

Trust your standing! Standing of beneficiaries of trusts and foundations in Swiss criminal or mutual assistance proceedings

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The issue of standing is fundamental in all types of proceedings.

It is all the more important in criminal proceedings, where this issue arises notably as to who may join criminal proceedings as a private plaintiff and who may appeal a decision.

In accordance with article 115 of the Swiss Code of Penal Procedure (CPP), standing in criminal proceedings belongs to whomever was harmed by the crime(s) under investigation and makes a declaration to join the proceedings (Art. 118 CPP). Being granted private claimant status is key, as it grants them essentially the same party rights as the suspects, in particular: to access the file from the early stages of the investigation by the public prosecutor, with the right to levy copy for use in the criminal proceedings or in parallel proceedings, in Switzerland or abroad; to request from the public prosecutor to issue orders (including freezing, production and search orders) and other investigative measures; to participate in the examination of witnesses or suspects and have questions put to them; to receive notice of the decisions of the public prosecutor and appeal against those which aggrieve their rights, and file observations in respect of other parties' appeals. After the completion of the criminal investigation, the private claimant may, in the context of the criminal trial, request the award of damages against the accused person. The persons harmed by a crime are also entitled, at their request to be awarded the forfeited assets, replacement assets, fines and bonds in compensation for their damages, as established in a judgment or a settlement, if the crime caused damage not covered by insurance and if it must be presumed that the offender will not pay compensation. The cooperation and support that the private claimants provide to the criminal investigation and trial will also assist in securing a conviction, as they may have a better understanding of the circumstances of the

crime, of the location of the offender's assets and may supplement the public prosecutor's work with the support of their lawyers, forensic accountants, private investigators and other professionals.

The issue of who has standing to appeal a decision of a criminal court or a public prosecutor is just as important. Under article 382 CPP, any party with a legitimate interest in the quashing or amendment of a decision may seek an appellate remedy.

Mistakes regarding standing are sometimes committed regarding foreign trusts or foundations. Switzerland does not have a substantive trust law and family foundations cannot be created under Swiss law. Therefore, all trusts and most foundations are governed under foreign law. Even though Switzerland is a party to the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition since 2007, and there were, as of 31 December 2020, 393 trustees operating in Switzerland, according to the Swiss Financial Market Supervisory Authority FINMA, many legal practitioners are still unfamiliar with foreign trusts and foundations.

Two recent rulings, one from the Federal Court, Switzerland's supreme court, and another, from the Federal Criminal Court, illustrate those issues.

Ruling 1B_43/2021 of 28 July 2021

The relevant facts

In its ruling 1B_43/2021 of 28 July 2021, the Federal Court examines the notion of private claimant when an offence targeting the assets of a legal entity is committed against the assets of that entity, in this case a Panamanian foundation.

The case involved a foundation under Panamanian law created in 2003 whose beneficiaries were members of the same family, namely a mother, her two daughters and her granddaughter.

The foundation's rules provided that the mother had exclusive use of the foundation's assets during her lifetime.

The foundation held a bank account in Geneva. The governing bodies of the foundation entrusted the management of the bank account to companies run by the husband of one of the two daughters.

The mother died in 2013.

A few years later, two beneficiaries of the foundation, namely one of the two daughters and the granddaughter, noted that the assets in the account had decreased significantly. They decided to file a criminal complaint before the Office of the Attorney General of Geneva.

The third beneficiary and her husband, who was entrusted with the management of the account, were suspected of misappropriation and criminal mismanagement.

They refused to comment on the matter as they consider that the two beneficiaries who filed the complaint could not be admitted to the criminal proceedings as private claimants.

The legal issues

The Public Prosecutor noted that the foundation's governing bodies may have facilitated the commission of the alleged offences. In this context, the foundation was unable to file a complaint since this would imply that the governing bodies incriminate themselves. **Justice and equity** thus required that the two beneficiaries be considered as private claimants in the criminal proceedings.

The Court of Appeal of Geneva rejected the Public Prosecutor's reasoning. Only the foundation, as a legal entity, **was harmed** by the alleged offences. The beneficiaries could therefore not be considered private claimants.

The two beneficiaries filed an appeal with the Federal Court.

The Federal Court's reasoning

The notion of private claimant

The Federal Court begins its reasoning by defining the notion of **private claimant** under the Swiss Code of Penal Procedure (CPP).

A private claimant is a person suffering harm who expressly declares that he or she wishes to participate in the criminal proceedings as a criminal or civil claimant (Article 118 CPP). A person suffering harm is a person whose rights have been directly violated by the offence. In other words, the private claimant must have suffered harm that is **directly causal** to the offence being prosecuted (Article 115 CPP). If an offence is committed against the assets of a legal entity, only the legal entity suffers damage, to the exclusion of its shareholders and creditors. This principle also applies to the beneficiaries of a foundation with legal personality.

The Federal Court notes that, according to its statutes, the foundation is as "*a Foundation of Private Interest as a judicial person and legal entity in its own rights under the laws of the*

Republic of Panama ". The laws of Panama mentioned in the statutes provide that registration in the public register confers legal personality.

Therefore, the Federal Court considers that the Court of Appeal cannot be criticised for having considered the foundation as a legal entity.

The separation between the legal entity and its beneficiaries

The Federal Court then examines the appellants' argument that the assets of the foundation are inseparable from their own.

The doctrine of piercing of the corporate veil allows, in certain circumstances, to **disregard the duality** between a legal entity and the natural person who is its beneficiary. However, this doctrine was not developed to allow the natural person to choose to disregard the existence of the legal person, depending on the circumstances and the advantages that their might derive from it.

The Federal Court notes that the deceased mother had decided to place her assets in an entity with legal personality. She has therefore **accepted the risks and benefits** of this choice. Furthermore, the appellants have no power of disposal over the assets of the foundation: they do not show that they are in possession of a formal document establishing a power of attorney in their favour allowing a direct withdrawal from the foundation's bank account.

Consequently, the Federal Court confirms that only the assets of the foundation, as an entity with legal personality, may have been damaged by the alleged offences.

The governing bodies' involvement in the alleged offences

Lastly, the Federal Court examines the argument of the appellants that the doctrine of piercing of the corporate veil should apply as the governing bodies of the foundation are **unable to defend its interests**.

The Federal Court notes that the two appellants did not take any steps to have the powers conferred on the president of the foundation board withdrawn or to have new members appointed. Such steps could not be avoided simply because they were complicated. Despite the accusations against the president of the foundation board, the appellants did not file a complaint against him. Furthermore, the alleged offences are prosecuted *ex officio*.

The Federal Court therefore considers that there is **no reason to disregard** the duality existing between the foundation and its beneficiaries to allow the latter to defend their interests.

The Federal Court emphasizes that the appellants are not comparable to beneficiaries of a trust since a **trust has no legal personality**. The trustee is the owner of the trust's assets and therefore must be considered directly harmed by offences targeting the trust's assets. However, according to the legal literature quoted by the Federal Court, the beneficiaries of the trust should, however, be considered as directly harmed when the trustee is involved in these offences.

The Federal Court reaches the conclusion that the beneficiaries were not harmed by the alleged offences and therefore cannot be admitted to the criminal proceedings as private claimants. Their appeal is therefore rejected.

Ruling RR.2021.38 of 14 June 2021

The relevant facts

In the context of mutual assistance proceedings in favour of Malaysia in the 1MDB investigations, the Office of the Attorney General of Switzerland issued a decision of closing of the proceedings and accepted to transmit to Malaysia bank documents pertaining to a Swiss bank account in the name of a New Zealand trust and the freezing of its assets.

A Swiss lawyer filed in the name of the New Zealand trust an appeal against the said decision of closing with the Federal Criminal Court.

The legal issue

The Federal Criminal Court had to decide whether a trust had standing to file an appeal.

The Federal Criminal Court's reasoning

The Federal Criminal Court first reminds that under Article 80h let. b of the Federal Act on International Mutual Assistance in Criminal Matters (IMAC), the right to appeal is recognized to the person who is personally and directly affected by the assistance measure. Only the account holder, whether or not he is a party to the proceedings, can appeal against a freezing order.

At the beginning of its ruling, the Federal Criminal Court defines a trust by reference to article 2 of the Hague Trust Convention (*"the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose"*), reminding that a trust has no legal personality and does not, therefore, have standing before courts. It notably makes reference to

the Federal Court's case law of 2010 that only a trustee has standing to appeal a decision affecting the trust's assets, as the legal owner of such assets.

The Federal Criminal Court then examines whether declaring the appeal inadmissible due to the trust's lack of standing could be deemed to be a case of excessive formalism, since the lawyer who filed the appeal produced, after the filing of the appeal, a power of attorney executed by the corporate trustee of the New Zealand trust. The Federal Criminal Court finds that the designation of the appellant as the trust rather than the trustee was deliberate and not a mere drafting simplification.

Consequently, the Federal Criminal Court finds the appeal inadmissible.

Conclusion

Standing in criminal or mutual assistance proceedings ultimately affects the possibility to influence the outcome of such proceedings, and must, as rule, be examined carefully. Swiss courts take a rigorous approach of standing, and mistakes in this respect may have irreparable consequences.

Beneficiaries of a trust or of a foundation do not have standing in proceedings that affect the trust's or the foundation's assets.

This is not a mere technical issue, as sometimes, the beneficiaries may find themselves in a situation where the trustee or the foundation board refuse to act in the proceedings to defend the trust's or the foundation's assets. It may be necessary, when such a case arises, for the beneficiaries to petition the court at the seat of the trust or the foundation to compel the trustee or the foundation board to act to preserve the trust's or the foundation's assets.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.