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**International Association of Prosecutors Ninth European Regional
Conference 2009
“Following the Money”
The Hague, 11-13 March 2009**

The Swiss approach

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Contribution of the Office of the Attorney General of Switzerland



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- **The Swiss perspective**
- worldwide cooperation in criminal matters based on multilateral and bilateral treaties as well as on national legislation (Federal Act on Mutual Assistance in Criminal Matters IMAC) and the principles of reciprocity and trust
- Criminal investigations concerning laundering of the proceeds of crime based on information from Swiss banks: money laundering suspicious transaction reports filed to the Swiss FIU, the Money Laundering Reporting Office of Switzerland (MROS) and/or based on information from received requests for mutual legal assistance (MLAT requests)



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- **Multilateral conventions applicable in asset recovery proceedings with Switzerland**
- UNCAC (signed but not yet ratified)
- UNTOC (in force since 26.11.06)
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- Council of Europe Conventions of 1959 on Mutual Legal Assistance and of 1990 on Money Laundering
- Council of Europe Convention of 1999 against Corruption with Additional Protocol of 2003
- UN Convention on Combating Terrorism Financing (in force since 23.10.2003)
- Council of Europe Convention on Combating Terrorism (in force since 20.8.1983)



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- **The competent Swiss authorities**
- The Federal Office of Justice (FOJ): Central Authority in MLAT matters (for incoming and outgoing MLAT requests)
- The Office of the Attorney General of Switzerland: competent to investigate complex cases of corruption and to execute incoming MLAT requests concerning complex cases of corruption
- The Federal Criminal Police (FCP) with specialized units to investigate corruption cases
- The Money Laundering Reporting Office (MROS) as part of the Federal Office of Police
- 3 official languages (German, French and Italian)



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- **The Swiss legislation concerning Asset Recovery (Forfeiture)**
- Most legal systems distinguish between criminal and civil forfeiture, generally using separate courts, different procedures and different evidential rules – the Swiss legal system doesn't !
- What forms of criminal forfeiture are known in Swiss law ?
- What happens with seized assets until they can be confiscated?
 - „restraining orders“ according to Swiss law
- Swiss law also knows „civil forfeiture“ – art. 69 SPC !



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- **The Swiss legislation concerning Asset Forfeiture (cont'd)**
- art. 69 SPC - actio in rem
- no penalizing aspect in 69 /criminal sanction
- connection between crime and object required
- art.70 ff SPC. - actio in personam
- confiscation is mandatory, even when it causes destitution of accused
- assets can be confiscated with any person who has control over them, whether that person is accused of crimes or not
- connection between assets and crime is required, forfeiture of assets in the sense of a „monetary sanction“ is not admissible
- confiscation/forfeiture of „immediate“ and „intermediate“ profits from corruption ? actual state of jurisprudence in Switzerland: immediate profits yes, intermediate profits only insofar as it can be clearly established (insofar as it can be shown that they were obtained by crime („principle of causality“)



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- **The Swiss legislation concerning Asset Forfeiture (cont'd)**
- Art. 70 f. (cont'd): forfeiture/confiscation of the assets that are the product of crime or confiscation of surrogate values
- seizure of assets on the basis of an MLAT: basic principle of Switzerland is to return the assets to the country of origin
- exception: assets that qualify for sharing
- „independent confiscation“ of values if foreign State does not send MLAT to Switzerland – if predicate offense was committed outside of Swiss jurisdiction: requirements are dual criminality and „forfeitability“ of assets – according to Swiss law, assets can be confiscated in criminal proceedings concerning money laundering even if no conviction has been rendered abroad for predicate offense, provided enough elements can be brought by to show the likelihood that the predicate offense has been committed and that it was a crime



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- **The Swiss legislation concerning Asset Forfeiture (cont'd)**
- Art. 69 SPC
- „par. 1 The court orders, not considering the punishable offences committed by an identified person, the confiscation of objects which have served to commit a crime or were destined for this purpose or which are the product of a crime, if these objects endanger the security of human beings, moral order or public order.
- par. 2 The court can order the confiscated objects to be destroyed.“



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- **The Swiss legislation concerning Asset Forfeiture (cont'd)**
- Art. 70 SPC
- „par. 1 The court orders the confiscation of assets which were obtained through a crime or were destined to motivate or reward a crime, if these assets are not returned to the injured party in order to re-establish the rightful order.
- par. 2 Confiscation is excluded if a third party has acquired the assets, not knowing anything about the grounds for confiscation and insofar as the third party has provided in return an equal contribution or if the confiscation would prove to be a disproportionate hardship on the third party.
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- par. 5 If the amount of assets to be confiscated cannot be established or can only be established with a disproportionate effort, the court can give an estimate.“



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- **The Swiss legislation concerning Asset Forfeiture (cont'd)**
- Art. 71 SPC
- „par. 1 If the assets subject to confiscation are not in existence anymore, the court recognizes a surrogate claim of the State in the same amount, towards a third party only insofar as this is not excluded according to art. 70 par. 2.
- par. 2 The court can refrain from a surrogate claim completely or partially if this claim is likely to be unobtainable or if it would seriously harm the reintegration of the defendant.



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- **The Swiss legislation concerning Asset Recovery and Mutual Assistance in Criminal Matters**
- **Art. 74a IMAC:** restitution of assets that are „proceeds of crime“ including the replacement value – no „money judgement“ enforceable based on this article
- **Art. 94 IMAC:** „exequatur proceedings“ – possibility to enforce a „money judgement“/judgement on monetary sanctions/compensation claim



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- **Art. 74a IMAC: Handing Over [of Property] for the Purpose of Forfeiture or Return**
- 1 Upon request, the objects or assets subject to a precautionary seizure may be handed over to the competent foreign authority after conclusion of the mutual assistance proceeding (art. 80*d*) for the purpose of forfeiture or return to the person entitled.
- 2 The objects or assets referred to in paragraph 1 above include:
 - a. instruments which served to commit the offence;
 - b. products or profits of the offence, their replacement value and an illicit advantage;
 - c. gifts and other contributions which served to instigate the offence or recompense the offender, as well as their replacement value.



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- **Art. 74a IMAC** (cont'd):
- *d* the objects or assets are necessary for a pending criminal proceeding in Switzerland or appear, because of their nature, to be subject to forfeiture in Switzerland.
- 5 Whenever somebody claims to have rights over the objects or assets under paragraph 4, its handing over to the requesting State shall be suspended until the legal situation is clear. The objects or assets claimed may be handed over to the person entitled if:
 - a. the requesting State agrees
 - b. in case of paragraph 4, letter b, the authority gives its consent; or
 - c. the claim has been recognized by a Swiss court.
- 6 Article 60 shall apply to fiscal liens.



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- **Art. 72 SPC – reversal of the burden of proof concerning assets of criminal organizations**
- The court orders the confiscation of all assets under the control of a criminal organization. Concerning assets of a person who has participated in a criminal organization or who has supported such an organization (Art. 260ter) the control of the criminal organization is assumed, until the opposite is proven.



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- **Good Practices in Asset Recovery cases with Switzerland:**
- Tracing and securing proceeds of crime through MLAT request with preliminary measures (account freezes)
- Importance of stating clearly in the MLAT request that requesting authority is competent to ask for requested measures (account freezes/orders for search and seizure/production of evidence) – art. 76 lit. c IMAC
- Discuss content and scope of MLAT request with competent Swiss authority prior to sending formal request (on the basis of a draft request)
- Discuss timing and preparation of execution of request as well as details (confidentiality/participation of requesting authority etc.) with competent Swiss authority



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- **Good Practices in Asset Recovery cases with Switzerland**
(cont'd):
- Backup by requesting authority needed before and during procedures of appeal according to Swiss law against account freezes: need for supplemental information concerning funds that are identified as product of crime/proportionality of account freeze/minimum threshold of account freeze/possibility of partial lift of account freeze



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Useful to know in asset recovery proceedings with Switzerland

- no time limit stated in Swiss law concerning the duration of an account freeze
- account freezes cannot be upheld indefinitely; the account freeze has to be proportional (requesting state has to be able to demonstrate that proceedings in view of confiscation are still ongoing and have chances of succeeding)
- final and executable confiscation order can emanate from criminal, civil or administrative body in requesting state
- the primary reason when such a confiscation order is not possible to be obtained in the requesting state is considered to be the prescription (art. 33a O-IMAC)



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Useful to know in asset recovery proceedings with Switzerland (cont'd)

- Importance of obtaining final and executable confiscation order : according to established practice, the final and executable confiscation order is summarily examined by the competent Swiss authority, i.e. that the Swiss authority verifies that the requesting State is a legitimate State which respects individual rights, that the confiscation order is not in disrespect of the Swiss „ordre public“ and that the requesting country respects human rights
- *Important to keep in mind:* in cases of extradition, the assets belonging to the extradited person (i.e. assets that he has with him or over which he has control (bank accounts!) are extradited with the person, notwithstanding the non-existence of a final and executable confiscation order !



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- **Useful to know in asset recovery proceedings with Switzerland (cont'd):**
- Swiss banks continue to invest frozen assets according to instructions given to them by the responsible executing authority
- partial lifts of the freeze are in principle possible, but according to standard practice the account holder will be required to show that he has no other assets at his disposal concerning the payment that he allegedly needs to make from the frozen account – requesting authority will be consulted, insofar as that is possible, by the executing Swiss authority (stated in Council of Europe Convention on Money Laundering, art. 12 par. 3!)
- art. 74a IMAC: before returning frozen assets to the requesting state, the competent Swiss authorities will examine eventual legitimate demands of third parties which reside in Switzerland



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- **Questions?**
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