as well as with the United Nations as the Permanent Representative of the Republic of Uzbekistan, making her – according to the Criminal Chamber – a de jure public official at the time of the alleged facts. The Criminal Chamber adds that [Gulnara Karimova] is the daughter of a former autocrat, whose regime is generally conducive to the emergence of de facto public officials. Referring to one of the definitions of a politically exposed person (PEP) contained in the federal law of 10 October 1997 concerning the fight against money laundering and the financing of terrorism, the Criminal Chamber admits that [Gulnara Karimova] must certainly have been considered as such and concludes that it was firmly convinced that [Gulnara Karimova] was a public official. The relevance of the use of one of the legal definitions of the notion of PEP escapes the Chamber of Appeal's comprehension. Such a demonstration and, in particular, the firm belief of the Criminal Chamber are insuffi-

cient to establish [Gulnara Karimova]'s status as a de facto or de jure public official in the Uzbek telecommunications market between 2005 and 2012. There is no evidence of a concrete state role in the telecommunications sector. The only example is the one attributed to it by the Criminal Chamber, through its understanding of the concept of de facto public official." (Recitals, 2.7.1.)
- "However, these elements do not allow to establish that the counterpart expected from and/or provided by [Gulnara Karimova] was an act (or an omission) in relation to an otherwise undetermined state activity that she had exercised and that depended on her discretionary power – ie, on her decision-making power. As it stands, they do not allow us to exclude that [Gulnara Karimova]'s role was anything other than that of a private intermediary to influence the decisions of the UzACI's public officials." (Recitals, 2.7.3.)

Consequently, the Lower Appeals Chamber found that Gulnara Karimova was not a de facto foreign public official and that foreign passive bribery could thus not constitute a predicate offence for the offence of money laundering that led to the forfeiture of Takilant's assets.

However, the Lower Appeals Chamber indicated that the Criminal Chamber should have examined whether or not Gulnara Karimova had committed acts of active bribery of Uzbek officials, as these may – if proven – constitute a predicate offence to money laundering.

Therefore, when admitting the appeal, the Lower Appeals Chamber referred the case back the case to the Criminal Chamber for a new decision.

This decision deals with three issues:

- the definition of a de facto public official;
- the use of foreign proceedings to prove bribery; and
- the effect of criminal orders on third parties.

Regarding the concept of a de facto foreign public official, it should be noted that the two instances where it was admitted (in 2014 and 2018) were accelerated procedures before the Criminal Chamber and were unopposed. Decision BB.2022.3 was thus the first time that the issue of a de facto foreign public official was brought before the Lower Appeals Chamber. The decision gives a firmer standing to the definitions and concepts developed in judgments SK.2014.24 of 1 October 2014 and SK.2018.38 of 28 August 2018. It also reinforces how high the bar is for establishing that the relative of a high-ranking public official is a de facto public official, as it must be demonstrated that the relative is in a position to:

- effectively influence the foreign state's decisions; and
- perform a public task in the context of that decision-making process.

Decision BB.2022.3 also brings to light the risk of proving foreign bribery by reference to foreign proceedings, as they may have a different definition of a de facto public official. The Criminal Chamber discussed at length the decisions reached in France, Sweden, the Netherlands and the USA, in which Gulnara Karimova was found to be a de facto public official. The Lower Appeals Chamber gave very little regard to those decisions, however, and focused on the definitions issued in the 2014 and 2018 judgments.

Lastly, decision BB.2022.3 raises the question of the use of criminal orders and their effects on third parties. The criminal order of 22 May 2018

(which is not a public document but which content was reported in the media) was negotiated with the convicted person's lawyer without the participation of Takilant, even though the order forfeited its assets. The Criminal Chamber relied notably on evidence given by individuals who negotiated criminal orders with the OAG and admitted to laundering the proceeds of corrupt activities; however, they did not provide details on the specific crimes committed.

As mentioned earlier, criminal orders are not public and undergo no judicial review. Therefore, although they are easier to issue than going through an accelerated procedure, this case is a good example of their ultimate lack of evidentiary power when contested by third parties.

Monfrini Bitton Klein (MBK) was founded in Geneva by Enrico Monfrini in 1978 and became renowned in international business law, complex litigation and arbitration. From the end of the 1990s The firm began to focus on asset recovery and white-collar crime from the late 1990s onwards and went on to represent individuals and liquidators in bankruptcies and victims of fraud and Ponzi schemes – as well as representing foreign governments in grand corruption asset-recovery proceedings, companies. The firm changed its name to Monfrini Bitton Klein in 2017 and became a litigation-only practice in order to offer conflict-free services to its clients, focusing on asset recovery, white-collar crime, anti-corruption and cross-border bankruptcy, in addition to the enforcement of foreign judgments and arbitral awards. MBK is the representative for Switzerland in ICC FraudNet, the leading global network of fraud and asset recovery lawyers, and has access around the world to hundreds of specialist correspondent lawyers, private investigators, forensic accountants, insolvency practitioners and litigation funders.

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