Division of forfeited assets (asset-sharing)

1. Encouraging cooperation

The seizure and confiscation of assets acquired by criminal means is an important instrument in combating crime effectively. State access to such illegal gains follows the principle that crime should not pay. Often, the proceeds of crime are not located in the country where the offences were actually committed. Consequently, they can be confiscated only if two or more states work together. To encourage this cooperation, international conventions – specifically the Council of Europe Convention on Money Laundering, and the Financial Action Task Force, FATF – recommend that assets be shared between the states involved in the criminal proceedings. The Federal Act on the Division of Forfeited Assets (DFAA), which entered into force on 1 August 2004, provides the legal basis for the conclusion of asset sharing agreements between Switzerland and foreign states, as well as for the domestic division of assets between the Federal Government and the cantons.

2. Division between Switzerland and foreign states

The DFAA distinguishes between the active and passive sharing of assets internationally:

- In the case of *active international sharing*, the Swiss authorities confiscate assets of criminal origin under Swiss law as part of their own criminal proceedings. They then offer a share to the foreign state which supported those proceedings.
- In the case of *passive international sharing*, the criminal proceedings are pursued by a foreign authority, which confiscates assets of criminal origin under its own legal system. Upon request, the Swiss authorities provide these authorities with the necessary evidence and documents, or hand over assets that are located in Switzerland, so that they can be confiscated, or returned to their rightful owner, as part of the foreign criminal proceedings. In return for Switzerland's help, the foreign state allocates it a share of the confiscated assets.

Procedure

- Should federal or cantonal authorities be considering sharing forfeited assets with a foreign state, they will first notify the Federal Office of Justice (FOJ).
- The FOJ grants the authorities of the cantons concerned, and the Federal Government, a hearing.
- The FOJ conducts negotiations with the foreign state with a view to concluding an asset sharing agreement. As a rule, the assets will be shared equally between Switzerland and the foreign state. Assets which originate from the bribing of public officials or the improper conduct of a public office are not shared, but reimbursed in full to the foreign state which suffered the loss.
- The FOJ concludes the asset sharing agreement. Should the gross contribution exceed ten million Swiss francs, the FOJ will obtain the approval of the Federal Department of Justice and Police (FDJP) in advance.
- The Swiss authorities which have confiscated the assets hand these over to the FOJ. The FOJ transfers the agreed share to the foreign state. The FOJ may also instruct the cantonal authorities to transfer the foreign state's share to it directly.

3. Division between the Federal Government and the cantons

By applying simple rules for division, the DFAA creates a balance between the public authorities involved in the criminal proceedings, and thus prevents conflicts of interest. Division proceedings are conducted if the forfeited assets amount to at least 100,000 francs.

- 5/10 go to that public authority (canton or Federal Government) which led the criminal investigation and ordered the forfeiture, and thus bore the greatest share of the work.
- 2/10 go to the cantons in which the forfeited assets were located, in return for their cooperation in the criminal proceedings.
- 3/10 go to the Federal Government, in return for supporting the cantons in their fight against crime.

At the end of the division proceedings, the FOJ issues a ruling about the amounts owing to the cantons involved, and to the Federal Government. Its division ruling may be challenged by means of an appeal to the Federal Administrative Court.

Forfeited assets of criminal origin are paid to the general cantonal or federal treasury. The DFAA does not provide for their purpose to be tied in any way, but allows the recipient to decide at their discretion how they are to be used.

4. Cases

Between 2004 and 2015, Switzerland received assets of criminal origin of around CHF 90 million on the basis of international asset sharing agreements.

In almost all of these cases, the assets were split 50:50 according to the usual practice.

These assets had been forfeited following a foreign or Swiss forfeiture ruling, most commonly in proceedings for drugs offences or money laundering.

In the two largest asset sharing cases since the DFAA came into force, Switzerland shared funds of CHF 58.4 million with Japan and of USD 50 million with the USA.

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