



# Taking evidence

## 1. Definition

Whereas borders do not create barriers for criminals, they do present obstacles to prosecuting authorities. A foreign public prosecutor may not, for example, order a bank in Switzerland to freeze an alleged fraudster's account and hand over the relevant banking documents as evidence. Sovereignty precludes the conduct of official acts in a foreign state. However, the instrument of international mutual assistance in criminal matters makes it possible for states to support each other in the fight against international crime. If a public prosecutor has to investigate a case abroad, they will ask the judicial authorities of the country concerned to handle the case on their behalf. The requested state will lend legal assistance by undertaking on its territory the official acts that have been requested, and by forwarding the findings to the requesting state for use in a specific criminal case. Specifically, mutual assistance involves interviewing witnesses and suspects, securing and handing over evidence and documents as well as objects and assets, searching premises and seizing property, conducting identity parades and serving summonses, judgments and other court documents.

In the sense of voluntary legal assistance, a Swiss public prosecutor may pass on information or evidence which they have gathered during their own criminal investigations to a foreign prosecuting authority without being requested to do so. They may not pass on evidence which is private and confidential, such as banking documents. A Swiss public prosecutor is, however, permitted to pass on even confidential information if it will permit their foreign counterpart to make a request for mutual assistance to Switzerland.

A distinction must be made between international mutual assistance in criminal matters and the exchange of intelligence between police forces. The latter is simply information-gathering without the use of coercive action. This includes the police interviewing informants, the provision of extracts from official records, information about telephone subscribers, holders of post office boxes, keepers of vehicles, and the identity of specific persons, as well as address enquiries.

## **Taking evidence**

A distinction must also be drawn between mutual assistance and administrative assistance, which involves cooperation between tax and other government authorities. The exchange of information in tax proceeding is governed by the Federal Act on International Administrative Assistance in Tax Matters (SR 651.1) and bilateral double taxation treaties. The Federal Tax Administration (FTA) is responsible for fulfilling foreign requests for official assistance, and for submitting Swiss requests to foreign governments.

## **2. Principles of mutual assistance**

Mutual assistance is conditional upon the conduct of criminal proceedings in the requesting state. Switzerland may grant direct legal assistance to any state on the basis of the Federal Act on International Mutual Assistance in Criminal Matters (IMAC). If Switzerland has not concluded a mutual assistance treaty with the requesting state, then the request will generally be granted only if the requesting state guarantees reciprocity.

Coercive measures may be ordered in the execution of a mutual assistance request if the offence described in the request is also punishable in Switzerland. This is the principle of dual criminality. Coercive measures include searching premises, seizing evidence, serving summonses with a warning of arrest in the event of non-appearance, interviewing witnesses and lifting legal confidentiality obligations. Swiss banking confidentiality regulations are not absolute. They do not afford a suspected criminal any protection in, for example, a case of corruption in which bank documents (account statements) are to be supplied to the requesting authority.

Mutual assistance will not be granted if the subject of the investigation or proceedings is an act which is regarded by Switzerland as a political offence. Excluded from the definition of 'political offence' are all crimes that might be regarded as genocide or particularly reprehensible, such as aircraft hijacking or hostage-taking. Furthermore, a request will not be granted if it concerns a military offence such as insubordination or desertion.

Legal assistance will also be refused if there are serious shortcomings in the foreign proceedings. Examples include violations of the European Convention on Human Rights or the International Covenant on Civil and Political Rights. It will also be denied if the proceedings abroad are carried out to prosecute or punish a person on account of their political opinions, their belonging to a certain social group, their race, religion or nationality.

Legal assistance is no longer possible if the suspect has been acquitted of or served a

## Taking evidence

sentence for the same offence in either Switzerland or in the state where the offence was committed. This is the doctrine of *ne bis in idem*, or double jeopardy.

As a rule, Switzerland can grant legal assistance for fiscal offences only if the case described in the request constitutes tax or duty fraud under Swiss law. No legal assistance can be given in cases involving tax evasion, however. In cases of doubt, the Federal Office of Justice (FOJ) will consult the FTA. The terms of cooperation under the Schengen Agreement nonetheless provide for legal assistance relating to the evasion of consumer taxes, value-added tax and customs duties.

- *Tax evasion* is where a person does not reveal information in their tax return in order to avoid a tax assessment or to ensure that this is incomplete. In Switzerland, tax evasion is regarded as a misdemeanour and is punished by a fine.
- *Tax fraud*, meanwhile, refers to the provision of forged, falsified or untrue documents – such as business ledgers, balance sheets, profit and loss accounts and salary statements – in order to evade tax and deceive the tax authorities. *Duty fraud* refers to where a person fraudulently withholds a duty, fee or other payment to a public authority, or otherwise impairs its assets. Tax and duty fraud are regarded in Switzerland as crimes and are punished by imprisonment.

The evidence and information obtained through the means of mutual assistance can be used in the requesting state only in the criminal procedure for which assistance has been requested (reservation of speciality). The evidence and information may not be used, neither directly nor indirectly, in a criminal procedure concerning an offence for which assistance is not admissible.

Mutual assistance proceedings are governed by the principle of proportionality. However, this does not mean that a foreign state may seek assistance only after it has exhausted its own internal means of investigation. Mutual assistance proceedings are intended to assist criminal proceedings in the requesting state. Thus, all documents are to be handed over unless it is absolutely clear that they are unconnected with the charges that have been brought.

Objects and assets that derive from a criminal offence (proceeds of crime) may be surrendered to foreign authorities so that they can be seized by a foreign court or handed over to the foreign authorities to be returned to their rightful owners. As a rule, a legally valid and enforceable ruling must have been made by a criminal, civil or administrative court in the requesting state. In exceptional cases, Switzerland may waive this requirement if the criminal source is obvious, as in the Abacha case.

## Taking evidence

### 3. Mutual assistance proceedings in Switzerland

#### Channel of transmission

There are a number of different channels by which mutual assistance requests may be transmitted to Switzerland:

- Member states of the European Convention on Mutual Assistance in Criminal Matters (ECMA) send their requests directly or via their justice ministry to the FOJ.
- If no treaty has been signed, then diplomatic channels are the rule. The FOJ receives the request from the requesting state's representation in Switzerland.
- Direct contact between the foreign authority and the competent Swiss authority is in particular provided for in the Second Additional Protocol to the ECMA and in the Convention implementing the Schengen Agreement.

If there is no provision for direct contact, Swiss authorities transmit their requests to the relevant foreign authority via the FOJ.

#### Form and content of the request for mutual legal assistance

Requests for mutual assistance must contain the following information:

- Name of the requesting authority (generally a judicial authority)
  - The object of the foreign proceedings and the reason for the request (description of the official acts requested)
  - Identifying data of the person who is the object of the criminal proceedings
  - Legal evaluation of the offence in the requesting state
  - Description of the essential facts of the case: place, time and circumstances
- The requesting authority does not have to prove that its description is accurate. It must only present reasonable grounds for suspicion. The requesting authority may not be required to explain precisely what it wishes to establish with its request. 'Fishing expeditions', however, are heavily frowned-upon. Evidence may not be collected at random and without material clues, for example the freezing of all assets in Switzerland and the handover of banking documents without information on the whereabouts of these assets.

#### Handling of mutual assistance requests

The FOJ (Mutual Assistance Units I and II) conducts a summary examination of whether or not the request for mutual assistance satisfies the applicable formal requirements. If it does not, the FOJ asks the requesting authority to rectify or amend the request. In urgent cases, the FOJ may order provisional action – such as the freezing of accounts or seizure of assets – as soon as notice of a request has been given. The FOJ then sets a deadline for the

## **Taking evidence**

requesting state to submit the formal request.

If the request meets the requirements and if mutual assistance is not obviously inadmissible (in the case of military offences, for example), the FOJ will forward the request to the competent cantonal judicial authority for execution. If investigations are required in several cantons, the FOJ may appoint one of these cantons as lead canton. In practice, most requests for mutual assistance are executed by the cantons. However, the FOJ may also delegate the execution of a request to the federal authority which would be competent had the offence been committed in Switzerland. Examples of such authorities include the Office of the Attorney General of Switzerland in cases of acts of terrorism or corruption of federal officials, and the Federal Customs Administration in cases of violation of the Federal Customs Act. If several cantons are involved and if the lead canton does not render a decision within the appropriate time, or if the case is complex or of particular importance, the FOJ itself may take charge of executing the request for mutual assistance. Based on positive experience, specifically in the Abacha case, the Federal Council's strategy on the freezing, forfeiture and restitution of potentate funds ('Asset Recovery') provides that the FOJ should increasingly execute requests for mutual assistance in this field. Under the terms of the mutual assistance treaty between Switzerland and the USA, the FOJ is also responsible for executing all incoming US legal assistance requests.

The executing authority examines whether the substantive requirements to grant mutual assistance have been met. If this is the case, it issues a decree to enter into the case, and orders the requested measures to be carried out – provided they are admissible in Switzerland. This sets the mutual assistance proceedings in motion. They are generally followed through until their conclusion. Once all measures have been taken and the proceedings have been concluded, the executing authorities will issue a final ruling. This will contain a detailed, in-depth statement of the legality of mutual assistance in the case in question. It will also state the extent to which mutual assistance was provided, i.e. which documents or assets may be handed over to the requesting state. Mutual assistance proceedings may be executed in a simplified procedure without a final ruling if the holders of documents or assets consent in writing to their being handed over to the requesting state.

The parties involved in the foreign proceedings (police officers, public prosecutors, defendants, legal representatives) may be allowed to attend action taken in response to a request for mutual assistance, provided that the law of the requesting state would admit the evidence obtained by mutual assistance only if those persons were present (common-law practice) or if their presence would make criminal proceedings in the requesting country considerably more likely to succeed. Their presence simply means that the parties to the

## **Taking evidence**

foreign proceedings may be present at the execution of the request. They are not allowed to officiate themselves, however; official acts are the sole prerogative of Swiss officials.

## **Appeals**

No appeal may be lodged against the decree to enter into the case. In principle, appeals may be made only against the final ruling. Appeals against any interim rulings may also be lodged only at the end of the proceedings, together with the appeal against the final ruling.

Therefore, legal remedies are not available to the persons affected by mutual assistance measures until the end of the process. An exception is made for interim rulings which, because they involve the seizure of assets and valuables or the presence of foreign officials during execution, place the person concerned under an immediate and irreparable disadvantage, e.g. where a company has to close because a bank account has been frozen. The rulings of the authorities providing mutual assistance may be challenged before the Federal Criminal Court. An appeal against the decision of the Federal Criminal Court may be lodged with the Federal Supreme Court if that decision concerns the seizure or release of objects or assets, or the transmission of confidential information, and the case in question is a particularly important one. Mutual assistance is granted to the requesting state as soon as the final ruling has become absolute.

The only parties entitled to lodge an appeal are the FOJ, in its capacity as the federal supervisory authority in matters of mutual assistance, and persons who are personally and directly affected by a mutual assistance measure. Thus, a bank that was required to surrender account documents relating to a specific person has no right of appeal. Only the account holder has that right. The deadline for the appeal against the final ruling is 30 days (Federal Criminal Court) or ten days (Federal Supreme Court).

## **4. Further development of the legal framework to counter potentate funds**

To prevent assets that have been obtained unlawfully by politically exposed persons (potentate funds) entering the Swiss financial centre, Switzerland has devised a system based largely on the two pillars of prevention and repression. Within this system, the Money Laundering Act is one of the most important means of prevention. Repression is based on the International Mutual Assistance Act (IMAC), which permits cooperation with other states to seize and return illicit assets. Switzerland expanded this system with the enactment of the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (FIAA).

## **Taking evidence**

In practice, the FIAA is subsidiary to the IMAC. It applies only in those cases in which mutual assistance proceedings are unsuccessful because the requesting state is a failing state, in other words its structures are not sufficiently robust. The FIAA governs the freezing, forfeiture and restitution of illicit assets by the Federal Council at the request of the Federal Department of Foreign Affairs. To uphold the rights of politically exposed persons, provision is made for appeals before the Federal Administrative Court and the Federal Supreme Court.

A distinction must be drawn here between two separate procedures. One involves the freezing of assets as part of mutual assistance proceedings under the IMAC, and the precautionary freezing of assets with a view to cooperation on mutual assistance or to forfeiture should mutual assistance fail, under the FIAA. The other, distinct, procedure concerns the freezing of assets to impose sanctions ordered by the UN, the OSCE or Switzerland's most significant trading partners. At the request of the Federal Department for Economic Affairs, Education and Research, these and other coercive measures are ordered by the Federal Council under the terms of the Embargo Act. They serve to secure compliance with international law, and respect for human rights in particular.