



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
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Swiss Confederation

Federal Department of Justice and Police FDJP

**Federal Office of Justice FOJ**  
Mutual Assistance Unit

9th edition 2009 (Case law as of May 2010)

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# **International Mutual Assistance in Criminal Matters**

## **Guidelines**

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# 1 Introduction

## 1.1 Foreword to the Ninth Edition

Ten years have passed since the last edition of these Guidelines was published in 1998. Much has changed during this time.

The primary factor is technology. Given the growth of the internet and of Federal Administration websites, the Guidelines will be published only on the FoJ website<sup>1</sup> in future. The advantage of this is that they can be updated regularly. Secondly, the 1998 Guidelines were the only comprehensive publication on the issue of international mutual assistance in criminal matters. Fortunately, this is no longer the case. In the meantime, there have been a large number of works and commentaries that have made a valuable contribution to this field (cf. 6.1, p. 84). With this in mind, the principal objective of this ninth edition is to meet the need for a practical and user-friendly guide. It is structured in accordance with the procedures followed by practitioners when dealing with a request for mutual assistance in criminal matters.

Finally, at the law of treaties level, now and in the future Switzerland must address the intricacies of how new instruments of cooperation are to be applied in practice. These instruments include the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (AP II ECMA), the anti-fraud agreement with the EU, and the Convention implementing the Schengen Agreement. In the light of these developments, this document is intended to offer food for thought in achieving common practices in these uncharted areas.

These Guidelines are based on the case law up to 1 May 2010. Since the rulings of the Federal Supreme Court and the Federal Criminal Court are published on the internet, only the Courts' landmark rulings are quoted here.

Happy reading!

## 1.2 Subject Matter

These Guidelines deal primarily with the form of international cooperation in criminal matters which may be described as "specific", "accessory" or "other" mutual assistance (cf. 1.3.2 p. 5). They contain a summary of the most important elements: definition, sources of law, material principles, channels of communication, jurisdiction, rights of appeal, form, language, service of judicial documents and summonses. They address both Swiss requests made abroad and foreign requests made to Switzerland. The text is intended primarily for Swiss authorities, lawyers and other persons involved in the process, but may also be of use to foreign authorities and other interested groups.

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<sup>1</sup> <http://www.rhf.admin.ch/rhf/fr/home/straf.html>

For details of country-specific practical requirements, we would refer readers to the "***Practical Guide to International Mutual Assistance in Civil and Criminal Matters***"<sup>2</sup>, which lists the legal principles for each country and contains information on translation and certification requirements as well as on the channel for communication and any other special features.

## **1.3 Definition of Mutual Legal Assistance**

### **1.3.1 Mutual assistance in the broad sense**

International mutual assistance in criminal matters encompasses all of the measures that a state (the requested state) may take at the request of another state (the requesting state) to facilitate the prosecution and punishment of criminal acts in the requesting state. International mutual assistance in criminal matters has a bearing on international relations. It therefore falls under international law, is administrative in nature (even though criminal law terms are often used), and is effected primarily by the criminal prosecution authorities.

The Federal Act on International Mutual Assistance in Criminal Matters (IMAC) breaks the subject as a whole down into four areas: extradition, other forms of mutual assistance<sup>3</sup>, the transfer of criminal proceedings and the enforcement of foreign criminal judgments<sup>4</sup>.

### **1.3.2 Accessory (specific) mutual assistance**

Use of the term "mutual assistance" in the following text refers only to "accessory", "specific" or "other" mutual assistance in the sense of the third part of the IMAC. This comprises the support that the authorities of the requested state provide to the requesting state in the administration of justice by making enquiries or performing other official acts on their own territory, and forwarding the results thereof to the requesting foreign authorities for use in specific proceedings. Assistance includes interviewing witnesses, informants or defendants, and providing or securing documents or other items of evidence, search and seizure, the confrontation of persons, the handing over of assets and the service of summonses, judgments and other judicial documents<sup>5</sup> (cf. 4, p. 78)

### **1.3.3 Administrative assistance**

Mutual assistance (sometimes referred to as "legal assistance") should not be confused with "administrative assistance", which does not have the same meaning in all countries (and is also known as mutual assistance in administrative matters or administrative mutual assistance). This form of assistance involves co-operation between administrative authorities. Administrative assistance has increased significantly in recent years in a number of areas, including cooperation on stock market regulation and in customs and

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<sup>2</sup> <http://www.rhf.admin.ch/rhf/fr/home/strafrecht.html>

<sup>3</sup> Also known as "specific" or "accessory" mutual assistance.

<sup>4</sup> See 1.3.6 p. 8

<sup>5</sup> See Art. 63 para. 1 bis 3 IMAC, Art. 25 O-IMAC and Art. 1 point 4 of the Treaty between the Swiss Confederation and the United States of America on Mutual Assistance in Criminal Matters, TUS.

fiscal matters). The distinction is not always clearly made because administrative authorities may also deal with criminal matters in some cases, and because they may take enforcement action in order to fulfil the request from the foreign authorities<sup>6</sup>; their decisions are subject to judicial review<sup>7</sup>.

Wherever necessary, reference will be made to this problem in the text that follows.

### 1.3.4 Police cooperation

The IMAC also provides a basis for police cooperation<sup>8</sup>. It covers measures that can be undertaken without the use of compulsory procedures, including police questioning of those involved in the proceedings, or the restitution of assets without recourse to compulsory procedures. Handing over criminal judgments or criminal records is expressly excluded. The distinction between police cooperation and mutual assistance varies depending on the international conventions<sup>9</sup> and countries concerned, and occasionally requires the conclusion of "mixed" agreements<sup>10</sup>.

The most significant difference between police cooperation and mutual assistance is the absence of an appeal procedure for the persons concerned, as well as the fact that the dual criminality principle does not apply.

Police authorities generally communicate with foreign states via their national Interpol bureaus. Exceptions may be made in cases of urgency, of minor importance, of violations of road traffic regulations or of contiguous police forces<sup>11</sup>.

The Schengen Agreement has affected the rules for police cooperation within the EU. In particular, Switzerland had already concluded bilateral agreements on police matters with its neighbouring countries, with a view to attaining a similar level of cooperation<sup>12</sup>. This standard and, specifically, Switzerland's inclusion in the Schengen Information System (SIS) have been effective with all Schengen states since Switzerland's Schengen implementation agreement entered into force on 12 December 2008<sup>13</sup>.

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<sup>6</sup> See for example articles 15 and 24 of the Cooperation Agreement between the Swiss Confederation, of the one part, and the European Community and its Member States, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests ([SR 0.351.926.81](#)).

<sup>7</sup> Urs R. Behnisch, Internationale Amts- und Rechtshilfe im Steuerrecht – Neue Tendenzen. Schweizer Treuhänder 2007/4 p. 286-289.

<sup>8</sup> Art. 351quinquies Criminal Code, SR 311.0; Art. 75a IMAC.

<sup>9</sup> e.g.: In the Schengen Implementation Agreement ([CISA](#)), **cross-border observation** is listed under **police cooperation** (Arts. 42 and 43), but in the Second Additional Protocol to the European Convention it is also classified under **mutual assistance**. Simple surveillance of people in public places however falls under police cooperation (without compulsory measures). The person being monitored does not have the right to appeal against the transmission of the surveillance report to the requesting authority (TPF RR.2009.198 of 17 November 2009, delib. 2.3).

<sup>10</sup> e.g.: Additional protocol of 28 January 2002 to the Agreement of 11 May 1998 between the Swiss Federal Council and the Republic of France on Cross-Border Cooperation on **Judicial, Police and Customs Matters** (SR 0.360.349.11).

<sup>11</sup> Art. 35 para. 2 O-IMAC.

<sup>12</sup> For a complete list of agreements, see SR [0.360...](#)

<sup>13</sup> Official Journal of the EU no. [L 239 of 22/09/2000 S. 0019 - 0062](#) / This text is not published in the SR classification system for Swiss law, but can be found on the FoJ website: <http://www.rhf.admin.ch/rhf/fr/home/strafrecht/rechtsgrundlagen/multilateral/sdue.html>

## 1.3.5 Unsolicited transmission of information and evidence

### 1.3.5.1 Object

Art. 67a IMAC contains regulations on the unsolicited handover of evidence and information that has been gathered in the course of Swiss criminal proceedings and which the Swiss prosecuting authority wishes to pass on to a foreign partner authority because it believes that the evidence or information may be useful in instigating criminal proceedings or may assist in a pending criminal investigation. There is no right of appeal for the persons concerned by the information or evidence that is handed over<sup>14</sup>.

### 1.3.5.2 Content

Under Art. 67a IMAC, all pertinent **information and evidence** that is not covered by secrecy regulations may be handed over.

Where secrecy is concerned (in practice, this primarily refers to banking secrecy, but also to the confidentiality of communications), **information only** – but not evidence – may be handed over unsolicited.

In practice, the information that is handed over should be just sufficient to permit the foreign judicial authority to draw up a request for mutual assistance that satisfies the criteria laid down in the IMAC<sup>15</sup>. Even at this stage, the use of such information must be **subject to restrictions** so that it may not be used in proceedings for which mutual assistance is not permitted<sup>16</sup>. Switzerland will hand over the evidence in question only to foreign states that have specifically asked for it in a mutual assistance request.

Any unsolicited transmission must be recorded<sup>17</sup> in the Swiss proceedings and designated as such to the foreign authority; this document must also be submitted for information to the FoJ, as the supervisory authority<sup>18</sup>.

### 1.3.5.3 Restrictions

The option offered by Art. 67a IMAC must be used with restraint to avoid encouraging negative comment and to prevent the uncontrolled outflow of information abroad<sup>19</sup>.

Art. 67a IMAC is based on article 10 of the 1990 European Convention on Money Laundering<sup>20</sup>. Essentially, Art. 67a IMAC applies for only as long as the criminal proceedings

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<sup>14</sup> Federal Supreme Court Ruling (BGE) 125 II 238.

<sup>15</sup> e.g., where bank information is handed over: the object of the proceedings in Switzerland, their relation to the foreign state, the location of the bank account concerned, the account holder(s), and a request to submit a mutual assistance request.

<sup>16</sup> e.g. **model** provided by the Conference of Criminal Prosecution Authorities in Switzerland, Appendix point 6.5, p. 90. The option of attaching conditions to the unsolicited handover of information or evidence is currently the rule under the law of treaties (Art. 11 AP II ECMA / SR 0.351.12; Art. 18 para. 4 und 5 UNTOC / SR 0.311.54). It is also possible under the CLau (Art. 33 Abs. 3 CLau / SR 0.311.53)

<sup>17</sup> Art. 67 para. 6 IMAC.

<sup>18</sup> BGE 125 II delib. 6 c and d p. 248/249.

<sup>19</sup> Dispatch of 29 March 1995, Federal Gazette 1995 III p. 1 ff., 25.

<sup>20</sup> SR 0.311.53

are ongoing in Switzerland<sup>21</sup>. In addition, the unsolicited handover may concern only information or evidence that is not already the subject of a request for mutual assistance<sup>22</sup>.

Furthermore, it should be noted that the handover of evidence to a state with which Switzerland has not concluded a treaty-level agreement requires the **consent of the FoJ**<sup>23</sup>.

### 1.3.6 Execution of criminal judgments

Other documents from the Federal Office of Justice exist on the subject of the execution of foreign prison sentences in Switzerland, or of Swiss prison sentences abroad. These Guidelines deal only with specific matters concerning the execution of other judgments, such as the handover or forfeiture of assets (cf. 3.5, p. 62).

### 1.3.7 Information on foreign criminal law

Accessory legal assistance does not include obtaining information on foreign criminal and criminal procedural law, which is covered by the Additional Protocol to the European Convention on Information on Foreign Law<sup>24</sup>. Requests for such information are also dealt with by the Federal Office of Justice.

## 1.4 Legal Cooperation Framework

**For information on the legal principles that apply to a given state, please refer to the "*Guide to International Mutual Assistance/ Rechtshilfeführer/ Guide de l'entraide judiciaire/ Guida all'assistenza giudiziaria*" on the FoJ website<sup>25</sup>.**

### 1.4.1 International law

#### 1.4.1.1 Preliminary remarks

It is common knowledge that criminals were quick to use technological developments (transport, communications) and greater personal and capital mobility to increase their illegal wheelings and dealings exponentially. The international community responded by concluding a raft of conventions that take account of the changes demanded by these new forms of crime and give the criminal prosecution authorities new and more effective instruments of cooperation. This work was undertaken by several different bodies,<sup>26</sup> and has tended to result more in agreements on certain criminal offences<sup>27</sup> than in conventions on cooperation in general<sup>28</sup>. Meanwhile, Switzerland has established a matrix of bilateral agreements with neighbouring countries and other states that are further afield,

<sup>21</sup> Art. 67a para. 2 IMAC refers to **pending** criminal proceedings.

<sup>22</sup> BGE 129 II 544 delib. 3.2.

<sup>23</sup> Art. 67a para. 3 IMAC.

<sup>24</sup> SR 0.351.21.

<sup>25</sup> <http://www.rhf.admin.ch/rhf/fr/home/rechtshilfefuehrer/laenderindex.html>

<sup>26</sup> Mainly the United Nations, Council of Europe, OECD and the European Union.

<sup>27</sup> Listed under [SR 0.311](#) ...

<sup>28</sup> Applies to the prosecution of all crimes: the "all crimes approach".

some of which cover the same ground as the multilateral conventions. This has the effect that, in practice, it is not always clear whether or on the basis of which agreement international mutual assistance measures can be ordered.

Where Switzerland is party to a treaty or international convention, the Swiss authorities are obliged to provide legal assistance under the provisions of that agreement. These international agreements can be allocated to the categories set out below.

#### **1.4.1.2 Multilateral level**

##### **1.4.1.2.1 General conventions<sup>29</sup>**

At European level, Switzerland most frequently uses the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters (ECMA/SR 0.351.1)<sup>30</sup>. Its provisions are complemented by the Second Additional Protocol of 8 November 2001 (AP II ECMA/SR 0.351.12) which, while introducing modern instruments of collaboration, has currently been ratified by less than half of its signatory states (status as at 19.05.2009)<sup>31</sup>. The declarations and reservations of states parties with regard to certain provisions of the Convention must be considered alongside the text of the Convention itself (these are all listed under SR 0.351.1 and 0.351.12).

##### **1.4.1.2.2 Conventions for the suppression of certain crimes<sup>32</sup>**

Several Conventions concerning specific criminal acts have been adopted under the aegis of the **United Nations**. Where the fight against terrorism is concerned, for example, more than 14 conventions have been concluded since 1963. These contain specific provisions on international mutual assistance in criminal matters<sup>33</sup>. More recent instruments include the Convention Against Transnational Organized Crime<sup>34</sup> and the forthcoming Convention Against Corruption<sup>35</sup>. UN instruments also include the Rome Statute of the International Criminal Court of 17 July 1998, which set up the International Criminal Court (ICC, cf. 5 p. 82).

The **Council of Europe** has also drafted several conventions on international mutual assistance in criminal matters. Most frequently applied in practice is the Convention of 8 November 1990 on Money Laundering (CLau/SR 0.311.53). The recent past has also seen the adoption of conventions on combating corruption ([SR 0.311.55](#)). Finally, the

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<sup>29</sup> Listed in [SR 0.351](#) ...

<sup>30</sup> The "old" convention remains a reference text to which the law of treaties on mutual assistance matters still refers. The European Union is currently developing autonomous mutual assistance legislation (see e.g. article 48 para. 1 [CISA](#), preamble to the Convention on Mutual Assistance in Criminal Matters Between the Member States of the European Union / Official Journal no. [C 197 of 12/07/2000 S. 0003 - 0023](#)).

<sup>31</sup> The First Additional Protocol of 17.3.78 expanded cooperation in mutual assistance on fiscal matters. In its Dispatch of 31.8.83 (FG 1983 IV 121), the Federal Council requested its ratification, but both chambers of the Swiss Parliament decided on 4.10.85 to exclude judicial assistance on fiscal matters. Since this resolution removed almost all of the content of the Additional Protocol, the Federal Council ultimately decided not to ratify it.

<sup>32</sup> Listed under [SR 0.31](#) ...

<sup>33</sup> Most recently the International Convention of 13 April 2005 for the Suppression of Acts of Nuclear Terrorism (SR 0.353.23).

<sup>34</sup> UNTOC of 15 November 2000 (SR 0.311.54).

<sup>35</sup> Convention of the United Nations against Corruption (UNCAC / Federal Gazette 2007 7349), currently being ratified in Switzerland.

Protocol amending the European Convention on the Suppression of Terrorism must also be mentioned. This was ratified by Switzerland in 2006 but has not yet entered into force, because all parties to the Convention must first agree to be bound by the Protocol.

### 1.4.1.2.3 Marginal mutual assistance provisions

Certain bilateral or multilateral agreements to which Switzerland is party also include provisions on mutual legal assistance in criminal matters<sup>36</sup>.

#### 1.4.1.3 Bilateral level

Multilateral conventions are often compared with the "one size fits all" approach<sup>37</sup>, while bilateral agreements are more bespoke affairs. Bilateral arrangements permit targeted mutual assistance in criminal matters to be set up and developed with a distant state, and close ties to be cultivated with a neighbouring country.

##### 1.4.1.3.1 General treaties

Switzerland has concluded several **mutual assistance treaties** at a **bilateral** level, the first of which was with the USA,<sup>38</sup> followed by other distant countries<sup>39</sup>; others are currently in preparation<sup>40</sup>. It has also concluded other, less detailed agreements<sup>41</sup> with the aim of guaranteeing a common basis for cooperation.

Switzerland has set out uncomplicated forms of collaboration with its neighbouring countries in **Additional Agreements to the ECMA**. Such treaties were concluded with Germany on 13 November 1969<sup>42</sup>, with Austria in 1972<sup>43</sup>, with France in 1996<sup>44</sup>, and finally with Italy in 1998<sup>45</sup>.

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<sup>36</sup> These include the International Convention for the Suppression of the Traffic in Women and Children (SR 0.311.31-34), the Slavery Convention (SR 0.311.37), the Convention for the Suppression of Counterfeiting Currency (SR 0.311.51), and the Convention on Narcotic Drugs (SR 0.812.121.1-6).

<sup>37</sup> Given the large number of states, it is more difficult to introduce new ideas or imperative provisions (see Art. 57 para. 3 a UNCAC as an exception).

<sup>38</sup> Dated 25 May 1973 (SR 0.351.933.6: referred to below as the TUS). Since this treaty existed prior to the IMAC, Switzerland enacted implementing legislation (SR 351.93; referred to below as the TUS-IA; see 1.4.2.2, p. 14). The treaty has been extended following several rounds of correspondence (specifically that of 3 November 1993 concerning mutual assistance in supplementary administrative proceedings relating to punishable acts in connection with the offering, purchase and sale of securities and derivative financial products (futures and options); SR 0.351.933.66), as well as by the Memorandum of Understanding dated 10.11.1987 (FG 1988 II 394).

<sup>39</sup> Australia 1991 (SR 0.351.915.8), Canada 1993 (SR 0.351.932.1), Ecuador 1997 (SR 0.351.932.7), Peru 1997 (SR 0.351.964.1), Hong Kong 1999 (SR 0.351.941.6), Egypt 2000 (SR 0.351.941.6), Philippines 2002 (SR 0.351.964.5), Mexico 2005 (SR 0.351.956.3) and Brazil 2009 (SR 0.351.919.81).

<sup>40</sup> Specifically with Argentina and Colombia.

<sup>41</sup> e.g. in the form of correspondence with India in 1989 (which is deemed a treaty per se and forms the basis of cooperation between the two states / BGE 122 II 140 e. 2) or the declaration of reciprocity with Japan of 1937.

<sup>42</sup> SR 0.351.913.61.

<sup>43</sup> SR 0.351.916.32.

<sup>44</sup> SR 0.351.934.92.

<sup>45</sup> SR 0.351.945.41.

These agreements gradually introduced new provisions to a) simplify and accelerate the processing of mutual assistance requests and b) to expand the scope of application of mutual assistance between the parties.

#### **1.4.1.3.2 Marginal mutual assistance provisions**

Some mutual assistance provisions were introduced with the conclusion of **agreements** between Switzerland and its neighbouring states **concerning the police** and/or customs<sup>46</sup>.

Furthermore, in addition to specific provisions on extradition, certain **old extradition treaties** also contain rules on "further mutual assistance measures" in criminal matters (cf. [SR0.3](#)....). The FoJ's Guide to International Mutual Assistance provides further information on this area<sup>47</sup>.

### **1.4.2 Federal law**

#### **1.4.2.1 Federal Act on International Mutual Assistance in Criminal Matters (IMAC)**

##### **1.4.2.1.1 Content**

The Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (**IMAC**; [SR 351.1](#)), which governs international mutual assistance in general, entered into force on **1 January 1983**.

There were subsequently a number of mutual assistance cases in which proceedings were judged to be far too lengthy. This prompted the Federal Council to undertake a partial revision of the IMAC<sup>48</sup> and other provisions of Swiss mutual assistance legislation<sup>49</sup>. The **revised Act**, which entered into force on **1 February 1997**, was intended first and foremost to cut the length of mutual assistance proceedings, but also to introduce new provisions to strengthen the FoJ's powers<sup>50</sup>, to set out clear rules for the handover of assets<sup>51</sup> and to permit the unsolicited provision of information<sup>52</sup>.

Following its entry into force, the IMAC was amended once again by the entry into force of the following:

- **1 January 2002**: Federal Act on the Surveillance of Postal and Telecommunications Traffic<sup>53</sup> (**new powers in accordance with Art. 18a IMAC**);
- 1 August 2004: Federal Act on the Division of Forfeited Assets<sup>54</sup> (reservations to Art. 74a para. 7 and 93 para. 2 IMAC);

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<sup>46</sup> With France in 1998 (SR.360.349.1), Germany in 1999 (SR 360.136.1), and Austria and Liechtenstein in 1999 (SR 360.163.1).

<sup>47</sup> <http://www.rhf.admin.ch/rhf/fr/home/rechtshilfefuehrer/laenderindex.html>

<sup>48</sup> Amendment of 4 October 1996 (AS 1997 114 131; FG 1995 III 1).

<sup>49</sup> Primarily the O-IMAC, TUS-IA.

<sup>50</sup> See for example Art. 79a IMAC.

<sup>51</sup> Art. 74a IMAC.

<sup>52</sup> Art. 67a IMAC.

<sup>53</sup> SR 780.1.

- 1 January 2007: Revision of the Swiss Criminal Code<sup>55</sup> (dual criminality requirement need not be fulfilled where compulsory measures are used in the investigation of sexual offences against minors; letter b of the new para. 2 of Art. 64 IMAC<sup>56</sup>);
- 1 January 2007: Federal Act on the Federal Administrative Court<sup>57</sup> (amendment to methods of appeal and the related deadlines; Arts. 17, 23, 25, 26, 48, 55, 80e, 80f, 80g, 80i, 80p, 110b IMAC)<sup>58</sup>;
- 5 December 2008: Federal Act on Federal Police Information Systems<sup>59</sup> (data management system, new Art. 11a IMAC);
- 1 February 2009: Federal Act on the Implementation of the Revised Recommendations of the Financial Action Task Force<sup>60</sup> (new wording for Art. 3 para. 3 IMAC: new letter b: comprehensive mutual assistance (all parts of the IMAC) in cases of aggravated duty fraud pursuant to Art. 14 para. 4 ACLA).

The IMAC is supplemented by the Federal Council Ordinance of 24 February 1982 ([SR 351.11](#)), referred to below as the O-IMAC<sup>61</sup>). The O-IMAC contains implementing provisions on the individual articles of the Act.

Since the IMAC and its implementing ordinance do not contain any criminal provisions but set out procedural rules instead, unlike criminal legislation they may also be applied retroactively. The provisions of the Act and the Ordinance therefore apply to all proceedings that were pending when they entered into force<sup>62</sup>.

#### 1.4.2.1.2 Scope of application

##### a) In the absence of a treaty

Where no treaty exists, the IMAC only sets out those conditions under which mutual assistance may be granted<sup>63</sup>. A foreign state cannot therefore derive any right to cooperation from Switzerland from the IMAC<sup>64</sup>.

##### b) Where a treaty exists

Where a treaty applies, the judge handling the mutual assistance case is obliged to grant mutual assistance under the terms laid down in that treaty. The IMAC applies only insofar as the applicable treaties do not provide either explicitly or implicitly for a different solution<sup>65</sup>.

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<sup>54</sup> SR 314.4.

<sup>55</sup> AS 2006 III 3459 / 3535.

<sup>56</sup> New statute of limitations; see remarks on Art. 5 para. 1 c and 13 IMAC.

<sup>57</sup> SR 173.32.

<sup>58</sup> AS 2006 II 2239.

<sup>59</sup> SR 361.

<sup>60</sup> AS 2009 361 367.

<sup>61</sup> Entered into force on 1.1.83; amended on 9.12.96, amendment entered into force on 1.2.97.

<sup>62</sup> Art. 110a IMAC.

<sup>63</sup> e.g. BGE 129 II 453 (Federal Democratic Republic of Ethiopia vs. FoJ).

<sup>64</sup> Art. 1 para. 4 IMAC.

<sup>65</sup> Art. 1 para. 1 IMAC.

According to the **favourability principle**, the IMAC applies where a treaty does not provide for certain mutual assistance measures, such as the handover of the proceeds from a criminal act (Art. 74a IMAC) or mutual assistance in the case of aggravated duty fraud (Art. 3 para. 3, clause 2 IMAC). According to Federal Supreme Court case law, the rule that is most favourable to the granting of mutual assistance must be applied in each case<sup>66</sup>.

Equally, Switzerland cannot refuse mutual assistance on the grounds of its domestic laws if these grounds are not set out in the treaty which binds it to the requesting state, or if the mutual assistance agreement in question sets out more favourable rules<sup>67</sup>. Consequently, neither the fact that a case is time barred (Art. 5 para. 1 c IMAC)<sup>68</sup> nor that it is trivial (Art. 4 IMAC)<sup>69</sup> can be cited as grounds for refusing support to the parties to the ECMA, which does not recognise such grounds for rejection.

As a general rule, treaties do not make any statements with regard to how a request for mutual assistance should be executed. Instead, they tend to refer to the domestic provisions of the requested state on such matters (cf. for example Art. 3 point 1 ECMA, Arts. 9 and 14 para. 1 CLau). Consequently, the IMAC is of great practical importance even where a treaty exists because it describes mutual assistance procedures and determines the rights of appeal open to those affected by a foreign request for mutual assistance.

#### **1.4.2.2 Federal Act on the Mutual Assistance Treaty with the USA**

Requests for assistance from the USA are executed in accordance with the Federal Act implementing the Mutual Assistance Treaty with the United States of America, of 3 October 1975 (TUS-IA; SR 351.93<sup>70</sup>). The main difference between this and the IMAC is that a central office at the FoJ is responsible for all mutual assistance matters concerning the USA. The jurisdiction of the USA central office extends to all requests from the USA, even if they have no basis in the Mutual Assistance Treaty<sup>71</sup> (e.g. requests concerning duty fraud).

#### **1.4.2.3 Federal Resolution on Cooperation with International Courts for the Prosecution of Serious Violations of International Humanitarian Law and the Federal Act on Cooperation with the International Criminal Court**

Following the violations of international humanitarian law in the former Yugoslavia and Rwanda, the United Nations set up an international tribunal for each, to which it transferred jurisdiction for the prosecution of the criminal offences committed in those countries<sup>72</sup>. Switzerland then issued regulations which permitted these courts to operate on Swiss territory. The IMAC could not be applied as it stood, owing to the supranational nature of these courts and the fact that non-cooperation would have been almost unthinkable. The Federal Ruling of 21 December 1995 on Cooperation with International

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<sup>66</sup> BGE 129 II 362 e. 1.1, BGE 123 II 134 e. 1a.

<sup>67</sup> BGE 131 II 132 e. 2.4.

<sup>68</sup> BGE 117 Ib 53, Zimmermann op. cit. no. 669 p. 621.

<sup>69</sup> Zimmermann op. cit. no. 655 p. 608. In this respect see also BGE A.290/1983 delib. 3c.

<sup>70</sup> The ISAT-IA itself was revised on 1.2.97 and 1.1.2007 (legal remedies).

<sup>71</sup> Art. 36a ISAT-IA.

<sup>72</sup> Resolution 827 (1993); Resolution 955 (1994).

Courts for the Prosecution of Serious Violations of International Humanitarian Law<sup>73</sup> was therefore drafted to avoid a legal vacuum. The Federal Ruling's scope of application was subsequently extended to include the special court with jurisdiction over Sierra Leone<sup>74</sup>.

**The establishment of the International Criminal Court<sup>75</sup> (ICC)** – a permanent criminal court – necessitated the enactment of the Federal Act of 22 June 2001 on Cooperation with the International Criminal Court<sup>76</sup>.

### 1.4.3 Cantonal law

Because the Federal Government has exercised its power to legislate in the field of international mutual assistance in criminal matters, cantonal law applies only if the IMAC does not expressly specify otherwise (Art. 12 IMAC). The standardisation of mutual assistance procedures in the revision of 4 October 1996 means that cantonal rules of procedure no longer apply. Since 1 January 1997, appeal proceedings have been subject entirely to federal law<sup>77</sup>. Provisions of federal law may override cantonal law even where the organisation of authorities is concerned<sup>78</sup>. The reservation in favour of cantonal law is therefore now only of minimal significance: the fulfilment of the obligation to complete proceedings promptly<sup>79</sup> should no longer be jeopardised by cantonal regulations.

A similar reference to cantonal law also exists for the execution of American requests for mutual assistance<sup>80</sup>.

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<sup>73</sup> SR 351.20; the provisions on mutual assistance are laid down in Arts. 17 to 28.

<sup>74</sup> Ordinance of 12 February 2003 on the Extension of the Scope of Application of the Federal Resolution on Cooperation with International Courts for the Prosecution of Serious Violations of International Humanitarian Law to the Special Court for Sierra Leone.

<sup>75</sup> Rome Statute of the International Criminal Court of 17 July 1998 (SR 312.1).

<sup>76</sup> (ICCA /SR 351.6).

<sup>77</sup> Sections 30-33 of the Appendix to the Federal Act of 17 June 2005 on the Federal Administrative Court (SR 173.32)

<sup>78</sup> For example, cantonal regulation which, under the old law, provided for two cantonal appeals bodies (plus an appeal to the Federal Supreme Court against the ruling of a court of first instance), was in violation of federal law.

<sup>79</sup> Art. 17a IMAC.

<sup>80</sup> Art. 7 para. 2 and Art. 3 para. 1 TUS-IA.

## 2 Principles of Mutual Legal Assistance

### 2.1 Principles of Cooperation

#### 2.1.1 Rule of law<sup>81</sup>

Art. 2 IMAC is intended to prevent Switzerland from granting mutual assistance or authorising an individual's extradition in proceedings in which the defendant is not granted the minimum guarantees that are his right in a democratic state governed by the rule of law. Switzerland would be violating its own international obligations if it were to extradite a person to a state in which there is good cause to believe that the defendant might be treated in a way that contravenes the ECMA or the UN Pact II, or international public policy. Art. 2 IMAC applies to all forms of international cooperation, including mutual assistance. The review of whether or not the conditions laid down in Art. 2 are fulfilled demands a value judgement about the internal affairs of the requesting state, specifically its political system, its institutions, its understanding of basic rights and its guarantee of such rights in practice, as well as the independence and impartiality of the judicial system<sup>82</sup>. If the outcome of this review is negative, the court will refuse mutual assistance to the state concerned. In practice, however, an effort is made to grant mutual assistance where possible, subject to certain conditions<sup>83</sup>.

#### 2.1.2 Criminal matters

Art. 1 para. 3 IMAC states that the Act applies only to criminal matters which may be brought before a court under the law of the requesting state. In other words, mutual assistance may only be granted for criminal proceedings abroad that concern criminal offences that the judicial authorities of the requesting party are responsible for suppressing when the request for mutual assistance is submitted<sup>84</sup>. The term "criminal matters" has a broad meaning here. It encompasses both secondary criminal law<sup>85</sup> and "civil" forfeiture proceedings under Anglo-Saxon law, provided the authority in the requesting state has the power to suppress the acts concerned<sup>86</sup>. Proceedings in criminal matters also include, in particular, administrative measures against an offender<sup>87</sup>. These measures are also the subject of international agreements, especially with the USA<sup>88</sup>, on the prosecution of unlawful insider trading<sup>89</sup>.

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<sup>81</sup> "Kein Rechtsstaat, keine Rechtshilfe", Hans Schultz, Das schweizerische Auslieferungsrecht, Basel, 1953, p. 404.

<sup>82</sup> BGE 129 II 268 delib. 6 and the case law cited.

<sup>83</sup> Art. 80p IMAC.

<sup>84</sup> Art. 1 para. 1 ECMA, BGE 130 IV 40 delib. 3.1.

<sup>85</sup> In particular administrative criminal law.

<sup>86</sup> BGE 132 II 178 delib. 3-5.

<sup>87</sup> Art. 63 para. 3 c IMAC. Examples include the disqualification from driving, revocation of a banking or exchange trading licence, as well as welfare measures in the case of psychiatric patients or drug addicts.

<sup>88</sup> Art. 1 para. 3 TUS (SR 0.351.933.6).

<sup>89</sup> Correspondence of 3 November 1993 between Switzerland and the United States concerning mutual assistance in supplementary administrative proceedings in the case of criminal acts in connection with the offering, purchase and sale of securities and derivative financial products (futures and op-

By contrast, the Swiss legislation on mutual assistance in criminal matters does not provide a basis for Switzerland's cooperation in purely administrative proceedings or in civil proceedings conducted abroad. A request for mutual assistance in criminal matters that is submitted purely to circumvent the rules on mutual assistance in civil matters would have to be regarded as an abuse of the system<sup>90</sup>.

It is not absolutely necessary for an accusation to have been made or for formal charges to have been brought. A **preliminary investigation** suffices, provided it results in the accused being brought before the court with jurisdiction over the criminal acts for which mutual assistance has been sought<sup>91</sup>. Since – unlike police cooperation (cf. 1.3.4, p. 6) – such cases generally concern compulsory measures, the request for mutual assistance is normally made by a judicial authority. However, Swiss law also takes account of other systems, in particular the Anglo-Saxon concept of law, in which criminal offences are investigated by the police or even by specialised administrative authorities (cf. 3.1.3, p. 38 for details).

Switzerland thus allows judicial cooperation in investigations conducted by administrative authorities, provided they constitute the stage preliminary to the matter being dealt with by the prosecution authorities<sup>92</sup> and will potentially result in the matter being brought before a criminal court<sup>93</sup>. Mutual assistance is also granted for preliminary proceedings where the requesting state has clearly stated its intention to commence criminal proceedings from the outset<sup>94</sup>.

### 2.1.3 Connection with Switzerland

The circumstances which form the basis of the proceedings underlying the foreign request for assistance must have a specific connection with Switzerland. Consequently, a request that is simply fishing for evidence that might be available in Switzerland<sup>95</sup> would be denied. Switzerland – a major financial centre – will not accommodate requests which, without providing further details, seek to establish whether or not a person subject to proceedings abroad holds bank accounts in Switzerland<sup>96</sup>.

### 2.1.4 Essential Swiss Interests (Art. 1a IMAC)

Mutual assistance may be refused if the execution of the request is likely to prejudice Switzerland's sovereignty, security or similar essential interests<sup>97</sup>. The decision on this is made by the Federal Department of Justice and Police, which must be consulted within

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tions)/SR 0.351.933.66. The mutual assistance provided for in the TUS-IA may therefore be granted for administrative proceedings conducted by the SEC or the CFTC, even where no criminal proceedings have yet been commenced.

<sup>90</sup> BGE 122 II 134 delib. 7b.

<sup>91</sup> BGE 123 II 161 delib.3a; 118 Ib 457 delib. 4b; 116 Ib 452 delib. 3a.

<sup>92</sup> BGE 109 Ib 50 delib. 3 concerning the Securities and Exchange Commission.

<sup>93</sup> BGE 121 II 153.

<sup>94</sup> BGE 132 II 178 delib. 2.2 p. 181; 113 Ib 257 delib. 5 p. 271.

<sup>95</sup> "Fishing expeditions", BGE 122 II 367, 121 II 241 delib. 3a. This is a more specific expression of the proportionality principle.

<sup>96</sup> In contrast to, say, France or Brazil, there is no central register of bank accounts, so there would, in any case, be major practical obstacles to executing such a request.

<sup>97</sup> Art. 1a IMAC, Art. 2 b ECMA, Art. 3 point. 1 a TUS.

30 days of the written communication of the final ruling<sup>98</sup>. Rulings by the FDJP are subject to an administrative appeal to the Federal Council<sup>99</sup>.

In these proceedings, no objections may be filed if they may be made in ordinary appeal proceedings. The examination is restricted to whether or not the assistance which is, in itself, permitted, should nonetheless be denied because Switzerland's essential interests would be prejudiced<sup>100</sup>. Essential Swiss interests are classified as those interests that are key to Switzerland's existence. Economic interests, for example, are essential if fulfilling the request might jeopardise the Swiss economy as a whole<sup>101</sup>. Only natural persons resident in Switzerland and legal entities registered in Switzerland are entitled to invoke Switzerland's essential interests<sup>102</sup>. Under Art. 1a IMAC, the Federal Council may itself intervene *ex officio* where an appeal is not permitted<sup>103</sup>.

As the Federal Supreme Court has ruled<sup>104</sup>, cooperation may be authorised because it benefits essential Swiss interests. Switzerland does not want the tarnished reputation of being safe haven for flight capital or the proceeds of crime, and this desire should also be taken into account within the framework of the decision-making freedom available to the executing authorities as a positive factor in granting mutual legal assistance. The Federal Council shares this view<sup>105</sup>.

## 2.2 Grounds for Refusing Requests

### 2.2.1 Procedural defects (Art. 2 IMAC)

Although cooperation in criminal matters may be established in principle (cf. 2.1.1, p. 15), serious defects in foreign proceedings, such as a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>106</sup> or the International Covenant on Civil and Political Rights<sup>107</sup> may lead to mutual assistance being refused<sup>108</sup>. Serious defects include gross breaches of Art. 5 ECHR (the legality of detention, notification of charges to be brought against the detainee, judicial review of the legality of detention) and Art. 6 ECHR (right to defence, right to be tried by an independent and impartial tribunal, presumption of innocence, etc.).

Where circumstances in the requesting state permit, Swiss courts have so far opted for the less incisive option of approving mutual assistance subject to certain conditions, in-

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<sup>98</sup> In practice, the FDJP will generally not make its decision until final approval has been given for mutual assistance.

<sup>99</sup> Art. 17 para. 1, Art 26 IMAC, Art. 4 TUS-IA.

<sup>100</sup> VPB 45.48, 49.35, 49.45.

<sup>101</sup> VPB 70.5 delib. III/3.B.a.

<sup>102</sup> VPB 2008.28.

<sup>103</sup> VPB 2009.8 delib. 8

<sup>104</sup> BGE 123 II 595 delib. 5 and 5a.

<sup>105</sup> VPB 70.5 delib. III/B. d: "In the present case, Switzerland has a material interest in ensuring that its financial industry is not abused for criminal purposes, and thus to contribute to greater transparency in trading transactions in major financial centres.

<sup>106</sup> SR 0.101.

<sup>107</sup> SR 0.103.2.

<sup>108</sup> Art. 2 a IMAC.

stead of simply refusing it out of hand<sup>109</sup>. In such cases, the requesting state must provide assurance in advance that it will abide by the principle of fairness in the criminal proceedings for which Switzerland is providing mutual assistance<sup>110</sup>.

The FoJ is responsible for reviewing this assurance. An appeal against its ruling may be filed with the Federal Criminal Court within ten days. The Federal Criminal Court will then issue a final decision on the matter in simplified proceedings (Art. 80p IMAC). If the request for mutual assistance concerns the handover of banking documents, a defendant who is on the sovereign territory of the requesting state may invoke Art. 2 IMAC if they can credibly substantiate a specific threat to their rights in legal proceedings. However, a person who is abroad or on the territory of the requesting state, but who is not exposed to any risk there, may not raise an objection to any breach of Art. 2 IMAC. Legal entities are not entitled to claim defects in foreign proceedings<sup>111</sup>.

The request will also be denied if proceedings are being conducted abroad in order to prosecute or punish a person on account of their political opinions, their affiliation to a certain social group, or their race, religion or nationality (non-discrimination clause)<sup>112</sup>. As soon as there is good cause to consider that the objections of the person concerned could be true, the Federal Office of Justice may be informed so that more precise details of the situation in the requesting state may be obtained from the competent Swiss diplomatic representation abroad or from the Federal Department of Foreign Affairs.

It is of course recognised that this provision is open to abuse, so related claims and declarations by defendants or other affected parties must be treated with caution. The fact that a certain criminal case in the requesting state is receiving extensive media coverage or that the government has declared combating this type of offence as a priority does not automatically warrant the conclusion that the foreign proceedings are tainted with serious defects<sup>113</sup>.

That said, a request for mutual assistance must be refused if a convincing case can be made that there is a serious and objective risk of unlawful discrimination. In this connection, it has been held, for example, that it is not sufficient to allege that the criminal proceedings commenced abroad are part of a plot to remove the appellant from the political stage. Rather, there must be specific factors that lead to the assumption that the appellant is being prosecuted for undisclosed reasons, primarily owing to their political views<sup>114</sup>.

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<sup>109</sup> BGE 116 Ib 463, BGE 123 II 172 f.

<sup>110</sup> BGE 130 II 217 delib. 8.

<sup>111</sup> BGE 126 II 258 delib. 2d/aa.

<sup>112</sup> Art. 2 Bst. b IMAC.

<sup>113</sup> BGE 129 II 168 delib. 6.1 and the case law cited (the Abacha case / mutual assistance with Nigeria).

<sup>114</sup> BGE 1A.15/2007 delib. 2.5 and the case law cited (rejection of a request for legal assistance owing to the political nature of proceedings / mutual assistance with Russia / the Yukos case).

## 2.2.2 Political or military offences (Art. 3 paras. 1 and 2 IMAC)

- a) No assistance is granted for investigations or proceedings concerning an offence which Switzerland considers to be a political act or an act connected with a political offence<sup>115</sup>.

The IMAC does not regard as political offences crimes which amount to acts of genocide, or which are otherwise particularly reprehensible because the offender, for the purposes of extortion or duress, jeopardised or threatened the freedom, life or limb of others (hijacking of planes, taking of hostages), or which constitute grave breaches of international humanitarian law<sup>116</sup>. Acts prosecuted under Italian legislation on the financing of political parties are not regarded as political offences, but simply as ordinary criminal offences<sup>117</sup>.

- b) A request for assistance will be rejected if the foreign proceedings relate to a violation of the obligation to perform military or similar services<sup>118</sup>. Military offences are considered to be only those which involve a violation of military duties, but not ordinary criminal offences listed in the military criminal code<sup>119</sup>.

Given their restrictive wording, these two grounds for rejecting a request for mutual assistance are of very little practical importance nowadays.

- c) If the request involves a fiscal offence, then mutual assistance is essentially out of the question, with a very few exceptions. These are mainly cases in which the facts of the case as described in the request would constitute tax or duty fraud under Swiss law. (cf. 2.3, p. 22 below).

## 2.2.3 Currency, trade and economic offences (Art. 3 para. 3 IMAC)

Art. 3 para. 3 IMAC essentially rules out mutual assistance in support of foreign proceedings concerning the prosecution of currency, trade or economic offences<sup>120</sup>.

The ECMA does not expressly state that cooperation may be refused for these categories of offences. Switzerland nonetheless takes the view, that their suppression runs counter to its public policy and its essential interests, as expressly reserved in Art. 2 b ECMA<sup>121</sup>.

Mutual assistance may nonetheless be granted in response to requests from states with which a treaty on breaches of certain economic policy regulations exists<sup>122</sup>. Breaking a ban does not constitute a fiscal offence<sup>123</sup>.

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<sup>115</sup> Art. 3 para. 1 IMAC, Art. 2 a ECMA, Art. 2 point 1 c (1) TUS.

<sup>116</sup> Art. 3 para. 2 IMAC.

<sup>117</sup> BGE 124 II 184 delib. 4b.

<sup>118</sup> Art. 3 para. 1 IMAC, Art. 1 point 2 ECMA, Art. 2 point 1 c (2) TUS.

<sup>119</sup> BGE 112 Ib 576 delib. 10.

<sup>120</sup> For fiscal offences see 2.3, p. 24, below.

<sup>121</sup> BGE of 19.6.2000 / 1A.32/2000 delib. 5a.

<sup>122</sup> e.g. the breaking of an embargo supported by Switzerland, or the unlawful export of advanced technology; see BGE 121 IV 280 delib. 4b and c, 112 Ib 212 ff.

<sup>123</sup> Art. 76 of the Federal Customs Act; SR 631.0 / BGE of 27.11.2000 / 1A.47/2000 delib. 4d.

## 2.2.4 Minor cases (Art. 4 IMAC)

This reason for refusing mutual assistance is derived from the proportionality principle. The court must reject a request for mutual assistance (in the broad sense) if the significance of the act does not justify proceedings.

Article 4 IMAC should be applied with caution and restraint. This reason for refusing assistance is not mentioned in either the ECMA or the ECE, so whether it could still be applied at all<sup>124</sup> within the scope of these two conventions<sup>125</sup> or a bilateral treaty is questionable. The case law applies a narrow definition to the term "minor case". Where the amount at issue is concerned, precedent is based on the criteria laid down in Article 172ter of the Criminal Code<sup>126</sup>. It must also be remembered, however, that a case which the Swiss authorities deem "minor" may be classified differently in the requesting state<sup>127</sup>.

## 2.2.5 Expiry of criminal liability. Res judicata (ne bis in idem) and time-bar (Art. 5 IMAC)

a) **Res judicata:** Mutual assistance may not be granted where a foreign authority requests assistance in a matter in which the Swiss authorities have already conducted criminal proceedings. If the defendant has been acquitted, has benefited from proceedings being dismissed or has already served his sentence in Switzerland or in the state in which the offence was committed (which need not necessarily be the same as the requesting state), then no mutual assistance may be granted<sup>128</sup>. By contrast, mutual assistance may be granted if the criminal proceedings that have been commenced in Switzerland to investigate the same act have been suspended only on the grounds of expediency<sup>129</sup>. In addition, the *ne bis in idem* rule is subject to further restrictions: for example, mutual assistance to bring about the revision of a legally enforceable judgment is permitted<sup>130</sup>. In the case of mutual assistance to prosecute narcotics offences, Art. 36 of the Single Convention on Narcotic Drugs<sup>131</sup> must be considered. This article classifies a range of individual acts as independent offences. A Swiss conviction for importing narcotics into Switzerland does not automatically preclude mutual assistance in prosecuting the export of the same narcotics from the requesting state.

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<sup>124</sup> The Federal Supreme Court leaves the matter open in its rulings BGE 1A.76/2006 delib. 3.2 (with regard to the EEC) and BGE 1A.323/2005 delib. 4 (with regard to the ECMA).

<sup>125</sup> The Federal Supreme Court leaves the matter open in BGE 1A.76/2006 delib- 3.2 (with regard to the ECE and BGE 1A 323//2005 delib. 4 (with regard to the ECMA).

<sup>126</sup> An amount of at least CHF 300 is not regarded as minor in the sense of this provision (BGE 1A.247/2004 delib. 2.2).

<sup>127</sup> The mere fact that a request for mutual assistance has been submitted illustrates the importance attached to the case by the requesting state, the economic circumstances of which are often less favourable than those of Switzerland (BGE 1A.247/2004 delib. 2.2: Value of offence EUR 1,100, requesting state: Estonia).

<sup>128</sup> Letter a of the Swiss reservation to Art. 2 ECMA, more restrictive than Art. 5 para. 1 a and b IMAC (BGE 1A.136/2001 delib. 5b) see also Art. 54 Schengen Convention and TPF RR.2009.196 of 26 March 2010, delib. 2.

<sup>129</sup> BGE 110 Ib 385 ff.

<sup>130</sup> Art. 5 para. 2 IMAC.

<sup>131</sup> SR 0.812.121.0.

- b) **Ne bis in idem** (double jeopardy): Mutual assistance may also be refused if criminal proceedings are still pending in Switzerland in relation to the act to which the foreign request for assistance refers, and the defendant is in Switzerland<sup>132</sup>. However, mutual assistance may be granted if the foreign proceedings concern the prosecution of co-offenders, or the exoneration of the defendant<sup>133</sup>.

Cantonal executing authorities may also invoke the *ne bis in idem* principle. That said, *ne bis in idem* should not be asserted where a person who has been convicted in Switzerland flees to their home country and the authorities in that country seek mutual assistance. Otherwise, there is the risk that the person concerned goes unpunished if, because of their nationality, they cannot be extradited from their country of origin to Switzerland.

- c) **Time bar**: Mutual assistance will be denied if the act that is the subject of investigations abroad would have been time-barred if it had been committed in Switzerland<sup>134</sup>. As is the case with dual criminality, limitation periods must be examined in the context of the applicable law at the time the final ruling was issued<sup>135</sup>. The limitation period runs from the time at which the enforcement measure is executed, for example from the time at which the documents whose handover has been ordered are seized from banks<sup>136</sup>.

This reason for refusing mutual assistance cannot, however, be applied to a request for assistance where there is an agreement between the requesting state and Switzerland which does not provide accordingly<sup>137</sup> or, logically, where it has been declared that there is no time limit for the prosecution of the criminal acts which are the subject of the foreign proceedings. It is therefore becoming more and more unlikely that assistance will be refused on the grounds that it is time-barred in the requested state<sup>138</sup>.

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<sup>132</sup> Art. 66 para. 1 IMAC.

<sup>133</sup> Art. 66 para. 2 IMAC.

<sup>134</sup> NB: The new rules on time limits were codified in Arts. 97 to 101 of the Swiss Criminal Code with effect from 1 January 2007. The "absolute" limitation imposed by Art. 5 para. 1 c IMAC no longer exists.

<sup>135</sup> BGE 130 II 217 delib. 11.2.

<sup>136</sup> BGE 130 II 217 delib. 11.2.

<sup>137</sup> e.g. ECMA (BGE 133 IV 40 delib. 7.4), TUS and AA-D/ECMA with Germany. Other rules apply to mutual assistance measures for which no provision is made in the ECMA. In this case, the statute of limitations may be cited as grounds for refusing assistance (BGE 126 II delib. 4d).

<sup>138</sup> see Zimmermann, no. 437 and, on extradition, Art. IV AA-D/ECE with Germany, amended on 1 March 2002 (SR 0.353.913.61).

## 2.3 Assistance in Fiscal Matters

### 2.3.1 Principles

Switzerland does not grant mutual assistance for the prosecution of fiscal offences that are the subject of investigations by a foreign authority<sup>139</sup>. The decision not to cooperate is not rooted in the problem of dual criminality<sup>140</sup>; neither is it based directly on banking secrecy, which may be lifted in certain cases that are provided for in law<sup>141</sup>.

The main reason why Switzerland does not provide assistance in fiscal matters is that banking secrecy represents a direct obstacle to tax-related investigations under Swiss law as well, and may only be suspended in cases of tax fraud<sup>142</sup>. Consequently, in the context of mutual assistance Switzerland is unable to grant foreign prosecuting authorities broader privileges than those accorded to Swiss authorities in their domestic investigations<sup>143</sup>.

The name of an offence, its systematic classification under the law of the requesting state or the general responsibilities of the requesting authority do not necessarily imply that no assistance will be given. For example, "Fiscal" (Spanish-speaking countries) or "Procurator Fiscal" (Scotland) actually means "Public Prosecutor, State or District Attorney"; in certain countries, investigations relating to drugs offences are carried out by the customs authorities (e.g. in the UK); in the United States, these offences are defined in customs legislation, with a number of agencies (specifically the Internal Revenue Service) responsible for prosecution. The acts described in a request for assistance (the object of the investigation) determine whether or not that request concerns a fiscal matter.

### 2.3.2 Definition of "fiscal offence"

A **fiscal offence** is defined as an act which is designed to **reduce fiscal duties**, i.e. the evasion of taxes, customs duties or other public levies<sup>144</sup>.

If the act is intended **improperly to obtain benefits from the fiscal authorities** (the state), then an **ordinary criminal offence** has been committed. As such, it may form the object of accessory legal assistance, as well as other forms of cooperation (such as extradition<sup>145</sup>, or the delegation of prosecution).

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<sup>139</sup> Art. 3 para. 3 IMAC, clause 1 BGE 8.11.2006/ 1A.176/2006 delib. 2.2.

<sup>140</sup> Fiscal offences are punishable in Switzerland as they are elsewhere (see e.g. Art 14 ACLA and Art. 186 DFTA for tax fraud, Arts. 175 to 185 DFTA for tax evasion).

<sup>141</sup> Art. 47 para. 5 of the Banking Act: "Still applicable are the federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority".

<sup>142</sup> Aubert, Kernén und Schönle, *Le secret bancaire suisse*, 3 ed. 1995, p. 222 ff. / Günter Stratenwerth, *Basler Kommentar (Bankengesetz) 2005 ad Art. 47 n 36 ff. p. 689*.

<sup>143</sup> A distinction must be made between cooperation in the sense of mutual assistance and administrative assistance in cases of tax fraud and related offences, which is provided for in the treaties to prevent the double taxation of income (e.g. Art. 27 of the treaties with the USA: SR 0.672.933.61 and with Germany: SR 0.672.913).

<sup>144</sup> With the exception of contributions to social security schemes. see Art 2. point 3 TUS.

<sup>145</sup> BGE of 18.8.2005 / 1A.194/2005 delib. 3.1.4. BGE of 13.1.2006 / 1A.297/2005 delib. 3.

This means that fraudulently obtaining subsidies or other benefits from the state is not regarded as a fiscal offence, because the defendant is not depriving the state of something that would otherwise be due under the tax and duty legislation<sup>146</sup>. For the same reason, assistance may be granted to investigate the suspicion that a private physician did not hand over to the public hospital that legally prescribed part of his fee for treating his patients. In this case, the offence is directed against the state as an employer, and not against the tax authority. Conversely, falsifying documents is deemed a fiscal offence if it has been undertaken purely for tax purposes<sup>147</sup>.

### 2.3.3 Exceptions to the refusal of assistance in fiscal matters

#### 2.3.3.1 *Duty or tax fraud*

Three exceptions are made to the principle that no assistance may be granted in fiscal matters:

- a) Assistance to **exonerate a person being prosecuted** is permitted – provided this exception is applied with restraint<sup>148</sup>. The reason for this caution is that the evidence and arguments that the person being prosecuted abroad is requesting to exonerate himself may, under certain circumstances, turn out to be highly unfavourable to his case and thus result in the very outcome he is seeking to avoid<sup>149</sup>. The defendant's written consent to the gathering of evidence in this way must be obtained and enclosed with the request for assistance<sup>150</sup>.
- b) An obligation to provide assistance exists in cases in which a US request concerns criminal proceedings against leading members of **criminal organisations in the USA**<sup>151</sup>.
- c) If the subject of foreign proceedings is an act which would be classified in Switzerland as **duty or tax fraud**, then assistance may be granted (Art. 3 para. 3 clause 2 IMAC). Art. 24 para. 1 IMAC defines duty or tax fraud by reference to Art. 14 para. 2 of the Administrative Criminal Law Act (ACLA, SR 313.0). Despite the wording used ("may"), an obligation to provide assistance exists provided all of the relevant conditions are fulfilled<sup>152</sup>.

Duty or tax fraud is deemed to have been committed where a person fraudulently evades taxes or duties by using false, forged or untrue information – the latter being the most common case<sup>153</sup>. That said, other instances of the fraudulent deception of tax authorities are conceivable which do not necessarily require the use of falsified documents<sup>154</sup>. For example, cases in which inflated invoices are issued so that capital can be clawed back

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<sup>146</sup> Subsidy fraud, see BGE 112 Ib 55 ff. / Non-justified refunds of value added tax via a "VAT carousel": CCR of 19.11.2007 / RR.2007.106 delib. 3.4.

<sup>147</sup> See BGE 103 Ia 218 ff., BGE 103 Ia 108 IV 27 ff.

<sup>148</sup> Art. 63 para. 5 IMAC.

<sup>149</sup> VPB 46/IV no. 68 p. 379 f. letter b.

<sup>150</sup> BGE 113 Ib 67 delib. 4a.

<sup>151</sup> Art. 2 point 2 TUS. See Art. 7 TUS for the conditions that must be fulfilled for assistance to be provided in such cases. This regulation has been applied only very rarely to date.

<sup>152</sup> BGE 125 II 250 delib. 2.

<sup>153</sup> BGE 111 Ib 242 ff.

<sup>154</sup> BGE 125 II 250 delib. 3b and BGE of 3.4.2005 / 1A.323/2005 / delib. 5.

are classified as this type of fraud<sup>155</sup>. The use of intermediate domiciliary companies and the systematic issue and application of falsified contracts<sup>156</sup> may also be defined as "schemes of lies"<sup>157</sup>.

A foreign request may not be refused simply because the same types of duties or fiscal regulations do not exist under Swiss law<sup>158</sup>.

For assistance to be granted in cases of duty or tax fraud, the allegations must leave no doubt that the requirements for the offence under Swiss law are met. This is intended to prevent the requesting foreign authority – under the guise of an ordinary criminal offence or duty or tax fraud that it merely claims has been committed – collecting evidence to punish fiscal offences for which Switzerland would not otherwise provide assistance.

First and foremost, a scheme of lies must be clearly shown to exist. According to Federal Supreme Court precedent, the requesting state must present sufficient indication that tax fraud has been committed. However, when submitting its request for assistance, the requesting state does not necessarily need to include evidence supporting its suspicions. It need only describe those suspicions and make a credible case for the existence of a crime<sup>159</sup>.

Where doubts exist about the nature of the taxes or duties referred to in the request, the Swiss Federal Tax Administration will be called upon to give a written opinion<sup>160</sup>. Although its report is not binding on the executing authorities<sup>161</sup>, the latter may not deviate from it without good reason to do so.

In cases of customs fraud, frequent use is made of the option provided for in Article 79 IMAC. This permits the conduct of the entire mutual assistance procedure to be transferred to the Swiss Federal Customs Administration. This can be useful not only because the SFCA has a greater specialist knowledge of the field, but also because it often also helps to avoid concurrent proceedings (where Swiss customs regulations have been infringed at the same time, or where administrative proceedings are running in parallel).

Swiss mutual assistance requests made to foreign authorities may not impose any conditions on the use of the information they contain. The requested state may therefore also pass this information on to its tax authorities. This dilemma can usually be resolved by only disclosing information subject to business or banking secrecy that is absolutely necessary to obtain assistance.

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<sup>155</sup> BGE 111 Ib 242 ff.

<sup>156</sup> BGE of 31.1.2006 / 1A.234/2005 delib. 2.3.

<sup>157</sup> The IMAC gives duty and tax fraud a broader definition than Art. 186 of the Federal Act on Direct Federal Taxation (DFTA / SR 642.11), which defines tax fraud as the use of false, forged or untrue information with intent to deceive the tax authorities.

<sup>158</sup> Art. 24 para. 2 O-IMAC.

<sup>159</sup> BGE 125 II 250 delib. 5b, CCR of 28.10 2008 / RR.2008.165 delib. 5.5.

<sup>160</sup> Art. 24 para. 3 O-IMAC.

<sup>161</sup> BGE of 8.2.2001 / 1A.308/2000 delib. 2c.

### **2.3.3.2 Cooperation agreements between the Swiss Confederation and the European Union on mutual assistance in the field of indirect taxation**

The conclusion of the second series of bilateral agreements ("Bilateral II") between Switzerland and the European Union will not result in any major changes to Swiss legislation on mutual assistance. There is one exception, however: the **extension of cooperation with regard to indirect taxation**. The Cooperation Agreement between the Swiss Confederation, the European Union and the European Community on their Association with the Implementation, Application and Development of the Schengen Aquis<sup>162</sup> and the Cooperation Agreement Between the Swiss Confederation, of the one part, and the European Community and its Member States, of the other part, on the Combating of Fraud and other Illegal Activity to the Detriment of Their Financial Interests (with Final Act)<sup>163</sup>, **introduce the same standard for cooperation between Switzerland and the EU on indirect taxes as apply between EU Member States themselves**<sup>164</sup>. It should be stated here that mutual assistance will also be provided in cases of money laundering within the EU if the offence in both countries concerned carries a sentence of more than six months imprisonment (specifically: for the money laundering of the proceeds from tax fraud, e.g. in connection with VAT, and professional smuggling operations). **Direct taxation is not affected by this**. In this area, mutual assistance remains restricted to cases of duty or tax fraud.

There are two special features of the Agreement on Combating Fraud: a new type of cooperation – the **monitoring of bank accounts**<sup>165</sup>, and the **cancellation of the right of appeal** against the **representatives of the requesting state being present** when the request is carried out.

## **2.4 Concurrence of Refusal and Admissibility of Cooperation (Art. 6 IMAC)**

If the circumstances of the case presented in the request for assistance indicate that ordinary criminal offences have been committed in addition to fiscal, political or military offences, then mutual assistance will be granted under the proviso that the findings communicated by Switzerland are to be used to prosecute or punish the ordinary criminal offences only<sup>166</sup> (on the speciality reservation, please refer to 2.7 p. 32). No assistance may be granted, however, if the circumstances of the specific (fiscal, political or military) offence affect all aspects of the ordinary criminal offence and thus take precedence over it<sup>167</sup>.

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<sup>162</sup> FG 2004 6447 / CISA, in force since 15 December 2008. The SR classification system does not include the text, but it may be accessed via the FoJ website:

<http://www.rhf.admin.ch/rhf/fr/home/strafrecht/rechtsgrundlagen/multilateral/sdue.html>

<sup>163</sup> FG 2004 VI 6503 / BBA (SR 0.351.926.81), in force early with certain Member States of the European Union since April 2009 (see also the Guide to International Mutual Assistance).

<sup>164</sup> Lower limit: the amount evaded must be at least EUR 25,000 or the value of the unlawfully imported or exported goods must be at least EUR 100,000.

<sup>165</sup> See Art. 284 and 285 of the future Swiss Code of Criminal Procedure (CPO).

<sup>166</sup> Art. 6 para. 1 IMAC.

<sup>167</sup> See Art. 6 para. 2 IMAC, Art. 2 point 4 TUS and BGE 104 Ia 49 ff. delib. 4).

## 2.5 Grounds for Refusing Assistance

### 2.5.1 Reciprocity (Art. 8 IMAC)

As a rule, a request will be granted only if the requesting state guarantees reciprocity (Art. 8 para. 1 first sentence 1 IMAC). The Federal Office will obtain an assurance of reciprocal rights where this appears appropriate (Art. 8 para. 1 second sentence 2 IMAC). It may exercise considerable discretion in this regard<sup>168</sup>. An assurance will generally be required unless the relationship between Switzerland and the requesting state is based on some form of convention. In accordance with the principle of good faith, which is a crucial element in international relations, the Swiss authorities are not required to check whether the declaration of reciprocity complies with foreign requirements as to form, or the competence of the authority that submits the declaration, unless there are clear indications that abuses have occurred. The FoJ may also waive the reciprocity requirement, particularly if carrying out the request appears appropriate due to the type of offence or the need to combat certain crimes (Art. 8 para. 2 a IMAC). This exception especially concerns the suppression of organised crime, white-collar crime, money laundering and corruption<sup>169</sup>.

The question of who is responsible for submitting the declaration of reciprocity is determined by the domestic law of the state concerned<sup>170</sup>; the declaration is generally contained in a note from the diplomatic representation in Switzerland of the state concerned, or in a letter from the attorney general's office or the ministry of justice.

In view of the globalisation of crime and the mobility of its proceeds, there is – rightly – a growing tendency to waive the reciprocity condition<sup>171</sup>.

### 2.5.2 Dual criminality

#### 2.5.2.1 Principle

In principle, assistance should be granted as far as possible even if the act described in the request is not an offence in Switzerland. However, in executing a request, procedural enforcement (premises searches, seizure of evidence, summons to appear with a warning of enforcement in the event of non-compliance, interviewing of witnesses<sup>172</sup>, telephone tapping, and the lifting of the obligation to keep certain facts confidential<sup>173</sup>) may be ordered only if the offence described in the request also constitutes a criminal offence under Swiss law<sup>174</sup>.

The court reviewing the request for assistance will look into the question of *prima facie* criminal liability<sup>175</sup>. Under Art. 64 para. 1 IMAC, this examination concerns the objective

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<sup>168</sup> BGE 110 Ib 176.

<sup>169</sup> BGE of 23.4.2003 / 1A.49-54/2002 delib. 4.

<sup>170</sup> BGE 110 Ib 173 delib. 3a.

<sup>171</sup> In this connection, BGE of 18.5.2005 / 1A.38/2005 delib. 3.4.

<sup>172</sup> A voluntary statement made by the accused should be accepted as the granting of a legal hearing.

<sup>173</sup> In particular – and above all – banking confidentiality (Art. 47 BankA).

<sup>174</sup> Art. 64 para. 1 IMAC, Art. 5 a ECMA and the attendant Swiss declaration, Art. 4 TUS.

<sup>175</sup> BGE 124 II 184 delib. 4b.

elements of the criminal act, independent of the special provisions of Swiss law on guilt and prosecution.

Here, it is not necessary that the legal classification of the criminal act is the same in both systems of law, or that the criminal provisions or potential sanctions are the same. It is sufficient for the act described in the request to be an offence in both states that would normally result in international cooperation<sup>176</sup>. In contrast to extradition, the condition of dual criminality must not be fulfilled for every offence for which a request for assistance is submitted – it must be fulfilled for just one<sup>177</sup>.

Criminal liability under foreign law is not examined<sup>178</sup>. The timing of criminality in Switzerland is **determined** by the date on which **compulsory measures were ordered**<sup>179</sup>.

### **2.5.2.2 Exceptions (Art 64 para. 2 IMAC)**

The IMAC provides for two exceptions to the principle of dual criminality<sup>180</sup>. Even where the act that is being prosecuted in the requesting state is not an offence in Switzerland, enforcement measures may still be ordered in the following cases:

- To exonerate the defendant (cf. 2.3.3.1 lit. a), p. 23);
- To prosecute offences that constitute sexual acts with minors.

### **2.5.3 Confirmation (Art. 76 c IMAC)**

According to the IMAC only<sup>181</sup>, but not the ECMA<sup>182</sup>, for searches of premises and the seizure or handover of objects the request for assistance must be accompanied by confirmation that these measures are permitted in the requesting state. This precaution is intended to prevent the requesting state demanding compulsory measures from Switzerland that it would be unable to execute within its own sovereign territory<sup>183</sup>. The confirmation provided for in this provision is not requested systematically, but rather only where doubts exist about the lawfulness of the measure in the requesting state<sup>184</sup>.

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<sup>176</sup> BGE of 3.5 2004 / 1A.3/2004 delib. 10.1.

<sup>177</sup> BGE 125 II 569 delib. 6.

<sup>178</sup> e.g. expressly with the USA; see Art. 4 point 4 TUS; BGE 111 Ib 137 f.

<sup>179</sup> BGE 129 II 462 delib. 4.3.

<sup>180</sup> The principle of dual criminality tends to be waived at least in part in mutual assistance relationships between EU Member States (e.g.: Art. 3 para. 2 of the Framework Decision 2003/577 of 22 July 2003 on the execution in the European Union of orders freezing property or evidence / L 196.45).

<sup>181</sup> Art. 76 c IMAC, Art. 31 O-IMAC.

<sup>182</sup> The requirement of Art. 76 c IMAC cannot be held against a State Party to the ECMA / BGE of 25. 2.2000 /1A.274/1999 delib. 3b.

<sup>183</sup> A search or seizure warrant enclosed by a foreign authority with its request for assistance is deemed to be confirmation of the legality of such measures (Art. 31 para. 2 IMAC).

<sup>184</sup> BGE 123 II 161 delib. 3b p. 166.

## 2.6 Principles governing the Execution of Assistance

### 2.6.1 Principle of good faith

The principle of good faith not only applies to legislation on mutual assistance, but also forms the foundation for all relations between states which are parties to a bilateral or multilateral agreement<sup>185</sup>. In international mutual assistance in criminal matters, the principle of good faith means that the requested state will generally not cast doubt over the request for assistance submitted by the requesting state with regard to:

- the jurisdiction (*ratione loci et materiae*) of the requesting authority<sup>186</sup>,
  - whether the allegations forming the basis for the legal proceedings abroad are true or give rise to criminal liability in the requesting state<sup>187</sup>;
  - the circumstances of the case presented in the request<sup>188</sup>;
  - the benefit and scope of the measures being requested<sup>189</sup>;
  - the obligation to execute the request as long as it has not been withdrawn<sup>190</sup>,
  - compliance with the speciality reservation where the two states are bound by a treaty or a convention<sup>191</sup>;
  - the credibility of the assurances concerning reciprocal rights<sup>192</sup>,
- other than in the case of obvious and easily proven abuses.

### 2.6.2 Principle of favourability

Legal precedent on international cooperation has developed a positive approach which calls upon the judge examining the mutual assistance case – who is often confronted with a variety of parallel legal provisions, all of which are potentially applicable – to choose the solution that is more favourable to the assistance process. This "favourability principle" applies to both specific mutual assistance and deportation cases.

Even where international treaty law does not provide expressly for a certain form of cooperation, Switzerland may grant this cooperation on the basis of provisions in its domestic law, such as the IMAC. The courts have consistently permitted the application of domestic law where it is more favourable to cooperation than treaty law<sup>193</sup>; another factor here is the generally-held view that treaties should encourage, rather than limit, international cooperation. It would be paradoxical, and evidently contrary to the spirit of the relevant treaties, if Switzerland were to refuse to cooperate with states to which it is bound

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185 "Pacta sunt servanda".

186 BGE 116 Ib 92 delib. 2c aa.

187 BGE 126 II 212 delib. 6 bb.

188 BGE 132 II 81 delib. 2.1.

189 BGE 132 II 81 delib. 2.1.

190 BGE 1A.218/2003 delib. 3.5.

191 BGE 1A.78/2000 delib. 2b.

192 CCR RR.2008.177 delib. 5 / BGE 130 II 217 delib. 7.1.

193 BGE 132 II 178 delib. 2.1 / CCR RR.2007.48 delib. 2.4.

by treaty in situations in which it would grant assistance to other states on the basis of its national law alone.

Switzerland should not apply more restrictive national law if a treaty leaves a given point open.

Consequently, the time bar issue need not be examined at all in the context of mutual assistance which is subject to the European Convention on Mutual Assistance in Criminal Matters (ECMA) (Art. 5 para. 1 c IMAC). However, if the mutual assistance measures are not provided for in the ECMA, but only in the IMAC (such as the handover of assets under Art. 74a IMAC), then assistance must be granted in accordance with this law. The time bar requirements set out in Art. 5 para. 1 c IMAC must therefore be observed in this case<sup>194</sup>. The confirmation required under Art. 76 c IMAC (which must be enclosed with requests for premises searches and property seizure) cannot be demanded of the states parties to the ECMA<sup>195</sup>. The question of whether or not the same applies for Art. 4 IMAC (minor cases), remains open<sup>196</sup>.

### 2.6.3 Principle of promptness (Art. 17a IMAC)

International mutual assistance in criminal matters is an assistance process in support of criminal proceedings abroad. Every accused person has the right to have a decision made on the charges against them within an appropriate period of time<sup>197</sup>. Mutual assistance must therefore be provided promptly.

The principle of promptness has since been laid down formally in law<sup>198</sup>. It expressly states that the competent authority must execute the request promptly and issue its ruling without delay<sup>199</sup>. The competent authority is monitored by the FoJ, which may intervene at this authority if there is a delay. The FoJ may also intervene owing to an unjustified delay at the supervisory authority<sup>200</sup> or itself file a complaint on the grounds of a denial of justice<sup>201</sup>. As a last resort,<sup>202</sup> the FoJ can itself decide on the admissibility and the execution of the request, instead of the defaulting body<sup>203</sup>.

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<sup>194</sup> BGE 1A.323/2005 delib. 3 (in the future, this case law will no longer be binding in respect of states parties to the AP II ECMA, which contains a provision on the handover of assets).

<sup>195</sup> BGE 1A.274/1999 delib. 3b.

<sup>196</sup> BGE 1A.323/2005 delib. 4.

<sup>197</sup> see Art. 6 ECHR; SR 0.101.

<sup>198</sup> Art. 17a IMAC.

<sup>199</sup> Compliance with the promptness requirement must be judged in view of the specific circumstances of the case. In complex cases, the decision to grant assistance may not be delayed for more than a few days or weeks, but actually executing the request itself may take more or less time, depending on the enforcement measures that have been requested (BGE 1A.223 of 28.2.2000 delib. 2 a) .

<sup>200</sup> Art. 17a para. 2 IMAC.

<sup>201</sup> Art. 17a para. 3 IMAC.

<sup>202</sup> Given the FoJ's limited resources.

<sup>203</sup> At the defaulting authority's expense, however! (Art. 13 Abs. 1bis O-IMAC).

## 2.6.4 Proportionality and extent of assistance

### 2.6.4.1 General

The principle of proportionality must also be observed in the course of mutual assistance proceedings<sup>204</sup>. However, this does not mean that assistance should be subsidiary in nature, i.e. the foreign state might seek assistance only after it has exhausted its own internal means of investigation. It is increasingly necessary to conduct investigations in several states in the interests of an efficient criminal investigation into transnational criminal activity.

Under the proportionality principle, assistance may be granted only insofar as it is necessary for the criminal justice authorities of the requesting state to establish the truth.

**The question of whether the requested information is essential to criminal proceedings, or merely useful, is generally left to the discretion of the criminal prosecution authorities in the state concerned.** Since the requested state will generally not have the resources that would allow it to give its opinion on the appropriateness of gathering certain evidence in the course of the foreign investigation, its own discretion is no substitute for that of the competent specialist judge<sup>205</sup>.

The proportionality principle prevents the requesting authority demanding measures that are useless to their investigations, and also prevents the enforcement authority overstepping the bounds of its allotted task. In the absence of resources that would permit the requested Swiss authorities to assess the appropriateness of providing evidence, it must review compliance with this principle with great restraint. **The mutual assistance judge must also restrict himself to an examination of whether or not the information that is to be handed over displays a *prima facie* connection with the act on which the request for assistance is based. The only documents that should not be handed over are those which are deemed with certainty to be unimportant to the foreign investigators (this review is limited to "potential" importance).** This corresponds to the "widest measure" of mutual assistance pursuant to Art. 1 ECMA, and it avoids supplementary requests for assistance being submitted where it can immediately be seen that the foreign authority will probably not be satisfied with the information it has received<sup>206</sup>. Where necessary, the requested authority may interpret the request in the sense that may reasonably be assumed. There is nothing to say that the request should not be interpreted broadly where it is clear that, on this basis, all of the conditions for the grant of assistance are fulfilled. This approach also obviates the need for any supplementary request<sup>207</sup>.

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<sup>204</sup> Federal Supreme Court Ruling BGE 106 Ib 264, 351; see also Art. 4 IMAC.

<sup>205</sup> CCR RR.2007.171 of 25.2.2008 delib. 3.1.

<sup>206</sup> CCR RR.2008.84 of 8.10.2008 delib. 7.1.

<sup>207</sup> BGE 121 II 241 delib. 3a p. 243.

#### **2.6.4.2 Triage of records**

The person concerned has a say in which records are selected.

Having seized the documents relevant to the request for assistance, with a view to the final ruling, the enforcement authority will then select the records that are to be handed over. It is forbidden to hand over documents as they stand, without first having investigated their relevance to the foreign proceedings<sup>208</sup>. If only certain passages are to be omitted, then these passages will be made illegible<sup>209</sup>.

However, before the enforcement authority makes its decision, it will set the owner of the documents a deadline by which he must present convincing arguments for each and every record that, in his view, should not be handed over. Here, it is not sufficient simply to assert categorically that a record has no bearing on the case. Rather, the document owner must offer detailed grounds for his opinion. From the request execution stage onwards, the document owner is obliged to cooperate with the enforcement authority. Simply delegating document triage to the enforcement authority without providing any support, and then subsequently accusing the authority of having violated the proportionality principle, is irreconcilable with the principle of good faith. The right to a fair hearing goes hand-in-hand with an obligation to cooperate. A failure to comply with this obligation is punished in that the document owner is not permitted to present the arguments that he withheld from the enforcement authority to the appellate authority at a later stage<sup>210</sup>.

If the request is intended to clarify the flow of funds of criminal origin, the requesting state must be informed of all transactions conducted in the names of the companies and accounts involved in the matter. This justifies the issue of all banking documents covering a relatively long period of time. In such cases, the requesting authority essentially has an overriding interest in being able to examine all account movements<sup>211</sup>.

#### **2.6.4.3 Potential importance and money laundering**

The entry into force of regulations combating money laundering<sup>212</sup> offered the Swiss criminal prosecution authorities the opportunity to commence criminal proceedings on the grounds of money laundering based on information contained in foreign requests for mutual assistance. The outcomes of these investigations are therefore linked to the acts that are described in and form the basis of the request for assistance. Given their potential importance, they may therefore be passed on to the requesting state. The unsolicited handover of information is not permitted, however, because this would fall outside the original (extended) scope of the request.

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<sup>208</sup> BGE 130 II 14.

<sup>209</sup> Art. 2 IMAC: The FoJ has the right to view the complete version; Art. 2 para. 3 O-IMAC, Art. 28 para. 2 TUS-IA.

<sup>210</sup> BGE 126 II 258 delib. 9.

<sup>211</sup> BGE of 26.1.2007 1A.244/2006 delib. 4.2.

<sup>212</sup> In particular, Art. 305bis and ter of the Swiss Criminal Code (SR 311.0), Money Laundering Act (MLA / SR 955.0).

## 2.7 Speciality of Mutual Assistance

### 2.7.1 General

Since the information provided in the context of mutual assistance in criminal matters is often confidential, it is understandable that the informing state has the right to control the use of that information in the requesting state. As a general rule, the information may be used only in the criminal proceedings which form the basis for the request. Other forms of use in the requesting state are not forbidden *ipso facto*, but are subject to the approval of the requested state. These principles are contained in different forms in the Mutual Assistance Convention<sup>213</sup> or in the bilateral agreements that Switzerland has concluded<sup>214</sup>. The speciality principle is absent from the ECMA<sup>215</sup> and was subsequently provided for only as an option in the MLA<sup>216</sup>, but is increasingly and systematically being included in conventions on mutual legal assistance in criminal matters<sup>217</sup>. In certain conventions, it is covered by the regulations on data protection<sup>218</sup>.

If a reservation is attached to the speciality principle, the requesting state is legally bound only if the reservation is mentioned when the enforcement documents are handed over<sup>219</sup>. If Switzerland restricts speciality on the basis of its reservation to Art. 2 ECMA or Art. 32 MLA, it is presumed that the other state will fulfil its treaty obligations and respect the reservation. Indeed, under international law the Swiss reservation is also binding on other member states<sup>220</sup>. In fact, it is self-evident that states that are bound by a treaty must fulfil their obligations under international law, such as compliance with the speciality principle, without any reminder being required in the form of a specific declaration. It is presumed that the requesting state will fulfil the obligations placed upon it under the treaty in good faith. This presumption could not be overturned even if the treaty was infringed in this regard.

An explicit assurance that speciality will be observed need not even be sought from a non-state party, provided the requesting authority undertakes to observe this condition in its request, and a clear reservation is made when the records are handed over<sup>221</sup>. A reservation of this kind results in a ban on the exploitation of evidence which is binding on all authorities in the requesting state.

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<sup>213</sup> e.g.: Art. 32 MLA, Art. 26 AP II, Art. 23 EU Convention 2000, Art. 46 para. 19 UNCAC, Art. 18 para. 19 UNTOC.

<sup>214</sup> e.g. Art. 5 TUS, Art. III AA-F/ECMA between France and Switzerland, and Art. IV AA-I/ECMA between Italy and Switzerland.

<sup>215</sup> Switzerland had to include a specific reservation to Art. 2 b ECMA

<sup>216</sup> Art. 32 MLA.

<sup>217</sup> e.g.: Art. 32 MLA (SR 0.311.53). Art. 18 para. 19 UNTOC (SR 0.311.54).

<sup>218</sup> e.g.: Art. 26 AP II (0.351.12).

<sup>219</sup> Exceptions are made in cases that are subject to binding international regulations, such as American requests for assistance, in which the principle of speciality is laid down expressly (Art. 5 TUS).

<sup>220</sup> BGE 104 Ia 59.

<sup>221</sup> BGE 110 Ib 177 delib. 3b.

## 2.7.2 Under Swiss law

Given the different ways in which the speciality reservation is formulated in domestic<sup>222</sup> and in treaty<sup>223</sup> law, the possibilities and types of use of the information that is handed over when the mutual assistance request is completed must be classified in the interests of better understanding on the part of the requesting foreign authority. Use may be permitted, prohibited, or subject to the authorisation of the FoJ<sup>224</sup>.

### 2.7.2.1 Permitted usage (Principle)

The information delivered in completing a request for assistance may essentially be used freely in the proceedings<sup>225</sup> for which assistance was requested<sup>226</sup>, as well as in all other criminal proceedings in the requesting state and for the prosecution of other offences<sup>227</sup>, even where such acts are not offences under Swiss law<sup>228</sup>. In this regard, the principle of speciality in mutual assistance deviates from the system that is applied to extradition<sup>229</sup>. Speciality may also be cited in respect of the officials of the requesting state who are present when the request for assistance is executed, or have inspected the corresponding documents.

### 2.7.2.2 Prohibited usage

#### a) In general

Under Art. 67 para. 1 IMAC and in accordance with Switzerland's reservation to Art. 2 b ECMA, the information that has been received may not be used in the requesting state either in investigations or as evidence in the prosecution of acts for which mutual assistance is not permitted. The acts in question are listed in Art. 3 IMAC<sup>230</sup>.

As a result, the information that has been received may not be used in the requesting state for the suppression of:

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<sup>222</sup> Art. 67 IMAC.

<sup>223</sup> See Swiss reservation to Art. 2 para. 2 ECMA, Art. 26 AP-II, and Art. 32 MLA, not to mention the bilateral agreements!

<sup>224</sup> Case law makes a different distinction. It refers to "**primary**" mutual assistance in the case of use, under criminal law alone, in the proceedings on which the request for assistance is based, and to "**secondary**" mutual assistance, where the same information is subsequently used in proceedings connected with the proceedings in the requesting state (BGE 132 II 178 delib. 2.2).

<sup>225</sup> Including the power to use the information received in requests for mutual assistance made to third countries (TPF RR.2009.156 - 158 of 25 November 2009, delib. 5.3). In such cases, consent from the FoJ is not required.

<sup>226</sup> The provisions of Art. 67 para. 2 IMAC are not exhaustive and are intended merely to illustrate two frequent issues. A change in legal classification and the use of document against co-offenders remain directly permissible.

<sup>227</sup> For example, information that is handed over to the requesting state in an embezzlement case may also be used in legal proceedings governing another offence in this state (e.g. forgery).

<sup>228</sup> BGE 124 II 184 delib. 4 (Italian Illegal Party Financing Act). The principle of dual criminality is irrelevant here.

<sup>229</sup> Pursuant to Art. 38 para. 1 a IMAC, none of the acts committed before extradition for which the extradition has not been approved may result in prosecution.

<sup>230</sup> BGE 133 IV 47 delib. 6.1.

- military or political offences (Art. 3 para. 1 and 2 IMAC);
- acts which contravene currency, commercial and economic policy regulations<sup>231</sup>;
- acts which appear to be aimed at reducing fiscal duties<sup>232</sup>.

#### b) Exceptions

As exceptions to the principles set out above, assistance will be granted in the following cases:

- in general: where legal assistance serves to exonerate the person being prosecuted<sup>233</sup>;
- in the case of political offences: in those cases listed under Art. 3 para. 2 IMAC;
- where fiscal matters are concerned:

Erga omnes:

- for duty-related fraud<sup>234</sup> or for aggravated duty fraud<sup>235</sup> under Swiss law.

In the European context:

- for criminal acts concerning legislation and regulations related to consumer taxes, value-added tax and customs duties (indirect taxation);
- with contracting parties to the Schengen Implementation Agreement, under the conditions set out in Art. 50 and 51 [CISA](#) ;
- with the contracting parties to the agreement between Switzerland and the EU to combat fraud and any other illegal activity to the detriment of their financial interests (Art. 2)<sup>236</sup>.

#### 2.7.2.3 *Having obtained consent for lawful usage*

Art. 67 para. 2 stipulates that **further use** other than that described in 2.7.2.1 and 2.7.2.2 p. 33f above requires the **consent of the FoJ** ("secondary" legal assistance). This concerns the following cases, in particular:

##### a) Connected fiscal proceedings

The information handed over as part of primary assistance may not be used in other fiscal proceedings<sup>237</sup> in the requesting state without the consent of the FoJ<sup>238</sup> .

<sup>231</sup> e.g. foreign exchange controls (BGE of 19.6.2000, 1A.32/2000 delib. 5b).

<sup>232</sup> The Federal Supreme Court has upheld that the direct or indirect use of documents obtained via mutual assistance channels, and the information they contain, is not permitted in any case for fiscal administrative proceedings or criminal proceedings concerning fiscal offences alone (excluding duty fraud). According to the Federal Supreme Court, even where assistance has been granted on the grounds of duty fraud, such documents and information may not be used to produce a tax assessment (BGE 115 Ib 373 delib. 8 / 107 Ib 264 delib. 4a).

<sup>233</sup> Art. 63 para. 5 IMAC. This exception is to be made with the greatest caution (see BGE 113 Ib 67 delib. 4b).

<sup>234</sup> Art. 14 ACLA

<sup>235</sup> Art. 14 para. 4 ACLA, new wording since 1.2.2009 (organised smuggling is now classified as a crime in connection with the implementation of the revised recommendations from the Financial Action Task Force (FATF)) (AS 2009 361 367 / FG 2007 6269).

<sup>236</sup> (SR 0.351.926.81) referred to below as the EC Anti-Fraud Agreement.

b) Other connected proceedings

The information provided by Switzerland may also be used in other **proceedings connected with the original criminal prosecution**, e.g. civil suits for damages for the victim of a criminal act<sup>239</sup>, parliamentary investigations, and even administrative proceedings to rule on a preliminary question that is decisive to the criminal proceedings concerned. These cases constitute an exception to the speciality reservation, which therefore requires the consent of the FoJ (Art. 67 para. 2 IMAC)<sup>240</sup>, and presupposes a **connection** with the criminal proceedings<sup>241</sup>.

c) Proceedings in a third country

The consent of the FoJ is also required where the requesting state wishes to forward information that has been received from Switzerland to a requesting **third state**<sup>242</sup>. A **connection** is also a prerequisite here.

**Exception:** the information and evidence received in application of the **Anti-Fraud Agreement**<sup>243</sup> (Art. 5 paras. 2 to 5) may be passed on freely between the contracting parties provided they are intended for use in investigations for which cooperation is not excluded. The forwarding of this information cannot be challenged in an appeal. An FoJ ruling is therefore neither necessary nor possible. This is not the case, however, where the information or evidence is intended for a non-state party<sup>244</sup>.

### 2.7.3 In practice

The formal speciality reservation is regularly applied by the Federal Office of Justice or – in case of direct dealings – by the competent cantonal authority when the documents relating to the execution of the request are forwarded to the requesting authority<sup>245</sup>. The speciality reservation must be worded such that its full scope is clear to the authorities of the requesting state. The Federal Office of Justice uses a special **form**<sup>246</sup> for this purpose.

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<sup>237</sup> Including those which the requesting state deems to be duty fraud or aggravated duty fraud, because this is the only way to avoid the risk of the information being used unlawfully in proceedings for which mutual assistance cannot be granted (e.g. tax evasion). The classification of a criminal act as a fiscal offence is governed by the law of the requested state (BGE 107 Ib 264 delib. 4a).

<sup>238</sup> BGE 1A.24/2004 delib. 6.1.

<sup>239</sup> BGE 132 II 178 delib 2.2

<sup>240</sup> Unless this type of usage is provided for in a treaty, e.g.: in civil damages suits: Art. III para. 2 c AA/F-ECMA (SR 0.351.934.92) and Art. 5 para. 3 a TUS (0.351.933.6), as well as Art. 49 c [CISA](#)

<sup>241</sup> BGE 132 II delib. 2.2.

<sup>242</sup> BGE 112 Ib 142 delib. 3b. The FoJ's consent is not required if the information transmitted by Switzerland and the findings made as a result form the basis for further requests for mutual assistance to third countries (TPF RR.2009.156 - 158 of 25 November 2009, delib. 5.3).

<sup>243</sup> Anti-Fraud Agreement: Cooperation Agreement of 26 October 2004 between the Swiss Confederation, of the one part, and the European Community and its Member States, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests ([0.351.926.81](#))

<sup>244</sup> Art. 5 para. 5.

<sup>245</sup> Art. 34 IMAC.

<sup>246</sup> [Speciality Reservation](#)

If the records are immediately handed over to the foreign officials attending to the execution of the request, the speciality clause may be expressed by making reference to it on the acknowledgement of receipt for the records that are handed over.

The speciality principle does not rule out the records handed over by Switzerland being brought to the attention of the parties to the criminal proceedings that have been commenced in the requesting state, including the tax authorities. However, the latter may not use the records concerned to open tax assessment proceedings for which Switzerland would not otherwise grant assistance<sup>247</sup>.

Equally, the speciality principle does not guarantee complete confidentiality in the requesting state. Given the general guarantee of public proceedings (cf. Art. 6 ECMA in particular), the information that is handed over in assistance proceedings often becomes broadly known in the requesting state. The important thing is that this state does not use this information for prohibited – specifically fiscal – purposes<sup>248</sup>.

Anyone wishing to **sue** on the grounds of a breach of the speciality reservation must present their argument to the deciding judge. The judge, in turn, may serve the FoJ with a request for an administrative review under Art. 71 APA, or petition the authorities in the requesting state to intervene to remind them of the scope of the speciality reservation<sup>249</sup>. This option is open only to those persons who are affected directly by the violation of the speciality principle. As such, interventions are not possible for third parties or to protect the sovereignty of the requested state<sup>250</sup>.

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<sup>247</sup> BGE 115 II 373 delib. 8.

<sup>248</sup> BGE 133 IV 40 delib. 6.2.

<sup>249</sup> BGE 1A.161/2000 delib. 4.

<sup>250</sup> BGE 1A.336/2005 delib. 2.1 Questions exist as to whether these restrictions can be justified, since the person objecting to the violation of the speciality principle does not have party rights (Art. 71 para. 2 APA), and because the FoJ intervenes ex officio where a violation has been proven.

## 3 Mutual Legal Assistance Process

### 3.1 Channel of Transmission, Form, Content and Language of the Mutual Assistance Request

#### 3.1.1 General remarks on the requirements of form

Any failure to comply with the designated channel of transmission or the requirements for form and content, or the absence of a translation will not automatically result in the refusal of assistance, as this would be excessively bureaucratic<sup>251</sup>. Instead, as is usual in the case of formal deficiencies, an attempt should be made to rectify the situation<sup>252</sup>. The requesting authority should be invited to revise or complete the application. This has no effect on the ordering of provisional measures<sup>253</sup>. If the deficiency is not discovered until the appeal proceedings before a court of higher instance then, in view of the obligation to execute the request promptly<sup>254</sup>, this higher instance should itself arrange for the necessary additions to be made to the request. There is no need to refer the case back to the first instance because there is full cognizance in the appeal proceedings<sup>255</sup> and deficiencies of form may also be remedied subsequently.

For country-specific practical requirements, reference is made to another publication from the Federal Office of Justice, the "**Guide to International Mutual Assistance**"<sup>256</sup>, which lists the legal basis for each country and contains information on the channel of transmission, on translation and certification requirements, and on any other special features<sup>257</sup>.

#### 3.1.2 Channel of transmission

In the texts of Switzerland's international treaties, the choice of transmission channel is determined primarily by the similarity of the other state's legal system, and its geographical distance from Switzerland. For example, the direct approach is taken with European countries, but ministries of justice (central offices) or diplomatic channels will be chosen as the conduit for communications with more geographically distant countries.

a) **Direct dealings** between judicial authorities (courts, public prosecutors, examining magistrates, etc.) are now possible in Europe on the basis of a number of instru-

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<sup>251</sup> BGE 1A.160/2000 delib. 3

<sup>252</sup> Art. 28 para. 6 IMAC / BGE 118 Ib 457 delib. 5

<sup>253</sup> Which means it is possible, e.g. to seize evidence as a provisional measure, even if the request for assistance requires completion (see the cases outlined in BGE 103 Ia 206 ff., 111 Ib 242 ff. and 116 Ib 97 ff.).

<sup>254</sup> Art. 17a IMAC.

<sup>255</sup> See Art. 25 para. 6 IMAC.

<sup>256</sup> <http://www.rhf.admin.ch/rhf/fr/home/rechtshilfefuehrer/laenderindex.html>

<sup>257</sup> In addition to instructions concerning requests for legal assistance and the provision of information in criminal matters, the Guide to International Mutual Assistance also covers the corresponding information in civil matters.

ments: additional agreements to the ECMA, AP II ECMA, [CISA](#)<sup>258</sup> and the Anti-Fraud Agreement. Direct dealings are **always permitted in urgent cases**<sup>259</sup>.

Direct dealings may be established via Interpol<sup>260</sup>. Requests may also be submitted directly to the requested competent authority based on information from the **Atlas** ad-hoc database, which was set up by the European Judicial Network<sup>261</sup>.

- b) The transmission of applications for assistance via **ministries of justice** is viewed as the normal case<sup>262</sup> and always provides an alternative to the direct dealings described under **a)** above. For Switzerland, the Federal Office of Justice is the competent authority for the receipt and forwarding of domestic and foreign requests for assistance<sup>263</sup>. The completed requests are returned via the same official channels. Transmission via ministries was also the channel chosen in the context of the TUS<sup>264</sup> and most of the bilateral treaties between Switzerland and countries outside Europe. The FoJ takes on the role of central office or central authority for Switzerland<sup>265</sup>.
- c) **Diplomatic channels** remain the rule only with distant states where there is no treaty with Switzerland and no direct contact with the ministry of justice<sup>266</sup>. Even where other channels of transmission are possible, diplomatic channels always remain open and can be called upon where necessary<sup>267</sup>.

Where direct dealings are not permitted, cantonal and federal authorities must send their request to the Federal Office of Justice, International Mutual Assistance Unit, 3003 Bern, for forwarding to the requested foreign authority.

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

Requests must be made in writing<sup>268</sup>. They must contain the following information<sup>269</sup> (cf. also the mutual assistance request checklist<sup>270</sup>):

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<sup>258</sup> Where some countries are concerned, in certain cases a duplicate of the request must be sent via the ministry of justice using official channels (see the corresponding reservations and explanations).

<sup>259</sup> Where direct dealings are admissible between judicial authorities, there is no prior summary examination by the Federal Office of Justice in accordance with Art. 78 para. 2 IMAC.

<sup>260</sup> Art. 29 para. 2 IMAC, Art. 15 point 5 ECMA. The use of Interpol channels in cases of urgency should not be confused with the exchange of police information (as per Art. 75a IMAC and Art. 35 O-IMAC), which always handled via Interpol or even directly between the police authorities (see 1.3.4 p. 6).

<sup>261</sup> [http://www.ejn-crimjust.europa.eu/atlas\\_advanced.aspx](http://www.ejn-crimjust.europa.eu/atlas_advanced.aspx)

<sup>262</sup> See Art 15. point 1 ECMA, Art. 29 para. I IMAC.

<sup>263</sup> Arts. 27 para. 2, 77 and 78 para. 1 IMAC; Swiss declaration on Art. 15 ECMA.

<sup>264</sup> With the particular feature that the FoJ submits the request to the USA itself on the basis of an application from the competent cantonal authority (Art. 28 TUS).

<sup>265</sup> Based on the supposition that it is preferable in dealings with states that have a different judicial tradition and are far away from Switzerland geographically to centralise the receipt and dispatch of requests with specialised authorities.

<sup>266</sup> In such cases, the FoJ is the direct recipient of diplomatic notes. A detour via the Federal Department of Foreign Affairs is not necessary.

<sup>267</sup> For example, to guarantee that a request is treated in confidence or to hand it over to an appointed individual.

<sup>268</sup> Art. 28 para. 1 IMAC.

<sup>269</sup> Art. 14 ECMA, Art. 29 TUS, Arts. 28 and 76 IMAC.

<sup>270</sup> <http://www.rhf.admin.ch/dam/data/rhf/strafrecht/wegleitungen/checkliste-justizbehoerden-f.pdf>

- a) **The name of the authority making the request**<sup>271</sup>. As a rule, this must be a judicial authority<sup>272</sup>. This often causes problems for states with an Anglo-Saxon system of law<sup>273</sup>. The capacity to request assistance has been extended to **the administrative prosecution authorities**, provided their decisions may be challenged in the competent jurisdiction, specifically that in criminal matters<sup>274</sup>.

The IMAC rests on the same principle. According to the law, what is generally permissible are requests in criminal proceedings (cf. 2.1.2 p. 15,) which may (subsequently) be referred to a judge<sup>275</sup>, even where the proceedings have been commenced not by a judicial authority but, for example, by an administrative authority<sup>276</sup>.

Finally, it is even admissible to accept requests for the execution of procedural acts from the **parties** (such as the accused or the victim), if such procedural acts are the responsibility of these parties according to the law of the state in question<sup>277</sup>.

Formal requests for assistance submitted by the police in an Anglo-Saxon state should not be confused with the exchange of police information<sup>278</sup> (cf. 1.3.4 p. 6).

- b) The **object of the foreign proceedings** and the grounds for the request. The requesting authority must demonstrate a connection between the foreign proceedings and the measures that it is requesting. The desired measures should be described in as much detail as possible<sup>279</sup>.
- c) As far as possible, precise and complete **details of the person** who is the subject of the criminal proceedings (last name and first name(s), date and place of birth, nationality, address) or information that would be useful in identifying the person under investigation (e.g. passport number). However, assistance is also permissible where the identity of the offender is unknown.

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<sup>271</sup> US requests are made by the US Justice Department and thus state which authority is conducting the investigative or criminal proceedings.

<sup>272</sup> See Art. 1 ECMA. Since the states parties are free to decide which national authorities they view as judicial authorities under the Convention, the term requires further explanation: it covers Danish police authorities, Finnish customs and border authorities, the British Department for Trade and Industry DTI) and even the Italian parliamentary review committee! (see the individual explanations on Art. 24 ECMA).

<sup>273</sup> There, the role of "examining magistrate" does not exist, and the police conduct their own investigations until they have gathered sufficient evidence to bring charges.

<sup>274</sup> e.g. Art. 1 para. 3 AP II (SR 0.351.12), 49 a [CISA](#), in the same sense Art. 1 para. 1 a TUS; Art. I paras. 1 and 2 AA/A-ECMA between Switzerland and Austria (SR 0.351.916.32).

<sup>275</sup> Art. 1 para. 1 Bst. b and Abs. 3 IMAC; for application, see e.g. BGE 109 Ib 47 (US Securities and Exchange Commission), 118 Ib 457 (supervisory authority for the French Bourse).

<sup>276</sup> BGE 123 II 161 delib. 3a.

<sup>277</sup> Art. 75 para. 2 IMAC. This rule also considers the legal situation in common law states. This provision should be applied with due reservation and be invoked only if it is clearly established that the authorities of the state in question are unable, under their law, to make a request for assistance (subsidiarity).

<sup>278</sup> Pursuant to Art. 75a IMAC and Art. 35 O-IMAC.

<sup>279</sup> However, for bank enquiries, for example, the number of the account cannot necessarily be stated in the request; depending on the gravity of the case, circular orders, may, however, be issued to all banks in a given area ("bank alert"); This is first and foremost a question of proportionality. Pure "fishing expeditions" in the sense of the case law (BGE 128 II 407 delib. 5.2.1) are forbidden.

- d) **Legal designation of the act** in the requesting state (while not imperative, it is sometimes helpful to provide details of the legal regulations that apply in that state<sup>280</sup>).
- e) **A summary of the circumstances** This is necessary where compulsory measures are being requested in order to examine whether or not the criminal act committed abroad also constitutes an offence under Swiss law<sup>281</sup>. The summary may be included in the request itself or in an appendix<sup>282</sup>. As a minimum, it should state the place, date and nature of the offence committed<sup>283</sup>. It must permit the requested authorities to decide whether and to what extent the request for assistance should be accommodated<sup>284</sup>, and to ensure that the offence that is being prosecuted in the requesting state does not constitute a political or fiscal offence, as well as to establish that executing the request would not impair the sovereignty, security, public order or other essential interests of the country<sup>285</sup>.

The requirements for the information to be given in the request are less strict if the request is made before a proper and detailed investigation of the case has been carried out<sup>286</sup>. If the request is incomplete, it may be supplemented by the file and other documents from the Swiss authorities, provided that the request permits evaluation together with the other documents<sup>287</sup>. Therefore, the authorities in the requesting state cannot be required to provide a complete account without any discrepancies. The object of the legal assistance process is, after all, to create clarity for the authorities of the requesting state on points that are still unclear<sup>288</sup>. The Swiss authority charged with handling a mutual assistance request in criminal matters does not have to make any statement as to the truth of the circumstances presented in the request. It may only determine whether or not they, as described, constitute a criminal act. The authority is bound by the description of circumstances given by the requesting state in all cases except those in which accounts are obviously and demonstrably misleading, or contain contradictions or omissions<sup>289</sup>.

If, mutual assistance is requested to suppress the offence of **money laundering**, the request must contain sufficient indication of an offence that requires prosecution, as prescribed by Art. 305bis of the Swiss Criminal Code. It is not sufficient for the requesting authority to contend, abstractly, that the flows of money may be of criminal origin. The authority is not required to prove the existence of such an offence, but may limit itself to describing suspicious transactions<sup>290</sup>. The request must be accom-

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280 Art. 14 para. 2 IMAC, Art. 29 point 2 TUS and Art. 28 para. 3 b IMAC.

281 e.g. the questioning of witnesses, premises searches, the handing over or securing of evidence or documents, the disclosure of legally protected secrets (e.g. banking confidentiality), where the measures that are being requested are subject to a court order (Art. 64 IMAC).

282 Art. 10 para. 1 O-IMAC. The requesting authority is also permitted, in its presentation of facts, to refer to a previous request in the same matter (BGE 109 Ib 161).

283 Art. 10 para. 2 O-IMAC. This requirement applies assuming such information can be provided. Since it is to be interpreted in line with its purpose, it is also sufficient to state that the place at which the offence was committed is unknown, but is known not to have been in Switzerland, or the time at which the offence was committed is unknown, but its prosecution has not yet become statute-barred.

284 BGE 124 II 184 delib. 4b.

285 BGE 129 II 97 delib. 3.1, 1A.57/2007 delib. 3.1.

286 BGE 103 Ia 210 f.

287 BGE 106 Ib 264 f.

288 BGE 117 Ib 88 delib. 5c.

289 BGE 126 II 495 delib. 5e/aa and BGE 118 Ib 111 delib. 5b.

290 BGE 129 II 97 delib. 4.1.

panied by relevant information that, at least at first glance, would show that the accounts concerned have indeed been used for the transfer of funds that are suspected of being of criminal origin<sup>291</sup>.

Where the act that is being prosecuted is classified as **duty fraud**, then the case law does not require strict evidence of this offence either. However, there must be sufficient grounds for suspicion, to avoid the requesting authority gathering evidence on the pretext of a duty fraud that will then be used to prosecute another fiscal offence for which Switzerland does not grant legal assistance (Art. 3 para. 3 IMAC, Art. 2 a ECMA)<sup>292</sup>.

- Requests for **service of process** require the name and address of the addressee, their role in the proceedings and information on the nature of the document to be served.
- **Special requirements for execution**, such as requests for persons to be allowed to attend proceedings abroad<sup>293</sup> or the exceptional application of foreign law<sup>294</sup> usually require further explanation.
- For the search of persons or premises, or the seizure or handing over of objects, the IMAC <sup>295</sup> requires express or indirect **confirmation**<sup>296</sup> that these measures are permitted in the requesting state. This requirement is not usually included in treaties or conventions and therefore does not apply where such instruments are in force. In any event, it is not requested systematically, but rather only where doubts exist about the lawfulness of the measure in the requesting state<sup>297</sup>.

All of the formal requirements mentioned above apply, by analogy, to **Swiss requests**<sup>298</sup>. In addition, however, the requesting state may ask for further procedures to be carried out. It is often difficult to provide general information on this area<sup>299</sup>: problems often occur with requests submitted to states with the Anglo-Saxon legal system<sup>300</sup>. Furthermore, certain states in Latin America attach importance to certifying the authenticity of documents and signatures. Wherever a treaty exists with the state in question, it is worthwhile studying the available articles, reservations and explanations.

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<sup>291</sup> BGE 130 II 329 delib. 5.1.

<sup>292</sup> BGE 115 Ib 68 delib. 3b/bb.

<sup>293</sup> Art. 65a IMAC.

<sup>294</sup> Art. 65 IMAC.

<sup>295</sup> Art. 76 c IMAC.

<sup>296</sup> As a rule, the requesting authorities do not make a special declaration as to the admissibility of the measure that is requested, but attach a warrant for the search or seizure which, whilst having no effect in Switzerland, may be considered such a confirmation (Art. 31 para. 2 O-IMAC). The content of the request may also warrant the conclusion that the requested act of procedure is admissible abroad (e.g. from information regarding searches that being made in the requesting state at the same time, see also Art. II para. 1 AA-D/ECMA with Germany).

<sup>297</sup> BGE 123 II 161 delib. 7b.

<sup>298</sup> Since Swiss authorities may not address requests to another state to which they themselves could not grant mutual assistance (Art. 30 para. 1 IMAC). see also Art. 11 para. 1 O-IMAC.

<sup>299</sup> see also 3.1.1 p. 41; [Guide to International Mutual Assistance](#).

<sup>300</sup> Which can be explained in part by their completely different procedural law. Common law requirements with regard to mutual legal assistance (extremely detailed presentation of the circumstances of the case, numerous points on which further information is required) extend far beyond what is required by continental European law, so that cooperation may be a one-sided exercise (e.g. the United Kingdom).

Where the foreign executing authority is not already known, the request should be addressed **"To the authority in ... (requested state) ... responsible for ... (place of execution)..."** and not to the Federal Office of Justice or the Swiss embassy in .... .

### 3.1.4 Language of the request for mutual assistance

The following comments relate to requests to obtain evidence. For the language of requests for service of process, see. 4.1 p. 78. Detailed information can be found in the "Guide to International Mutual Assistance" from the Federal Office of Justice<sup>301</sup>.

The IMAC states that, in essence, Swiss authorities will accept foreign requests that are formulated in one of Switzerland's three official languages (or in another language accompanied by the corresponding translation)<sup>302</sup>. Certain older treaties refer to a specific official language (usually French), but these are scarcely important nowadays in the context of the more extensive IMAC regulation.

As a rule, Swiss requests to a foreign country must be made in the official language of the requested state or accompanied by a translation into that language, unless the applicable international treaties provide otherwise. Even where there is no treaty obligation to do so, it is nonetheless sometimes appropriate and in the requesting authority's own interest to enclose a translation of the request in order to speed up execution. On the other hand, certain states accept Swiss requests in one of the official languages of Switzerland, or in English, without being obliged to do so.

The translation of the request is a matter for the requesting cantonal authority. The translation of the execution records is the duty of the requesting (cantonal or foreign) authority.

## 3.2 Competent authorities in the mutual assistance process

The allocation of executive powers in mutual assistance proceedings largely reflects that in criminal prosecution procedures at national level<sup>303</sup>. The IMAC contains organisational regulations in this regard, but infringements of these regulations do not affect the permissibility of the request for assistance<sup>304</sup>.

### 3.2.1 Cantonal authorities

Ordinary mutual legal assistance proceedings are, first and foremost, a matter for the cantonal authorities. They are therefore responsible for the preliminary examination<sup>305</sup>, execution<sup>306</sup> and the final ruling<sup>307</sup> on the permissibility and scope of assistance<sup>308</sup>. If di-

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<sup>301</sup> [Guide to International Mutual Assistance](#)

<sup>302</sup> Art. 28 para. 5 IMAC.

<sup>303</sup> Centralising the mutual assistance process with the Federal Government was examined in connection with the revision of the IMAC of 4.10.96, but subsequently rejected (FG 1995 III 9).

<sup>304</sup> BGE 1A.212/2001 delib. 4.2.

<sup>305</sup> Art. 80 IMAC.

<sup>306</sup> Art. 80a and Art. 80c IMAC.

<sup>307</sup> Art. 80d IMAC.

<sup>308</sup> Art. 80d IMAC.

rect dealings with the requesting authority are permitted, then the cantonal authority also accepts the request from abroad directly<sup>309</sup> and, at the end of the proceedings, arranges for the enforcement documents to be handed over, taking the speciality reservation into account.

If the act described in a foreign request for assistance is subject to federal jurisdiction in Switzerland<sup>310</sup>, then the cantonal authorities decide on the execution of the request in consultation with the Office of the Attorney General of Switzerland<sup>311</sup>.

Certain specific decision-making powers remain the preserve of the cantons and are incumbent on the Federal Office of Justice (cf. 3.2.3, p. 44). The Federal Department of Justice and Police (FDJP) decides whether or not granting assistance is likely to prejudice the sovereignty, security or other essential interests of Switzerland<sup>312</sup>.

### 3.2.2 Executing canton

If executing a request necessitates investigations in several cantons, the Federal Office may charge the responsible authorities of one of these cantons with leading the execution<sup>313</sup>. The purpose of appointing an executing canton is clearly to coordinate and speed up the mutual legal assistance proceedings. Furthermore, the executing canton alone is authorised to make decisions on accommodating the request and issuing the final ruling<sup>314</sup> on the admissibility of granting assistance, and on forwarding the information obtained. In order to complete the enforcement action, the executing canton must request intercantonal assistance from the other cantons involved. Articles 352 to 355 of the Swiss Criminal Code (SCC) apply accordingly. The Agreement on Mutual Assistance and Inter-Cantonal Cooperation in Criminal Matters of 5 November 1992<sup>315</sup> is also applicable<sup>316</sup>; under this Agreement, the executing canton may, should it wish, execute the request for assistance on the territory of the other cantons concerned under its own rules of procedure<sup>317</sup>. If the executing canton has entrusted execution to another canton under an inter-cantonal agreement, in carrying out the procedural actions requested this other canton is restricted to its own law of procedure.

The nomination of the cantonal authority charged with directing the proceedings cannot be challenged<sup>318</sup>. The authority may also be chosen after mutual assistance proceedings have been commenced<sup>319</sup> and may also include subsequent supplementary requests<sup>320</sup>.

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309 Art. 78 para. 1 IMAC.

310 see Art. 336 and 337 para. 1 of the Swiss Criminal Code (SCC); SR 311.0.

311 Art. 4 para. 3 O-IMAC.

312 Art. 2 b ECMA; Art. 3 TUS; Art. 1a and 17 para. 1 IMAC; Art. 4 a TUS-IA.

313 Art. 79 para. 1 IMAC.

314 In accordance with Arts. 80, 80a and 80d IMAC. This avoids the risk of contradictory decisions in the execution of the request for assistance.

315 SR 351.71.

316 BGE 122 II 140 delib. 2.

317 BGE 124 II 120 delib. 4b. Since the provisions of this agreement on cooperation are more favourable than the solution proposed by the IMAC (Art. 79 IMAC refers to Art. 359 para. 2 SCC, which observes the principle of "locus regit actum"). This is a practical example of the application of the favourability principle.

318 Art. 79 para. 4 IMAC.

319 Letter b of Art. 79a IMAC would otherwise make no sense.

320 Art. 79 para. 3 IMAC.

### 3.2.3 Federal Office of Justice (FoJ)

Generally speaking, the Federal Office of Justice performs the following tasks: "It ensures rapidly functioning international mutual assistance in criminal, administrative, civil and commercial matters and decides on requests for assistance, extraditions, the transfer of sentenced persons and criminal prosecution and enforcement measures on behalf of other states"<sup>321</sup>.

The FoJ therefore holds residual powers in international mutual assistance<sup>322</sup>. Where accessory legal assistance is concerned, it assumes in particular the functions described below.

#### 3.2.3.1 Forwarding and delegation function

The Federal Office of Justice receives foreign requests for assistance<sup>323</sup> and performs a **summary examination** to establish whether or not they meet the formal requirements of the IMAC or the applicable international agreement, and are not obviously inadmissible. If the request is in order, the FoJ will forward it to the competent canton<sup>324</sup>. Otherwise, it will return it to the requesting state for correction or completion<sup>325</sup>. No appeal may be filed against the ruling to accommodate and forward the request<sup>326</sup>.

The FoJ may **nominate an executing canton** or appoint a **delegation** to a federal authority (cf. 3.2.2 p. 43 and 3.2.4 p. 46 below). The appointment of the cantonal or federal authority charged with directing the proceedings is not subject to appeal<sup>327</sup>.

#### 3.2.3.2 Supervisory function

The Federal Office of Justice **supervises** the application of the IMAC<sup>328</sup>. This is why it has the power to challenge the rulings of cantonal or federal authorities by lodging an appeal under cantonal law or by filing an administrative court appeal with the Federal Supreme Court<sup>329</sup>. To enable the Federal Office of Justice to perform this supervisory role, it must be informed of the mutual assistance rulings of the cantons and the federal government, as well as those of the Appeals Chamber of the Federal Criminal Court<sup>330</sup>.

The FoJ may also file an appeal<sup>331</sup> on account of a **delay** or **refusal** to issue a ruling, or intervene with the appropriate supervisory authority<sup>332</sup> if an authority disregards its obli-

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<sup>321</sup> Art. 7 para. 6a of the Rules of Organization for the Federal Department of Justice and Police (SR 172.213.1 / RO-FDJP).

<sup>322</sup> In this respect, it may address any issue in the area in question that has not been allocated expressly to another authority.

<sup>323</sup> No summary examination by the FoJ is performed where authorities deal directly with each other.

<sup>324</sup> Art. 78 paras. 1 and 2 IMAC.

<sup>325</sup> Art. 78 para. 3 IMAC; an enquiry may also be submitted later in the proceedings by the executing authority or the appeals body within the FoJ, see Art. 80o para. 1 IMAC.

<sup>326</sup> Art. 78 para. 4 IMAC.

<sup>327</sup> Art. 79 para. 4 IMAC.

<sup>328</sup> Art. 16 para. 1 IMAC, Art. 3 O-IMAC.

<sup>329</sup> Art. 80h a, 25 para. 3 IMAC.

<sup>330</sup> Art. 5 O-IMAC.

<sup>331</sup> Art. 17a para. 3 IMAC.

<sup>332</sup> Art. 17a para. 2 IMAC.

gation to execute a request for assistance promptly. Alternatively, the Federal Office of Justice may itself issue the ruling<sup>333</sup>. Furthermore, it may take decisions on the admissibility of a Swiss request made abroad (in accordance with Art. 30 IMAC)<sup>334</sup> as well as in cases in which the foreign state to which the request is addressed offers a choice of different procedures (Art. 19 IMAC).

### 3.2.3.3 Operational function

In cases requiring urgent action, the FoJ may itself order **provisional measures**<sup>335</sup> even if only notice of a future request for assistance has been given<sup>336</sup>. Such measures are subject to a time limit<sup>337</sup>. The FoJ may order the surveillance of postal and telecommunications services to establish the current residence of the person being sought,<sup>338</sup> or the provision of other forms of legal assistance<sup>339</sup>.

The Federal Office of Justice is **always responsible** for deciding on requests for mutual assistance from the **USA**<sup>340</sup>. This may also include the ordering of provisional measures to preserve the status quo, to safeguard threatened legal interests or secure jeopardised evidence<sup>341</sup>. Furthermore, the FoJ will take the action necessary to execute the request<sup>342</sup>. The same options are open to the FoJ in connection with certain offences in mutual assistance relationships with Italy<sup>343</sup>. The decision-making powers of cantonal and federal authorities are thus restricted accordingly.

In accordance with the IMAC<sup>344</sup>, the FoJ may **itself decide**<sup>345</sup> on the admissibility of mutual assistance, specifically where it concerns several cantons<sup>346</sup>, where the competent cantonal authority does not take a decision within an appropriate period of time<sup>347</sup>, or where the cases are complex or of particular importance<sup>348</sup>. Execution may be left to the cantonal authorities, undertaken by the FoJ itself<sup>349</sup> or delegated to another authority<sup>350</sup>. Accepting a case also confers jurisdiction with regard to provisional measures<sup>351</sup>. The FoJ may also opt to accept a case even after cantonal mutual assistance proceedings

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<sup>333</sup> Art. 79a let. b IMAC; the costs that arise are charged to the canton, see Art. 13 para. 1bis O-IMAC.

<sup>334</sup> Art. 17 al. 3 c IMAC. In such cases, the cantonal authorities will hand the file over to the FoJ (Art. 7 O-IMAC).

<sup>335</sup> See also 3.4.1 p. 66.

<sup>336</sup> Art. 18a para. 2 IMAC.

<sup>337</sup> Until the formal request has been received. This is usually three months, which may be extended.

<sup>338</sup> Art. 18a para. 1 IMAC.

<sup>339</sup> Art. 18a para. 2 IMAC.

<sup>340</sup> Art. 10 ff. TUS-IA. This now applies even to cases which are not covered by the TUS-IA and have basis only in the IMAC, such as requests on the basis of tax fraud, see Art. 36a TUS-IA.

<sup>341</sup> Art. 8 TUS-IA.

<sup>342</sup> In accordance with Art. 5 TUS-IA (see also Art. 10 TUS-IA).

<sup>343</sup> Complex or particularly important criminal cases concerning organised crime, corruption or other serious crimes (Art. XVIII AP-I/ECMA between Switzerland and Italy / SR 0.351.945.41).

<sup>344</sup> I.e. with states other than the USA.

<sup>345</sup> Art. 17 para. 5 and Art. 79a IMAC.

<sup>346</sup> In such cases, there is also the option to appoint an executing canton, see 3.2.2 p. 51.

<sup>347</sup> See above, on the subject of supervision.

<sup>348</sup> In particular in cases concerning former heads of state or their associates (see the Marcos, Abacha, and Mobutu cases, summarised under the heading of "Politically Exposed Persons", or PEPs).

<sup>349</sup> Art. 79a IMAC.

<sup>350</sup> Art. 34a O-IMAC.

<sup>351</sup> According to Art. 18 IMAC; see also Art. 80g para. 2 IMAC.

have commenced<sup>352</sup> and may also include supplementary requests, even if these alone no longer meet the set criteria<sup>353</sup>.

### 3.2.3.4 *Specific functions (External relations)*

The Federal Office of Justice performs certain **special tasks**. These chiefly concern contact with abroad, specifically:

- Obtaining an assurance of reciprocity<sup>354</sup>;
- Cooperation in obtaining further details for mutual assistance requests<sup>355</sup>;
- Imposing conditions on the provision of mutual assistance<sup>356</sup> and deciding whether or not the response from the requesting state constitutes sufficient assurance in view of the conditions that have been set<sup>357</sup>;
- Extending speciality<sup>358</sup>.

### 3.2.4 **Other federal authorities**

If, under Swiss law, a federal authority (primarily the Office of the Federal Public Prosecutor, but also the Federal Tax or Customs Administration) is responsible for prosecution, this authority may also be charged with the mutual assistance proceedings<sup>359</sup>.

In 2002 and 2003, the prosecution of certain serious crimes was entrusted to the Federal Public Prosecutor's Office<sup>360</sup>. This delegation of authority cannot be challenged. It may also be made subsequently and it may also encompass supplementary requests, even if federal jurisdiction would no longer apply to them<sup>361</sup>.

## 3.3 **Procedures and Rights of Appeal**

### 3.3.1 **The procedure for mutual assistance in criminal matters**

The revision of the IMAC of 4 October 1996 introduced a uniform mutual assistance procedure for all of Switzerland. This sets out the following steps (cf. also diagram in the annex under 6.3 p. 87):

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<sup>352</sup> Letter b of Art. 79a IMAC would otherwise make no sense.

<sup>353</sup> Similarly, Art. 79 para. 3 IMAC; the obligation to complete proceedings promptly (Art. 17a IMAC) places particular importance on economy of process.

<sup>354</sup> Art. 8 para. 1 and 17 para. 3 a IMAC.

<sup>355</sup> Art. 78 para. 3 IMAC and Art. 80o para. 1 and 3 IMAC.

<sup>356</sup> Art. 80p IMAC.

<sup>357</sup> Since 1 January 2007 it has been possible to appeal against the FoJ's ruling within ten days before the Federal Criminal Court, which makes the **final decision in accelerated proceedings** (Art. 80p para. 4 IMAC). e.g.: CCR RR 2008/146 (the decisions previously lay with the Federal Supreme Court, e.g. BGE 1A.237/2005).

<sup>358</sup> Art. 67 para. 2 IMAC in those cases in which this is still necessary, see also 2.7, p. 35).

<sup>359</sup> Art. 17 para. 4 and Art. 79 para. 2 IMAC.

<sup>360</sup> See Art. 337 (formerly Art. 340bis) para. 1 (mandatory responsibility) and 337 para. 2 (optional responsibility) of the Swiss Criminal Code (AS 2001 3071 / AS 2003 3043).

<sup>361</sup> Art. 79 paras. 3 and 4 IMAC.

### 3.3.1.1 Acceptance and forwarding

As outlined above (3.1.2 p. 37 and 3.2.3 p. 44), the Federal Office of Justice remains the primary recipient of foreign requests for mutual assistance. It **performs a summary examination** to determine whether or not the incoming request meets the formal requirements and whether or not there are any obvious reasons for refusing it. The FoJ does **not** decide on the material admissibility of the request. It may, however, return the request for additional information to be added.

In cases of urgency, the FoJ may order **provisional measures** as soon as notice of a forthcoming request has been given<sup>362</sup>. The requesting state may be given a deadline for the submission of a formal request for mutual assistance.

Following the summary examination, the Federal Office of Justice will forward the request to the competent executing authority. This will generally be a cantonal authority<sup>363</sup>.

As under previous legislation, the acceptance and **forwarding** of a request are not subject to appeal<sup>364</sup>.

### 3.3.1.2 Accommodation and execution

- **Preliminary examination**<sup>365</sup>: The authority entrusted with executing the request will examine whether or not the statutory requirements for the grant of mutual assistance have been met.
- **Ruling on whether or not to consider the request**<sup>366</sup>: If the outcome of the preliminary examination is positive, the executing authority will issue a (*prima facie*) summary ruling that it will consider the request, including the reasons for its decision. It will specify that the material requirements for the grant of mutual assistance have been met. The mutual assistance measures that have been requested and are deemed to be admissible will be ordered at the same time. **No appeal may be filed against the ruling to consider the case.** Consequently, there is no need for any further avenue of appeal<sup>367</sup>. In principle, all that is needed is a written summary order, with grounds, in respect of those persons concerned by the mutual assistance measures.
- **Execution of the request**: The measures are then executed. The opportunities for appeal under cantonal procedural codes do not apply<sup>368</sup>. The measures must be executed promptly<sup>369</sup>. The request should therefore be executed in full, quickly and without interruption. It should not be forgotten here that the entitled parties should be given the opportunity to participate in the triage of the execution documents concerning them (cf. 2.6.4.2 p. 31 below).

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<sup>362</sup> Art. 18 para. 2 and 18a IMAC; see also 3.4.1 p. 65.

<sup>363</sup> For exceptions, see 3.2.2 and 3.2.4 p. 51ff

<sup>364</sup> Art. 78 para. 4 IMAC.

<sup>365</sup> Art. 80 IMAC.

<sup>366</sup> Art. 80a IMAC.

<sup>367</sup> To avoid misunderstandings or hasty reactions, the recipients of the ruling should be informed that appeals may be filed against the final decree at a later stage, at the end of the proceedings.

<sup>368</sup> This is because the IMAC fully covers this area and federal law therefore overrides cantonal law.

<sup>369</sup> Art. 17a paras. 1 and 2 IMAC.

- **Interim rulings**<sup>370</sup>: The only deviation from uninterrupted execution concerns the two separate cases provided by law in which an interim ruling must be issued. These are the **seizure of assets and valuables** and the **presence of foreign officials** as the mutual assistance measures are taking place.

However, even in the case of these two exceptions, the corresponding interim rulings are subject to appeal<sup>371</sup> only if they cause immediate and irreparable prejudice<sup>372</sup>. In the interests of not further complicating the execution of the request, and of the need for promptness, the legislators have emphasised that an immediate appeal against an interim ruling should remain the exception<sup>373</sup>. In cases in which assets have been seized, it is incumbent on appellants to state in their written appeal the nature of the prejudice and to prove that this is not remedied by a decision to quash the subsequent final ruling. The prejudice that may be considered comprises, for example, the inability to fulfil contractual obligations (the payment of salaries, interest, taxes, accounts payable, etc), exposure to debt collection or bankruptcy proceedings, the revocation of an official licence or the inability to conclude transactions which are virtually signature-ready. In general, the need to cover current expenses is not generally, in itself, sufficient to claim immediate and irreparable prejudice in accordance with Art. 80e para. 2 a IMAC<sup>374</sup>. Prejudice in the sense of Art. 80e para. 2 IMAC need not necessarily have occurred to be deemed immediate. While mere suspicions or assumptions offer no proof of immediacy, a serious and imminent prospect of prejudice may be sufficient<sup>375</sup>.

- On the presence of foreign officials, please refer below to 3.4.2 p. 59.

An interim ruling must contain a notice concerning rights of appeal<sup>376</sup> and be formally established.

An appeal against such an interim ruling does not have suspensive effect, but may be granted such effect by the appellate authority if the entitled appellant can present evidence of immediate and irreparable prejudice<sup>377</sup>.

- **Simplified execution / settlement procedure**<sup>378</sup>: Entitled persons, specifically the holders of documents, information or assets, may agree to hand these over<sup>379</sup>. This consent is irrevocable. It has permitted numerous mutual assistance proceedings to be settled out of court. The executing authority records the consent in writing and thereby concludes the proceedings<sup>380</sup>. A statement of reasons is **not necessary**, neither is a formal final ruling. Based on the consent given, the executing authority may **immediately** hand over the documents or assets to the requesting state.

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<sup>370</sup> Art. 80e para. 2 b IMAC.

<sup>371</sup> According to the Federal Council Dispatch on the matter, such appeals should remain the exception (as per. 80e b).

<sup>372</sup> Art. 80e para. 2 IMAC.

<sup>373</sup> FG 1995 III 12, see also BGE 126 II 495 delib. 5b and c.

<sup>374</sup> BGE 128 II 353 delib. 3.

<sup>375</sup> Example of admitted prejudice: BGE 130 II 329 delib. 2.

<sup>376</sup> With a period of 10 days in which an appeal may be filed (Art. 80k IMAC)

<sup>377</sup> According to Art. 80l paras. 2 and 3 IMAC.

<sup>378</sup> Art. 80p IMAC.

<sup>379</sup> This creates a situation similar to that where the persons concerned present themselves their documents to the requesting authority.

<sup>380</sup> This procedure may also concern only some of the documents that have been requested. In this case, the ordinary procedure is followed for the remainder (Art. 80c para. 3 IMAC).

### 3.3.1.3 Conclusion of mutual assistance proceedings

Once the request has been executed in full, i.e. all of the evidence that was requested has been gathered, then the executing authority will issue the **final ruling**. In it, it will refer to the material admissibility of the request and the extent<sup>381</sup> to which assistance was granted. Since the 1997 revision of the IMAC, the final ruling has become the cornerstone of the mutual assistance process and is the only ruling that is subject to appeal. As such, entitled persons may challenge only this final ruling, which is issued once the request has been completed, together with the preceding interim rulings<sup>382</sup> (cf. 3.3.3, p. 53 below for the appeal procedure). Once the final ruling has become legally enforceable, the documents and evidence that have been gathered may be handed over to the requesting state<sup>383</sup>.

Since the requesting state essentially has no party status in the mutual assistance proceedings, in no event may the final ruling and all other rulings issued during the proceedings (ruling on considering the request, interim rulings), or the other documents addressed by the parties to the executing authorities, be handed over to it, because this would restrict the rights of defence of those affected. In fact, the case law requires the Federal Office of Justice to intervene in the requesting state to demand the return of documents that have been handed over unlawfully, and to prevent their further use<sup>384</sup>.

### 3.3.2 Authorisation to participate in proceedings

When the IMAC was revised<sup>385</sup>, a right of appeal was laid down clearly in law for the first time<sup>386</sup>. However, the law does not state expressly who holds party status in mutual assistance proceedings<sup>387</sup>. Party status, however, is based on a right of appeal. These rules already apply at the cantonal level.

As the supervisory authority, the FoJ is always entitled to file an appeal<sup>388</sup>.

Confronted by the dilemma of needing to provide adequate legal protection on the one hand and having to execute the request for assistance quickly on the other, the courts generally take the view that legal protection may be given only to those who are sufficiently closely linked to the ruling that is being challenged. This therefore excludes those who are affected only indirectly. Any other solution would expand the group of persons who are entitled to oppose the granting of mutual assistance unduly and would, in many

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<sup>381</sup> I.e. what information may be handed over to the requesting state (exact designation of the documents that may be handed over).

<sup>382</sup> Art. 80e a IMAC.

<sup>383</sup> As a rule, this will be along the same channel as the one used to submit the request (see 3.1.2 p. 38 on channels of transmission). Exceptions are made, for example, in cases of urgency, in case of very extensive documentation, or if officials of the requesting state were present as the evidence was being taken and directly took the evidence with them (the rule to some extent in Anglo-American procedural law). In these cases, it should be noted that the speciality reservation has already been imposed by the executing authority, or that at least one copy of the executive letter is still returned by the official channel.

<sup>384</sup> CCR RR.2008.243 delib. 6 and case law cited.

<sup>385</sup> As of 4.10.96.

<sup>386</sup> Art. 80h IMAC, Art. 21 para. 3 IMAC, Art. 9a O-IMAC.

<sup>387</sup> The "persons entitled" in accordance with Art. 80b para. 1, 80c and 80m IMAC.

<sup>388</sup> Art. 80h a IMAC; as it is responsible as supervisory authority for the correct application of federal law, the FOJ has this right of appeal, although it has no practical interest in exercising it, (BGE 1C\_454/2009 of 9 12.2009, delib. 1.2.).

cases, obstruct or even paralyse international cooperation as a result. This would contradict the objective of the law and the treaties signed by Switzerland in this respect<sup>389</sup>.

### 3.3.2.1 *Right of appeal (Art. 80h IMAC)*

In the context of mutual assistance, a natural person or legal entity has a right of appeal if they are personally and directly affected by a mutual assistance measure and have a legitimate interest in the measure being annulled or modified. The two criteria laid down in this provision are the same as those which apply to public law matters<sup>390</sup>; fulfilment of one of these two criteria suffices, as they essentially set the same requirement and are ultimately closely interwoven with one another<sup>391</sup>. Persons who are the subject of the foreign proceedings may also file an appeal subject to the same conditions (Art. 21 para. 3 IMAC). The prospective appellant is responsible for proving their entitlement to do so.

The person concerned does not have to be affected in terms of their rights and obligations. **It is sufficient that the measure that has been ordered has a specific – material or legal – impact on them**<sup>392</sup>. The interest that underlies a person's right of appeal may be legal or actual. It need not necessarily be the interest that is protected by the legal provision that is being invoked. However the appellant must, as a result of their relationship with the matter at hand, be affected to a greater extent than any other person or the general public as a whole<sup>393</sup>. A legitimate interest exists if the actual or legal position of the appellant might be influenced by the outcome of the proceedings. Admitting the appeal must create a financial, material or immaterial advantage for the appellant.

In practice, the courts have established the following principles:

**Persons against whom a direct enforcement measure has been ordered** (premises search, seizure or questioning<sup>394</sup>, handover of documents in their possession or the interviewing of their employees<sup>395</sup>) may file an appeal. However, the authors of documents that are not in their possession may not<sup>396</sup>, even if the handover of the requested information would result in the author's identity being disclosed<sup>397</sup>.

The case law states that **the holder of a bank account**<sup>398</sup> about which information has been requested<sup>399</sup> or the client of a securities trader<sup>400</sup>, has a general right of appeal. Excluded from this right of appeal are persons who are only the beneficial owners of a

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389 BGE 122 II 133.

390 Art. 89 para. 1 of the Federal Supreme Court Act.

391 BGE of 12.1.2009 / 1C.287/2008 delib. 2.2

392 BGE 119 Ib 56 delib. 2a.

393 BGE 125 II 362.

394 BGE 121 II 38 delib. 1b

395 By way of exception, and providing no abuse of the law has occurred (BGE 123 II 153), case law grants the **beneficial owner of a legal entity that has been dissolved** authorisation to file an appeal, on condition that the beneficial owner can prove on the basis of official documents that the organisation has been liquidated. The deed of liquidation must also clearly designate the beneficial owners as the beneficiary of such liquidation (BGE 1A.212/2001 delib. 1.3.2 / TPF RR.2009.89 of 3 December 2009, delib. 2).

396 BGE 116 Ib 106 delib. 2a.

397 BGE 114 Ib 156 delib. 2a.

398 BGE 121 II 462 /Art. 9a O-IMAC.

399 Except where the account was opened under a false identity, BGE 131 II 172 delib. 2.2.2.

400 TPF RR.2009.218 of 17 March 2010, delib. 2.2 and Art. 43 SESTA / SR 954.1.

bank account that is the subject of investigations (shareholders of a limited company, settlers of trusts), and holders of a power of attorney over the account in question<sup>401</sup>. **The bank** is authorised to file an appeal only if it is affected in the conduct of its own business, but not if it is required only to hand over documents on the accounts of its clients and, via its employees, to provide additional explanations of these documents<sup>402</sup>. **Lawyers and accountants** are essentially subject to different rules. Unlike banks, they must be actively involved in managing the bank accounts entrusted to them under mandate from their client, and thus have a right of appeal as individual persons or entities against whom search measures are ordered<sup>403</sup>.

For the same reasons, a **person who has been examined as a witness** in mutual assistance proceedings may object to the handover of the interview transcripts only insofar as the information that the transcripts are intended to provide concerns that individual personally or if they make use of their right to remain silent, but not if their statements concern bank accounts of which they are not the rightful owner.

Problems occur where the request for mutual assistance is intended **to obtain information that is contained in the records of specific Swiss criminal proceedings**. This raises the question as to the extent to which persons who are named in different capacities in these records (as witnesses, the holders of bank documents, subjects of telephone surveillance) have a right of appeal against the request. Even where these persons are only indirectly affected by the execution of mutual assistance measures, it would seem justified that they are able to object to the request. The case law has not yet offered any clear solution to this situation<sup>404</sup>. If the solution that was chosen in connection with the unsolicited handover of documents or evidence (Art. 67a IMAC) were applied *mutatis mutandis*, it would be appropriate to grant a right of appeal to persons affected by the forwarding of confidential personal information.

Only those who have a right of appeal can consent to simplified execution<sup>405</sup>.

### **3.3.2.2 Right to participate in proceedings**

#### **a) Right to access files (Art. 80b IMAC)**

This right no longer affects only the mutual assistance request, but now extends to all other records, providing knowledge of them is necessary to safeguard interests<sup>406</sup>. The parties have a right to a legal hearing (Art. 29 para. 2 of the Federal Constitution). Specifically, this includes the right to access files, to assist in the collection of evidence and to acknowledge and respond to this evidence<sup>407</sup>. In a mutual assistance

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<sup>401</sup> BGE 123 II 153 delib. 2a.

<sup>402</sup> BGE 128 II 211 delib. 2.5.

<sup>403</sup> BGE 1.A 293/2004 delib. 2.3 / TPF RR.2010.11 of 22 March 2010, delib. 1.3.

<sup>404</sup> Right of appeal granted: BGE 121 II 38 delib. 1b and delib. 1.1. Right of appeal refused: BGE 1A.186/2005 and 1A.187/2005. Issue left open: BGE 1A.123/2006 and 1A.243/2006.

<sup>405</sup> Art.80c IMAC

<sup>406</sup> Art. 80n para. 1 and Art. 80b para. 1 IMAC.

<sup>407</sup> A violation of the right to be heard does not however lead automatically to the appeal being granted and the contested ruling being quashed. A minor infringement of the right to be heard may be remedied before the appeal court if the person concerned is given the opportunity to state his case before an appeal court that has the same power to examine the case as the executing authority. Basically this solution is only available in cases involving an infringement of party rights that are not especially serious, otherwise the

context, the right to a legal hearing is implemented with Art. 80b IMAC and Arts. 26 and 27 APA (by reference in Art. 12 para. 1 IMAC). These provisions allow the entitled person to access the files on the mutual assistance proceedings, the request for assistance and the accompanying documents, unless contra-indicated by certain interests (Art. 80b para. 2 IMAC).

In any event, access is granted only to documents that are of relevance to the party in question (Art. 26 para. 1 a, b and c APA)<sup>408</sup>. This does not rule out certain passages in those documents being concealed to protect the interests mentioned in Art. 80b para. 2 IMAC. The entitled person must be able, based on the information given, to establish the subject and objective of the request so that they are able to assert their rights effectively, with particular regard to the dual criminality condition and compliance with the proportionality principle<sup>409</sup>.

- b) Right to assist with the triage of execution documents (cf. 2.6.4 p. 30).
- c) Right to notification of rulings and to inform (Art. 80m und 80n IMAC)

Under the terms of Art. 80m IMAC, the executing authority must notify its rulings to the entitled person who is living or has an address for service in Switzerland, of. According to Art. 80 n IMAC, a holder of information is also entitled to inform those who mandated him of the existence of the request unless, as an exception, they have been forbidden to do so by the competent authority.

If the competent authority requests from a bank documents that are necessary to execute a request for assistance then it must, of course, notify the bank of its ruling accommodating the case, as well as its final ruling – regardless of where the holder of the accounts concerned is domiciled. If the account-holder is resident abroad, the bank must inform the client so that they are able to designate an address for service (Art. 9 of the Ordinance of 24 February 1982 on International Mutual Assistance in Criminal Matters [O-IMAC; SR 351.11]) and assert the right of appeal due to them under Art. 80h b IMAC and 9a a O-IMAC in good time. If the bank account has been closed, it is essentially unknown whether or not the client continues to maintain a business relationship with the bank, and thus whether or not a duty to notify still exists. Notice of rulings must nonetheless still be given to the bank that is the holder of the documents. The bank will then decide if it wishes to make use of the opportunity granted to it by Art. 80n IMAC. Under certain circumstances, the bank also has its own right of appeal, albeit one that it may assert only after it has received the rulings. Consequently, it is assumed in practice that documents that have been issued by a bank cannot be passed on until after the bank has been served with the final ruling. In cases in which the account-holder lives abroad, decisions as to the date on which the appeal period begins are also based on the premise of mandatory service to the bank<sup>410</sup>.

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procedural guarantees provided in proceedings before the court of first instance become worthless (TPF RR.2009.39 of 22 September 2009, delib. 5).

<sup>408</sup> BGE 1A0.57/2007 delib. 2.1.

<sup>409</sup> BGE 1A.146/2005 delib. 2.

<sup>410</sup> BGE 124 II 124 concerning an account with a retained mail agreement; ruling 1A.221/2002 concerning a closed account.

To avoid protracted mutual assistance proceedings, the law lays down the principle that anyone **wishing to intervene in legal assistance proceedings will be involved at the stage which proceedings have reached at the given point in time.** This means that rulings that have become legally enforceable (final or interim rulings) may be held against that person<sup>411</sup>.

### 3.3.3 Rights of appeal and grounds for appeal

#### 3.3.3.1 *Brief outline*

- a) The appeals system that was introduced when the IMAC came into force in 1983 essentially comprises two means of legal redress. Appeals (to the cantonal appellate authority, then to the Federal Supreme Court) may be filed against the ruling on considering the request and, thereafter, against the final ruling. However, this system has been abused in a number of important cases<sup>412</sup> and has resulted in delays in the legal assistance proceedings. These, naturally, contradict the promptness requirement that is laid down in mutual assistance law.
- b) Criticised as "very complex and cumbersome"<sup>413</sup> the legal assistance process was revised in 1996. The right to appeal against the ruling on considering the case was abolished<sup>414</sup> and appeal proceedings concentrated at the final ruling stage, which thus became the cornerstone of the legal assistance process. Another aim of the 1996 revision was to introduce a uniform appeal procedure<sup>415</sup>. The new regulations harmonised status<sup>416</sup>, the grounds for appeal, appeal periods and suspensive effect. These provisions now apply to proceedings at both federal and cantonal level.
- c) As part of the complete revision of the administration of justice at federal level<sup>417</sup> the Federal Council proposed gathering mutual assistance-related appeals against rulings from federal and cantonal bodies into a single appeal procedure before the new Federal Administrative Court. However, following an outcry connected with a high-profile mutual assistance case with Russia<sup>418</sup>, the general opinion became that a single appeal body could not sufficiently protect the rights of those who are affected by mutual assistance proceedings. It was therefore decided to give the Federal Supreme Court the opportunity to examine certain fundamental issues as a second-instance appellate authority.

Both chambers of the Swiss parliament then decided<sup>419</sup> to entrust the function of common appellate authority for mutual assistance to the Federal Criminal Court<sup>420</sup>, which had only just been established<sup>421</sup>.

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<sup>411</sup> Art. 80m al. 2 IMAC. see FG 1995 III 32.

<sup>412</sup> FG 1995 III 2. Two prime examples are the cases of Marcos (mutual assistance with the Phillipines) and Pemex (mutual assistance with Mexico).

<sup>413</sup> FG 1995 III 5.

<sup>414</sup> Exception: Art. 80e para. 2 IMAC.

<sup>415</sup> After extensive discussions, the Swiss parliament opted for the "Geneva model", which provides for possible legal redress only after the request has been executed.

<sup>416</sup> See 3.3.2, p. 54

<sup>417</sup> FG 2001 4202 ff.

<sup>418</sup> The Yukos case (mutual assistance with Russia)

<sup>419</sup> The sole reason for the reorganisation appears to be this body's modest workload at the time.

### 3.3.3.2 Appeals: First Instance (Federal Criminal Court)

#### a) Principle

**Only the final ruling** of the executing authority at cantonal or federal level, plus any **preceding interim rulings** may be **challenged** before the **Second Appellate Division of the Federal Criminal Court**<sup>422</sup> in Bellinzona.

The appeal period runs for **30 days** from written notification of the final ruling. The appeal has **suspensive effect**<sup>423</sup>.

#### b) Exception

**The interim rulings preceding the final ruling** may be **challenged only** by an **independent appeal** to the Second Appellate Division of the Federal Criminal Court<sup>424</sup> if these interim rulings concern:

- the seizure of assets or valuables
- or**
- the presence of persons who are involved in the foreign proceedings<sup>425</sup>
- and**
- if their effect is immediate and irreparable prejudice.

**Suspensive effect** is granted only if the **entitled person** can present a convincing case for direct and irreparable prejudice.

The **appeal period** runs for **10 days** from written notification of the ruling.

#### c) Grounds for Appeal

The grounds for appeal that the entitled person may claim are listed in Art. 80i IMAC. These are violations of federal law, including excess or abuse of discretion (a), and the inadmissible or manifestly inexact application of foreign law in the cases under Art. 65 IMAC (b). The appellant may also claim that executing the request constitutes a violation of an obligation of professional secrecy to which he is subject. A lawyer or notary can make this claim only if the act requested (e.g. seizing and handing over

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<sup>420</sup> Second Appellate Division

<sup>421</sup> For further details, see Rudolf Wyss, *Strafrechtshilfe – wie weiter? l'Atelier du droit/Mélanges Hinrich, Koller, Hilbling & Lichtenhahn* 2006, p. 295 ff

<sup>422</sup> Art. 28 para. 1 e point 1 of the Federal Criminal Court Act (CCA / SR 173.71), reworded in accordance with point 14 of the annex to the Act of 17 June 2005 on the Federal Administrative Court, in force since 1 January 2007; SR 173.32), Art. 80e para. 1 IMAC and 3 of the Federal Criminal Court Regulations (SR 173.710).

<sup>423</sup> As does an appeal against any other decree approving the transmission of confidential information to foreign countries, or the handover of objects or assets (Art. 80l para. 1 in fine IMAC).

<sup>424</sup> Art. 28 para. 1 e point 1 of the Federal Act on the Federal Criminal Court (CCA / SR 173.71), Art. 80e para. 1 IMAC and 3 of the Federal Criminal Court Regulations (SR 173.710).

<sup>425</sup> Art. 80e para. 2 IMAC.

documents) relates to information that is also genuinely connected with the profession he is carrying on and is not primarily of an economic nature<sup>426</sup>.

The objection that the accused did not commit the offence or that they are not guilty will be dismissed. The sole purpose of the mutual assistance proceedings is to establish the facts. They do not constitute advance criminal proceedings. There is no point in contesting the allegations or guilt. The requested Swiss authorities are bound by the presentation of the circumstances of the case given in the request for assistance. They may deviate from these only if there are obvious and immediately recognisable errors, omissions or contradictions.

Grounds for appeal under cantonal law ceased to be admissible with the entry into force of the FACA on 1 January 2007<sup>427</sup>.

#### d) Cognizance

Applying the practice of the Federal Supreme Court *mutatis mutandis*, the Federal Criminal Court will, freely and *ex officio*, examine the admissibility of the appeals that have been filed with it<sup>428</sup>. As is the case with the Federal Supreme Court, it is not bound by the applications made by the parties<sup>429</sup>. This not only means that, in its decision, it may also consider grounds that have not been mentioned by either party<sup>430</sup>, but also that it may rule against one of the appellants<sup>431</sup> (*reformatio in peius*).

The Federal Criminal Court will also examine the incorrect or incomplete presentation of legally relevant facts, as well as the appropriateness of the decision that is being challenged in accordance with Art. 49 b and c APA<sup>432</sup>.

### The Federal Criminal Court as the sole instance

Since the entry into force of the FACA on 1 January 2007<sup>433</sup> the Federal Criminal Court has ruled as the **sole instance** on appeals against rulings issued by the Federal Office of Justice in application of Art. 17 para. 3 IMAC<sup>434</sup> (a: obtaining a guarantee of reciprocity, b: choice of appropriate procedure, c: admissibility of Swiss requests) and Art. 80p IMAC (conditions subject to acceptance).

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426 TPF RR.2009.209 of 6 October 2009, delib. 3.

427 FG 2001 4423.

428 BGE 132 I 140 delib. 1.1.

429 Art. 25 para. 6 IMAC.

430 Although, as is emphasised repeatedly, the Federal Supreme Court is under no obligation to seek such grounds.

431 BGE 113 Ib 258 delib. 3d.

432 Given the preliminary work required, the extension of cognizance to the complaints provided for in the latter provision is justified. With the exception of the grounds that relate to cantonal codes of procedure (Art. 80i old IMAC), where mutual assistance is concerned the new appeal body has the same cognizance as the cantonal appeals bodies that were previously responsible for such matters (see FG 2001 4422 and 4424). A teleological interpretation of the norms on grounds for appeal thus extends the list of possible grounds for appeal given in Art. 80i IMAC by those contained in Art. 49 b and c APA.

433 New version of Art. 26 point 30 of the Appendix to the Federal Act of 17 June 2005 on the Federal Administrative Court, SR 173.32.

434 Previously the FDJP ruled on these questions as the sole appellate authority.

### 3.3.3.3 *Rights of appeal: Second Instance (Federal Supreme Court)*

#### a) Referrals

Switzerland's legislators wanted to tightly restrict access to the Federal Supreme Court in mutual assistance cases, and therefore permit appeals to it only in a limited number of particularly important cases<sup>435</sup>.

Under Art. 84 of the Federal Supreme Court Act (SCA / SR [173.110](#), also applicable to appeals against interim rulings), **appeals in public law matters** are admissible only if they concern **the seizure of property, the handover of objects or assets** or the **transmission of confidential information**. The matter in question must also be a **particularly important case**.

A case is regarded as particularly important in particular where there are grounds to believe that the proceedings conducted abroad violate elementary principles, are political in nature<sup>436</sup> or display serious defects. The phrase "in particular" indicates that the grounds for admitting an appeal given here are not conclusive. Specifically, a matter may be referred to the Federal Supreme Court where a ruling is required on a principle of law, or where the court of previous instance has deviated from past Federal Supreme Court precedent<sup>437</sup>.

The appellant must prove that these conditions are fulfilled. The Federal Supreme Court may exercise considerable discretion in deciding whether or not a case is particularly important<sup>438</sup>, unless the appeal appears to be completely groundless<sup>439</sup>.

#### b) Procedure

The appeal period runs for ten days from full publication of the decision<sup>440</sup>. Should the Federal Supreme Court deem an appeal related to international mutual assistance in criminal matters to be inadmissible, a **dismissal decision will be issued within 15 days** of the conclusion of any correspondence<sup>441</sup>.

By contrast, where the Federal Supreme Court deems that matter to be a **particularly important case**<sup>442</sup>, the appeal will be heard **in regular proceedings**. In such cases, the final ruling will generally be made by a panel of five judges<sup>443</sup>.

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435 BGE 133 IV 125.

436 BGE 133 IV 40 delib. 7.3.

437 BGE 133 IV 215 delib.1.2 Example: BGE 1C.287/2008 BGE 1C\_454/2009 of 9.12.2009.

438 BGE 1C.205/2007 delib. 1.3.1.

439 BGE 133 IV 125, delib. 1.2.

440 Art. 100 para. 2 b FSCA.

441 Art. 107 para. 3 FSCA.

442 Example: the decision to uphold a provisional seizure of assets with a view to their handover to the foreign authority, to enforce a claim for damages in connection with a fiscal offence (BGE 133 IV 215).

443 The process is explained in detail in BGE 133 IV 125.

### 3.3.3.4 *Rights of appeal: other channels of appeal*

#### a) Appeal proceedings with the USA

In the past, it was possible to object against rulings issued by the Federal Office of Justice – the central office in the application of the USAT-IA. Objection rulings by the FoJ were subject to an administrative court appeal to the Federal Supreme Court.

This special appeal procedure was adjusted in line with that of the IMAC when the FACA entered into force on 1 January 2007 and objections thus abolished as a legal remedy<sup>444</sup>. Since then, it has been possible to challenge rulings issued by the FoJ in the execution of a request for legal assistance from the USA with an appeal to the Federal Criminal Court<sup>445</sup>.

#### b) Proceedings with UN tribunals<sup>446</sup>:

Only one legal remedy is provided for in law<sup>447</sup>. Rulings issued by executing federal authorities and the cantons are directly subject to appeal to the Federal Criminal Court<sup>448</sup>. The appeal procedure is simpler than that laid down in the IMAC. Periods and grounds for appeal have been reduced. Persons facing charges before the International Criminal Court are not entitled to file an appeal against the request for legal assistance<sup>449</sup>.

#### c) Administrative appeal

The rulings issued by the **FDJP** in application of Art. 17 para. 1 IMAC on the issue of whether or not the request for mutual assistance impairs the **essential interests of Switzerland** as described in Art. 1a IMAC is subject to an **administrative appeal to the Federal Council**<sup>450</sup>.

A decision by the FDJP may be sought for up to 30 days following written notification of the final ruling<sup>451</sup>. The question as to whether Switzerland's sovereignty rights, security, public order or other essential interests under Art. 1 a IMAC are impaired is purely political in nature and must be answered independently of Federal Supreme Court proceedings<sup>452</sup>.

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444 AS 2006 p. 2243-2245.

445 Art. 17 TUS-IA / Art. 28e point 4 CCA.

446 Federal Act on Cooperation with International Courts for the Prosecution of Serious Breaches of International Humanitarian Law (SR 351.20), and Ordinance of 12 February 2003 on the extension of the scope of application of the corresponding federal resolution on Sierra Leone. Federal Act on Cooperation with the International Criminal Court (ICCA/SR 351.6).

447 In order to limit the length of proceedings.

448 Art. 28 para. 1 e point 2 and 3 CCA.

449 Art. 50 a ICCA.

450 see Art. 26 IMAC and Art. 18 para. 1 TUS-IA

451 Art. 17 para. 1 IMAC.

452 VPB 70.5 delib. 1

Art. 1a IMAC may be invoked only by Swiss citizens and non-Swiss citizens resident in Switzerland, as well as companies that have their registered office or permanent branches in Switzerland<sup>453</sup>.

The term "other essential interests" as per Art. 1a IMAC and the agreements and conventions mentioned above relates to interests that are existential to Switzerland. Where the Swiss economy is concerned, none of Switzerland's material interests are impaired if the execution of a request for mutual assistance is detrimental to a small number of economic entities. Rather, the execution of the request must be detrimental to the Swiss economy as a whole<sup>454</sup>.

No appeal may be filed against a **Swiss request for mutual assistance** to a foreign state (Art. 25 para. 2 IMAC and Art. 17 para. 2 TUS-IA). Cantonal and federal authorities<sup>455</sup> may, however, file an appeal against a Federal Office of Justice decision not to submit any request for assistance<sup>456</sup> (Art. 25 para. 3 IMAC and Art. 17 para. 2 TUS-IA).

## 3.4 Specific Procedural Steps

### 3.4.1 Provisional measures

#### a) Principle

At the express request of another state, the competent authority may order provisional measures to preserve the status quo, to safeguard threatened legal interests or to protect jeopardised evidence, if mutual assistance does not appear to be obviously inadmissible or inappropriate<sup>457</sup> under the terms of the IMAC<sup>458</sup>.

It is thus possible to order provisional measures to secure assets even if, at this stage of the process, not all of the conditions for the grant of mutual assistance have yet

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<sup>453</sup> VPB 2008.28.

<sup>454</sup> VPB 70.5 delib. 2

<sup>455</sup> Possible, although Art. 25 IMAC says nothing on this point; see BGE 1A.103/2005 delib. 2.2.

<sup>456</sup> Particularly where the magnitude of the offence does not justify conducting proceedings (Art. 30 para. 4 IMAC).

<sup>457</sup> The question of the legality of a mutual assistance-related seizure that merely serves to execute a foreign claim for damages is disputed by legal experts and was also left open by the Federal Supreme Court (BGE 130 II 329, delib. 6). The Federal Criminal Court ultimately came to the decision that a seizure in execution of a claim for damages would be permissible provided the legally binding and executable damages claim were permissible under Art. 94 ff. IMAC, which is not the case as far as tax offences are concerned (TPF RR.2008.252 of 16 February 2009, delib. 6.2).

<sup>458</sup> Art. 18 IMAC, Art. 8 para. 1 TUS-IA, Art. 31 ICCA, Art. 7 of the Federal Act on Cooperation with International Courts for the Prosecution of Serious Breaches of International Humanitarian Law. These provisional measures should not be confused with the foreign policy measures which the Federal Council may take under Art. 184 para. 3 of the Federal Constitution to protect Switzerland's national interests. These measures are a last resort and are taken only where mutual assistance has not yet been or is no longer possible.

been met. Enforcement measures or seizure will be refused only if the foreign state's claims are evidently without foundation<sup>459</sup>.

If a delay would pose significant risks, and if there is sufficient information to evaluate the pre-conditions<sup>460</sup>, then these measures may also be ordered by the FoJ itself as soon as notice of the request for assistance is given. In this case, however, a deadline is set for the submission of a formal request<sup>461</sup>.

#### b) Duration

Provisional measures usually stay in force until the end of the mutual assistance proceedings. Objects and assets that are to be handed over only following a final and enforceable ruling from the requesting state remain seized until this ruling has been issued, or the requesting state notifies the competent executing authority that such a ruling is no longer possible<sup>462</sup>. Legal precedent nonetheless recognises that, depending on the case at hand, a provisional measure may represent an inappropriate restriction on the ownership rights of the persons concerned (holder of a bank account, owner of real estate)<sup>463</sup>.

### 3.4.2 Presence of parties to the foreign proceedings and the performance of official acts by foreign authorities

- a) Increasingly often, the request for assistance asks that the parties to the foreign proceedings (police officers, examining magistrates, the accused, the defence lawyer, victims, etc.) be allowed to attend the execution of the request. This may be permitted<sup>464</sup> if the requesting state so requires on the basis of its own legal system<sup>465</sup> or if such presence is likely substantially to facilitate the execution of the request or the prosecution in the requesting state<sup>466</sup>. "Presence" simply means that the parties to the foreign proceedings may be present at the execution of the request. Control over those proceedings remains in the hands of the competent Swiss officials or magistrates. This (legal) situation must also be taken into account in interview records<sup>467</sup>. The presence of parties to the foreign proceedings may not result in their being given access to confidential facts and information before the competent authority has decided on the grant and the scope of mutual assistance (Art. 65a para. 3 IMAC).

All other acts of execution at which parties to the foreign proceedings are present, such as the inspection of files<sup>468</sup>, must therefore take place in a way that guarantees

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<sup>459</sup> BGE 116 Ib 96 delib. 3a p. 99-101. In an international comparison, the requirements laid down in Swiss law are – rightly – very conducive to the ordering of provisional measures (unlike the conditions set in common-law countries, for example). They have also proven effective.

<sup>460</sup> For security reasons, a written request should be required (e-mail or fax will suffice).

<sup>461</sup> As a general rule, the period set will be no more than three months, which may be amended subsequently. If no formal, valid request is submitted within the set period, the provisional measures must be lifted.

<sup>462</sup> Art. 33a O-IMAC.

<sup>463</sup> BGE 126 II 462 delib. 5.

<sup>464</sup> Where Italy is concerned, attendance will be approved on request provided the presence of those concerned does not contradict the legal principles in effect in the requested state (Art. IX AP/I-ECMA / SR 0.351.945.41).

<sup>465</sup> Art. 65 a IMAC.

<sup>466</sup> Other legal foundations: see Art. 4 ECMA, Art. 12 para. 2-4 TUS.

<sup>467</sup> Art. 26 para. 2 O-IMAC.

<sup>468</sup> BGE 130 II 329 delib. 3 / 128 II 211 delib. 2.1.

that no exploitable information reaches the requesting authority before the final ruling has become legally enforceable. This risk may, however, be prevented by obtaining assurances from the requesting authority that it will not use the information prematurely<sup>469</sup>. As a rule, an assurance will be deemed sufficient if it prohibits the use or copying of the information that has been received, as well as access to the interview records. Parties to the foreign proceedings may make notes while the request is being executed, provided the requesting authority has undertaken not to use information prematurely, and the notes that have been made during execution remain in the Swiss file and are not handed over to the requesting state until legally enforceable approval has been given for mutual assistance<sup>470</sup>.

The (minimum) content of the aforementioned assurances are set out under 6.7 below.

These guarantees must be obtained from the parties to the foreign proceedings before they attend any measure that executes the request for assistance. The Swiss magistrate in charge of execution must assure him or herself that the persons concerned have correctly understood the sense and spirit of the undertakings that have been given, must ensure compliance with them as the request is being executed<sup>471</sup> and must make sure that the assurances are mentioned in the protocol<sup>472</sup>.

The presence of parties to the foreign proceedings must be laid down in an interim ruling<sup>473</sup> which reproduces the wording of the assurances that have been given or, preferably, includes them as an appendix. This procedure reduces the risk of an appeal<sup>474</sup> or, should an appeal be filed, enables the Federal Criminal Court to make a rapid decision on the issue of suspensive effect, if such has been requested.

- b) Simple presence must be distinguished from the performance of official acts in Switzerland by foreign authorities themselves. In all cases, such performance requires the permission of the federal department concerned<sup>475</sup>. The performance of official acts without permission is illegal<sup>476</sup>. Permission is subject to restrictive conditions. It is granted only if it is impossible or senseless for a legal assistance measure to be performed by a Swiss official<sup>477</sup>.

The prosecution of criminal acts under Art. 271 of the Swiss Criminal Code falls within the jurisdiction of the Swiss Confederation (Office of the Federal Public Prosecutor)<sup>478</sup>.

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469 BGE 128 II 211 delib. 2.1.

470 CCR RR.2008.108 delib. 5. Past judgments by the Federal Supreme Court are more restrictive.

471 CCR RR 2008.56.

472 CCR RR.2008.106/107.

473 Art. 80e para. 2 b IMAC.

474 Which does not have a suspensive effect (Art. 80l al. 2 IMAC). Suspensive effect may nonetheless be granted if the entitled person can present a convincing case for direct and irreparable prejudice. (Art. 80l para. 3 IMAC).

475 Art. 31 of the Government and Administrative Organization Ordinance (GAOO / SR 172.010.1). It should be noted that cantonal authorisation is always required in addition.

476 see Art. 271 Swiss Criminal Code; SR 311.0.

477 As in the case of an inspection of the crime scene by the court.

478 Art. 336 para. 1 g Criminal Code

Finally in this context, it should be noted that the gathering of evidence by lawyers for a suspect or an accused, which is permissible according to the Anglo-American concept of law, is not permitted in Switzerland. Anyone who questions persons or examines documents on Swiss territory in order to testify before a foreign court must expect to be the subject of criminal proceedings on the grounds of illegal actions for a foreign state<sup>479</sup>. If a party to the proceedings wishes certain items of evidence to be taken in Switzerland, it must petition the competent foreign authority to issue a request for assistance.

### 3.4.3 Sealing of documents

The general part of the Federal Act on International Mutual Assistance in Criminal Matters contains a provision<sup>480</sup> on the sealing of documents. In view of the procedure introduced by the revision of the IMAC of 11 January 1997, sealing documents now makes sense only if the owner<sup>481</sup> of the papers asserts that they are protected by absolute professional confidentiality (Art. 321 Criminal Code) – which in mutual assistance terms normally refers to that of the attorney or the notary<sup>482</sup>.

The unsealing process is not a legal remedy against the rulings issued in mutual assistance proceedings (Art. 28 para. 1 e CCA). Instead, it is only one means of executing the request. Cantonal procedural codes continue to apply (Art. 9 and 12 IMAC). The authority responsible for ordering documents to be unsealed is therefore designated under cantonal law. At federal level, unsealing proceedings must be brought before the First Appellate Division of the Federal Criminal Court so that different authorities decide on the sealing of documents and the ultimate outcome of the case<sup>483</sup>.

### 3.4.4 Application of foreign law to the execution of requests

In principle, the law of the requested state applies to the execution of a request for mutual assistance<sup>484</sup>. If expressly requested and under certain conditions, the law of the requesting state may be applied as long as this is compatible with Swiss law<sup>485</sup>. The main application cases concern statements made under oath<sup>486</sup> or in other special forms so that evidence may be accepted in court<sup>487</sup>. However, the Federal Supreme Court has already allowed the application of foreign procedural law in connection with the use of undercover agents<sup>488</sup>.

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479 Under Art. 271 Criminal Code.

480 Art. 9 IMAC, which refers to Art. 69 of the Federal Administration of Criminal Justice Act, the principles of which are applicable to the inspection of documents.

481 And only he/she.

482 Banking secrecy alone does not justify documents being sealed because in itself it is not a ground for not granting mutual assistance (BGE 127 II 155 delib. 4c aa).

483 CCR RR 2007.159.

484 A precept also known as *locus regit actum*. see Art. 3 ECMA, Art. 9 TUS. The IMAC is applied directly where no treaty exists.

485 Art. 65 IMAC; Art. 8 AP II and Art. 9 point 2 TUS.

486 Art. 65 IMAC; Art. 8 AP II and Art. 9 point 2 TUS.

487 e.g. the presence of the accused or their attorney; see Art. 12 point 2, 18 point 5 TUS.

488 Unpublished Supreme Court ruling of 10.12.96 in the case of Michel-André W. (legal assistance to the USA).

With regard to the presence of parties to the foreign proceedings (state or district attorneys, examining magistrates, police officers, accused persons, defendants or their counsel, see. also 3.4.2, p. 59).

## 3.5 Handing Over Assets

### 3.5.1 Treaty law

International cooperation in criminal matters developed first and foremost in relation to extradition and the search for and handover of evidence. Treaty law allowed assets to be handed over only as evidence<sup>489</sup> or in the context of material extradition<sup>490</sup>. The only option to the victims of crimes against property was to demand the return of their property via civil law channels, and possibly to sue under foreign jurisdictions<sup>491</sup>.

The late 1980s saw international efforts to take action in relation to the proceeds of crime. Seizure and forfeiture were seen as efficient means of combating cross-border crime and denying the resources that sustained it. Efforts were devoted to the fight against drugs trading<sup>492</sup> and money laundering<sup>493</sup>. However, the wording of the relevant conventions provides only for the forfeiture of the proceeds of crime or the execution of confiscation rulings from other states. Monies that have been forfeited may be transferred only in the context of agreement on divisions that are left entirely to the discretion of the states parties<sup>494</sup>.

As the 1990s progressed, the problems associated with the restitution of assets took centre-stage internationally in a series of mutual assistance proceedings against politically exposed persons<sup>495</sup>.

The handover of assets for the purpose of confiscation or handover to their rightful owners was subsequently included in the Second Additional Protocol to the ECMA (Art. 12) and in other treaty texts in 2001<sup>496</sup>. It has now become one of the regular instruments of cooperation at international level.

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<sup>489</sup> See e.g. Art. 3 para. 1 and 6 para. 2 of the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters (SR 0.351.1 / ECMA); in such cases ultimate handover may be indirect, in that the requested state neglects to request the return of the assets that have been handed over.

<sup>490</sup> See e.g. Art. 20 para. 3 and 4 of the European Convention on Extradition of 13 December 1957 (SR 0.353.1 / ECE). If the conditions for extradition are fulfilled, the requested state will hand over to the requesting state any such objects or assets found to be in the possession of the prosecuted person that might be used as evidence or which originate from the criminal offence.

<sup>491</sup> Beat Frey, Die Wiedererlangung deliktischer Vermögenswerte in der Praxis der internationalen Rechtshilfe, Schulthess 1999, p. 77-79. Pascal Gossin, Récents accords bilatéraux et le rôle de l'Office fédéral de la justice p. 148 / Récents développements en matière d'entraide civile, pénale et administrative, Publication CEDIDAC 58, Lausanne 2004.

<sup>492</sup> United Nations Convention of 20 December 1988 Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (SR 0.812.121.03 / Vienna Convention).

<sup>493</sup> Council of Europe Convention of 8 November 1990 on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (SR 0.311.53 / CLau).

<sup>494</sup> Art. 15 CLau, Art. 5 para. 5 b ii) of the Vienna Convention.

<sup>495</sup> PEPs, i.e. heads of state and their associates (e.g.: Marcos, Duvalier, Suharto and Abacha).

<sup>496</sup> Art. 8 of the [Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union](#) (MAC- EU / [Official Journal of the European Communities No. C 197](#) of 12.07.2000 p. 3 - 23); Art. 14 para. 2 of the United Nations Convention of 15 November 2000 Against

The content of provisions on the handover of assets related to corruption and embezzlement has been toughened up in the more recent past. For the first time, Art. 57 of the United Nations Convention Against Corruption<sup>497</sup> subjects states parties to an obligation to hand over the proceeds of the embezzlement of public assets or the laundering of public monies that have been subject to fraud (Art. 57 para. 3 a UNCAC).

### 3.5.2 Swiss legislation

The new rule on the handing over of assets was one of the main points in the amendment of the IMAC on 4 October 1996. The law now draws a clear distinction between handing over for the purpose of giving evidence<sup>498</sup> and handing over for the purpose of confiscation or restitution to the entitled persons abroad<sup>499</sup>.

It should be pointed out here that special rules apply to the handing over of objects or assets in the context of extradition proceedings<sup>500</sup>.

The handover of objects and assets is an important field in bilateral agreements<sup>501</sup>.

### 3.5.3 Handover for the purpose of providing evidence

The handing over of objects, documents (originals) or assets to foreign authorities for the purpose of providing evidence is governed by Art. 74 IMAC, and is covered by most international agreements<sup>502</sup>. Third parties who have acquired rights in good faith<sup>503</sup> are protected – generally by means of an undertaking from the requesting state to return the objects or documents<sup>504</sup>. There are also rules in favour of authorities<sup>505</sup> and claimants.

In practice, surrender purely for the purpose of providing evidence poses few problems, provided the quantity or value of the transferred assets remains low.

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Transnational Organised Crime (SR 0.311.54 / UNTOC) and, in the more recent past, Art. 25 paras. 2 and 3 of the European Council Convention of 16 May 2005 on Money Laundering, the Financing of Terrorism and the Search, Seizure and Confiscation of the Proceeds from Crime (as things stand, Switzerland has neither signed nor ratified this Convention).

<sup>497</sup> UNCAC of 31 December 2003, passed by the Swiss parliament. Entered into force in autumn 2009.

<sup>498</sup> Art. 74 IMAC; for reimbursement see para. 2.

<sup>499</sup> Art. 74a IMAC.

<sup>500</sup> See Art. 59 IMAC ("material extradition"); objects or assets may be handed over even where the person themselves is not extradited, e.g. because of the escape or death of the person being prosecuted (Art. 59 para. 7 IMAC). There must be a very likely association between the criminal origin of assets and the facts which form the subject of the foreign investigations. However, handover is conditional upon an order from the requesting state not to confiscate the assets in question (BGE 123 II 595 delib. 4c).

<sup>501</sup> Provision for the handover of assets for the purposes of confiscation or restitution to their rightful owners is made in agreements with neighbouring countries. see Additional Agreement to the ECMA with Germany (Art. II para. 3 / SR 0.351.913.61), Austria (Art. II para. 3 / SR 0.351.916.32), France (Art. VI / SR 0.351934.92) and Italy (Art. VIII / SR 0.351.945.41), as well as other, more recent bilateral agreements (e.g. Art. 11 of the treaty of 9 July 2002 between the Swiss Confederation and the Philippines, SR 0.351.964.5). Where the USA is concerned, a handover obligation exists only in respect of objects and assets that belong to the requesting states or one of its component states (Art. 1 point 1 b TUS).

<sup>502</sup> see Art. 3 and 6 ECMA; Art. 16 and 21 TUS.

<sup>503</sup> The only reservation concerns rights in rem.

<sup>504</sup> Art. 74 para. 2 IMAC; Art. 6 point 2 ECMA.

<sup>505</sup> Also, in particular, the oft-cited fiscal liens (see Art. 74 para. 4 and Art. 60 IMAC), although they are of only minor significance in practice.

### 3.5.4 Handover for the purpose of restitution or confiscation<sup>506</sup>

#### 3.5.4.1 Preliminary remarks

Switzerland manages around 30 percent of the world's assets<sup>507</sup> and has thus for many years had to find solutions to the probability that assets of criminal origin will find their way into the Swiss financial sector. Switzerland has always been very clear that criminal assets are undesirable<sup>508</sup> and that everything possible must be done to comply with requests for their return from foreign states. The problems associated with handing over assets became particularly explosive in cases in which the assets in question were held on behalf of a (former) head of state or one of his associates<sup>509</sup>.

The handover of assets was introduced into the IMAC (Art. 74 paras. 2 and 3) on the basis of the additional agreements to the ECMA that Switzerland concluded with neighbouring states. Since the provision was regarded as too vague, the Federal Supreme Court drew up more detailed and practicable rules for the handover of assets in two high-profile cases<sup>510</sup>. The principles set by this legal precedent were largely codified with the revision of the IMAC and are now the subject of Art. 74a IMAC.

It is worth emphasising the following points:

- Following the revision of the IMAC, assets may be handed over for the purposes of restitution or confiscation under both the third (before the judgment<sup>511</sup>) and the fifth (after the judgment<sup>512</sup>) parts of the IMAC. If a legal assistance ruling contains the condition, laid down in the third part of the IMAC, that a final and executable judgment must have been issued on the part of the requesting state before assets may be handed over, this does not change the fact that mutual assistance is provided under the third part of the IMAC.
- The judge examining the mutual assistance case may generally exercise considerable discretion in deciding whether and on what terms a handover may be ordered<sup>513</sup>. Where the conditions for a handover are not met, the requesting state may, for exam-

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<sup>506</sup> For further detail on this topic, see MAURICE HARARI, *Remise internationale d'objets et de valeurs: réflexions à l'occasion de la modification de l'IMAC / Etudes en l'honneur de Dominique Poncet*, Geneva 1977, p. 167 ff.

<sup>507</sup> 5,374 billion as at the end of 2007 (Swiss National Bank figures).

<sup>508</sup> See e.g. Press release issued by the Federal Department of Foreign Affairs (DFA) on 14 June 2002 (freezing of Duvalier/Haiti assets): "This decision is an expression of the Federal Council's firm resolve to respect Swiss legislation as a whole. It wishes to prevent the Swiss financial sector being abused as a place of safety for assets originating from illegal acts. Ultimately, it wishes to ensure that, wherever possible, assets that have been acquired unlawfully are returned to their rightful owners."

<sup>509</sup> Politically Exposed Persons, or PEPs, such as Marcos, Duvalier, Suharto and Abacha. For an outline of the cases that have affected Switzerland: DAGMAR RICHTER, "Potentatengelder" in *der Schweiz: Rechtshilfe im Spannungsfeld der Menschenrechte von Tätern und Opfern*, ZaöRV 1998 p. 541 ff.

<sup>510</sup> Case of PEMEX (mutual assistance with Mexico): BGE 115 Ib 517 ff.; Marcos (mutual assistance with the Philippines): BGE 116 Ib 452 ff.

<sup>511</sup> This rule is not to be understood in absolute terms, however. In practice, for example, mutual assistance is still permitted to review a plea agreement that has already been accepted by a US court. The revision of sentences has also been considered, see Art. 5 para. 2 IMAC.

<sup>512</sup> Art. 94 ff. IMAC. In application of this article, damages will be collected for the requesting state, even though the law does not answer the question expressly (BGE 120 Ib 167).

<sup>513</sup> BGE 123 II 134 delib. 1.4. The obligation to hand assets over is laid down in Art. 1 para.1 b TUS and in the additional agreements to the ECMA concluded with Germany, Austria and France.

ple, be pointed in the direction of a civil suit. However, wherever possible, assets should be handed over pursuant to Art. 74a IMAC, which is the fastest and most cost-effective way for the requesting state.

### 3.5.4.2 Object

Art. 74a IMAC states that objects or assets that have been seized as collateral may be handed over on request to the competent foreign authority at the end of mutual assistance proceedings so that they may be confiscated or returned to their rightful claimants (para. 1). These objects or assets comprise, in particular, the product or the proceeds from a criminal act, their replacement value<sup>514</sup> and an unlawful advantage (para. 2 b) or even a claim for damages<sup>515</sup>.

The handover may be made at any stage in the foreign proceedings but is generally based on a final and executable decision from the requesting state (para. 3). This order governs the future ownership of the assets (forfeiture to the state, restitution to an entitled party). The IMAC does not use the term **criminal judgment**, referring merely to a **decision**, which presupposes simpler forms (decisions under civil or administrative law<sup>516</sup>). The requirement of a final and executable decision ruling is not absolute, however:

- This condition applies **only as a rule**; all clear cases are therefore exempt<sup>517</sup>.
- The requirement for a decision on forfeiture may also be waived in cases in which the circumstances of the case and subject of the foreign proceedings are covered by provisions in criminal law concerning the suppression of participation in or support for a **criminal organisation** (Art. 260ter and 72 Swiss Criminal Code). In such cases, the holders of the assets concerned must prove their lawful origin. Otherwise, pursuant to Art. 74 para. 3 IMAC, the handover of the disputed assets will be ordered without any further investigation of their origin<sup>518</sup>.

If handover is requested as part of the execution of a final and enforceable ruling in the requesting state, then the question of whether or not the objects or assets originate from a criminal act is deemed settled, as is that of whether the objects or assets in question must be returned or seized<sup>519</sup>, except where immediately obvious that this is not the case<sup>520</sup>.

If the handover of assets is requested before criminal proceedings have concluded, the executing authority will take the decision in consideration of all of the special features of the case<sup>521</sup>. The findings of criminal proceedings that are being held in the requested

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<sup>514</sup> See Art. 71 Swiss Criminal Code; see also Art. 7 point 2 and Art. 13 point. 3 CLau. Factoring in the replacement value has simplified the situation considerably.

<sup>515</sup> At least when the offence being prosecuted is compliant with the dual criminality principle (TPF RR.2008.244 of 16 February 2009, delib. 4).

<sup>516</sup> e.g. a ruling following "civil" seizure proceedings (in rem), a concept familiar in common-law states (BGE 132 II 178).

<sup>517</sup> In parliament, the example of the theft of a famous painting (the Mona Lisa) from a well-known museum (the Louvre) was given as an example. BGE 123 II 134 ff. created an initial positive prejudice.

<sup>518</sup> BGE 131 II 169 delib. 9.1 p. 184 (the Abacha case – mutual assistance to Nigeria).

<sup>519</sup> BGE 123 II 595 delib. 4e p. 604/605.

<sup>520</sup> BGE 129 II 453.

<sup>521</sup> BGE 123 II 595 delib. 4e p.605/606.

state in connection with the acts being prosecuted in the requesting state may serve to prove the unlawful origin of the assets concerned<sup>522</sup>. If the circumstances are so clear that there is no need whatever to investigate the criminal origin of the objects or assets, then the authority will order the handover<sup>523</sup>. In such cases, the interest of the requested state is limited to the observation of elementary treaty guarantees in proceedings that comply with the ECHR or UN Covenant II<sup>524</sup>. Furthermore, from this perspective consideration must be given to Switzerland's material interest under Art. 1a IMAC in not becoming a depository for large sums of money that have been diverted illegally by representatives of dictatorial regimes<sup>525</sup>.

If the criminal origin of the objects or assets requires further investigation, they should not be handed over until the situation has been resolved in court proceedings in the requesting state<sup>526</sup>.

### **3.5.4.3 Exceptions**

Art. 74a paras. 4 to 7 IMAC set out several sets of circumstances in which assets must be retained in Switzerland:

- If the injured party or persons not involved in the criminal offence who acquired rights in rem<sup>527</sup> to the assets in question in good faith, file claims in Switzerland. These persons must be ordinarily resident in Switzerland (unless their claims are not secured by the requesting state);
- If a Swiss authority (e.g. the tax authority) files claims;
- If the objects or assets are required for criminal proceedings that are pending in Switzerland, or might be confiscated by Switzerland;
- In the case of an asset agreement on division on the basis of the Federal Act on the Division of Forfeited Assets.

### **3.5.4.4 Procedure**

As a rule, the handover of assets is the subject of a separate request from the requesting state after it has received, in particular, the banking information that allows it to order the forfeiture of the disputed assets. The obligation to complete proceedings promptly nonetheless means that the requesting state cannot wait too long to order forfeiture, otherwise the assets that had been seized would have to be released. Whether or not assets have been held for an excessively long period is decided on a case-by-case basis<sup>528</sup>. Occasionally, the requesting state may be set a deadline by which it must order forfeiture, the

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<sup>522</sup> BGE 131 II 169 delib. 7.2-7.6 p. 177-182.

<sup>523</sup> BGE 123 II 595 delib. 4f p. 606; 123 II 134 delib. 5c and d p. 140 ff., 268 delib. 4a p. 274.

<sup>524</sup> BGE 123 II 595 delib. 4f p. 606.

<sup>525</sup> BGE 123 II 595 delib. 5a p. 606/607.

<sup>526</sup> BGE 123 II 595 delib. 4f p. 606, 268 delib. 4b p. 274.

<sup>527</sup> BGE 123 II 595 delib. 6b/aa p. 612/613. Statutory rights (esp. contracts) cannot be held against the handover of assets.

<sup>528</sup> Ten years was regarded as excessively long in a case involving Belgium (BGE 1A.314/2005), while 20 years was judged excessive in a case involving the Philippines (BGE 1A 27/2006 delib. 1).

consequence of not complying with the deadline being the release of the assets that had previously been seized<sup>529</sup>.

### 3.5.5 “Sharing” (division) of forfeited assets

For many years, the unlawful proceeds of drug trafficking and trading were not, as a rule, handed over to the requesting state under Art. 74a IMAC. Instead, they tended to be forfeited to the competent canton (SCR 107 lb 278) following preliminary seizure ordered as a legal assistance measure under Art. 24 of the Federal Act on Narcotics and Psychotropic Substances (NPSA; SR 812.121). In accordance with a precept that originated from the United States, it has since become accepted that the comprehensive review of cases with an international dimension should be a matter for one of the states concerned alone. Sharing seized assets allows the other states involved in the case to take a portion of the assets that have been confiscated. This encourages international cooperation because all of the states involved in the procedure for forfeiture of the proceeds of crime receive a share. This approach is also laid down in Art. 15 of the Money Laundering Convention<sup>530</sup>.

Previously, however, there was no legal foundation for the agreements on division concluded by Switzerland with foreign authorities. There was dispute as to who was actually competent to negotiate with the foreign authorities. There was also confusion about how Switzerland's share of assets under an agreement on division should be divided between the Confederation and the Cantons. The Federal Act on the Division of Forfeited Assets (SSAA; SR 312.4), which came into force on 1 August 2004, governs the competence and procedure for concluding international agreements on division. However, the details of the formula used to divide up the assets are left to the contracting parties. By contrast, the formula that determines the share of assets received internally by the Confederation and the cantons is fixed to ensure a fair balance and to avoid conflicts of interest. The Federal Office of Justice is responsible both for concluding international agreements on division and for the domestic distribution of forfeited assets between the Confederation and the cantons concerned.

The Division Act distinguishes between two types of international division arrangement. Active international division involves the Swiss authorities (cantonal or federal) applying Swiss law to order the forfeiture of assets of criminal origin. All or part of these assets are then offered to the foreign state that has participated in the criminal proceedings. Passive international division is where the criminal investigation is conducted by a foreign state and the competent foreign authorities order the forfeiture of the assets according to their own system of law. The Swiss authorities are required to provide the foreign authorities with the necessary evidence or information<sup>531</sup> or to hand over to them assets of criminal origin that are held in Switzerland, so that these assets may be returned to their rightful owners<sup>532</sup>. In return for Switzerland's help, the foreign state may allocate it a share of the forfeited assets<sup>533</sup>. Proceedings will be held to determine the handover of assets forfeited abroad to an authority in that country. The rightful owner of those assets may assert their

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<sup>529</sup> Ruling of the Federal Criminal Court RR.2007.7-11 delib. 3.2 (mutual assistance with Russia).

<sup>530</sup> SR 0.311.53; see also the Federal Council Dispatch of 19.8.92 (FG 1992 VI 9).

<sup>531</sup> Applying Art. 67a IMAC.

<sup>532</sup> Art. 59 and 74a IMAC.

<sup>533</sup> Dispatch on the SSAA of 24.10.2001, FG 2002 441.

rights in such proceedings<sup>534</sup>. Where an international division arrangement would be an option, the handover of the forfeited assets to the requesting foreign state will be ordered, subject to the conclusion of an agreement on division<sup>535</sup>. Once the handover ruling has become legally enforceable, the Federal Office of Justice will start to negotiate an agreement on division with the foreign state.

If assets are confiscated in Switzerland as part of international cooperation in criminal matters then they may, as a rule, be shared with the foreign state only if it guarantees reciprocity<sup>536</sup>. The Division Act does not grant foreign states any legal entitlement to a portion of the forfeited assets<sup>537</sup>. The Federal Office of Justice is responsible for negotiating an agreement on division with the foreign authorities. In advance of these negotiations, it will hold consultations with the competent cantonal authorities and – in matters which fall within the jurisdiction of the federal authorities – the Federal Public Prosecutor's Office or the competent administrative authority at federal level. It will also brief the competent Directorate within the Federal Department of Foreign Affairs<sup>538</sup>. The agreement on division must contain the details of distribution and the formula by which the assets will be divided up. As a rule, the seized assets will be divided equally between Switzerland and the foreign state<sup>539</sup>. The agreement on division will be concluded by the Federal Office of Justice. If the gross amount of the assets that have been or are to be forfeited exceeds ten million Swiss francs, the FoJ will obtain the approval of the Federal Department of Justice and Police, which will consult with the Federal Department of Finance before making its decision. If Swiss authorities are responsible for ordering the forfeiture of the assets concerned, the FoJ will obtain the approval of the competent authorities at cantonal and federal levels. The Federal Council will make a final decision in the event of any differences of opinion<sup>540</sup>. Switzerland's share of the assets once the agreement on division has been executed will then be divided between the Confederation and the cantons involved<sup>541</sup>.

Since a ruling on the rights of the rightful owner of the seized assets, and those of any injured parties, has already been made pursuant to Art. 70 ff of the Swiss Criminal Code in criminal proceedings, or in accordance with Art. 74a IMAC in legal assistance proceedings on the handover of those assets to a foreign authority, the negotiation and conclusion of an international agreement on division takes place at state level only.

Between 1992 and the entry into force of the Division Act, there were some 50 cases in which Switzerland shared assets worth more than USD 300 million in total with foreign states, almost exclusively with the United States. Assets were usually divided 50:50, although forfeiture was ordered in the USA in the majority of cases. Agreements on division of a value of over 60 million Swiss francs have been concluded with Japan, Canada, Liechtenstein and Pakistan since the Division Act entered into force.

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<sup>534</sup> Art. 74a paras. 4 and 5 IMAC.

<sup>535</sup> Art. 74a para. 7 IMAC.

<sup>536</sup> Art. 11 para. 2 SSAA.

<sup>537</sup> Art. 11 para. 3 SSAA.

<sup>538</sup> Art. 12 para. 2 SSAA.

<sup>539</sup> Art. 12 para. 3 SSAA.

<sup>540</sup> Art. 13 SSAA.

<sup>541</sup> Art. 15 SSAA.

## 3.6 New Instruments of Cooperation

### 3.6.1 Common procedural aspects

Some of the new instruments of cooperation provided for in the AP II and individual conventions or treaties (3.6.2 - 3.6.5, p. 71ff) require that investigations in mutual assistance proceedings remain confidential for a time, their findings being handed over continually for immediate use. Where requests to Switzerland are concerned, these results in a **conflict with the mutual assistance process**, since this requires that confidential information may be provided only with the consent of the person concerned, or on the basis of a legally enforceable final ruling issued in respect of that person (Art. 80c, d and I IMAC). The FoJ believes that this conflict should be resolved in the interests of cooperation. The proportionality principle nonetheless dictates a minimum of intervention in the rights of the parties. The process outlined below follows the practice laid down in the Federal Act on the Surveillance of Postal and Telecommunications Traffic (SPTA), which is becoming increasingly established. From the legal perspective, it is rooted in the precedence accorded to treaty law, and in Art. 80b IMAC, according to which participation in proceedings and access to files may be limited in the interests of the proceedings abroad, or owing to the nature of the action to be taken<sup>542</sup>.

**The process itself:** investigations in Switzerland that are conducted in the context of mutual assistance must remain secret only for the duration of the foreign investigative proceedings. Consequently, information gathered in Switzerland may be handed over to the requesting state on condition that it may not be used as evidence<sup>543</sup> until the ruling approving the requested mutual assistance has become final and enforceable. The requesting state must provide the corresponding undertaking in advance<sup>544</sup>. The same applies to further restrictions (e.g. prohibitions on use) which derive from Swiss legislation on procedure<sup>545</sup>. If, according to applicable Swiss law<sup>546</sup> a measure is subject to an approval procedure, then this must proceed as determined<sup>547</sup>. Here, the cognizance of the approving authorities is limited to whether or not the measure would be approved in the equivalent Swiss proceedings<sup>548</sup>. Where possible, the requested state will generally make a selection of the information it has obtained before handing this information over

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<sup>542</sup> On measures under the PTMA, see also Art. 18a para. 2 IMAC.

<sup>543</sup> i.e. before an adjudicating court; the information must remain admissible as evidence before a court determining enforcement measures, for example.

<sup>544</sup> As is the case where participants in the foreign proceedings are present at the execution of a mutual assistance request (see 3.4.2, p. 61 above). This provisional measure is intended to avoid misunderstandings and make it easier to enforce the condition.

<sup>545</sup> e.g. from the PTMA.

<sup>546</sup> Art. 12 para. 1 clause 2 IMAC.

<sup>547</sup> The approval procedure should not be confused with legal assistance proceedings. The latter are governed conclusively by the IMAC (see 3.3.3, p. 55 above).

<sup>548</sup> BGE 132 II 6, delib. 2. A "serious" suspicion in the sense of Art. 3 para. 1 a PTMA is to be evaluated solely on the basis of the summary of facts set out in the request for mutual assistance. Unlike domestic proceedings, no evidence need be presented.

to the requesting state<sup>549</sup>. Naturally, proceedings are not to be kept secret from the FoJ, which must be notified immediately of all rulings<sup>550</sup>.

This results in the following **procedural steps**:

- a) Summary review and delegation of execution by the FoJ.
- b) Ruling on considering the request and interim ruling: in addition to the usual content, the ruling also contains:
  - brief statements on the further steps in the process, specifically on any approval process
  - the conditions attached to the execution of the request, including the requirement that the requesting authorities must provide the corresponding assurances prior to execution
  - information on confidentiality with respect to the persons concerned within the meaning of Art. 80h letter b IMAC.
- c) Immediate notification of the interim ruling to the FoJ alone. In urgent cases, the FoJ will be asked to state whether or not it will be lodging an appeal.
- d) Any approval process. (This may be conducted even before the interim ruling has become legally enforceable).
- e) Assurances from the requesting state must be obtained. (This may be done even before the interim ruling has become legally enforceable).
- f) Execution of measures, triage of documents and handover for investigation purposes.
- g) Where provided for in procedural law, notification of surveillance to the persons concerned (see e.g. Art. 10 para. 2 SPTA) as soon as the foreign proceedings permit.
- h) Grant of a legal hearing to the persons concerned in the sense of Art. 80h letter b IMAC<sup>551</sup>, as soon as the foreign proceedings permit. This is followed by the issue and publication of the final ruling<sup>552</sup>.
- i) Once the final ruling has become legally enforceable the requesting authority will be informed of the findings of investigations<sup>553</sup>.

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<sup>549</sup> On the triage of documents see 2.6.4.2, p. 34 above.

<sup>550</sup> Art. 5 O-IMAC. The FoJ is entitled to file an appeal (Art. 25 para. 3 and 80h a IMAC). The interim decree under which confidential information may be handed over to the requesting state at an early stage for investigation purposes is independently subject to appeal (Art. 80e para. 2 and 80i IMAC).

<sup>551</sup> An obligation in this regard exists only if the person concerned is resident in Switzerland or has an address for service here (Art. 80m IMAC).

<sup>552</sup> Art. 80m IMAC).

<sup>553</sup> Art. 80d IMAC.

### 3.6.2 Taking of evidence by video and telephone conference

As a general rule, neither witnesses nor accused persons are under any obligation to appear for interview abroad in response to a summons<sup>554</sup>. Under the IMAC and the ECMA they may be interviewed only as part of the legal assistance process, i.e. by the requested authority, which will apply its own laws of procedure. Persons who are involved in the foreign proceedings may be present at such interviews, but they must remain passive<sup>555</sup>.

However, under the terms of later conventions and bilateral agreements<sup>556</sup>, the requesting authority may interview witnesses or accused persons itself by video or telephone conference, and in accordance with its own laws of procedure. Where a video link is used, witnesses – but not accused persons – may be compelled to appear for the interview. By way of checks and balances, the relevant agreements provide that the application of foreign law must not violate the fundamental principles of the system of law of the requested state, and that the witness may invoke the right to remain silent that they have in that state. Interviews by video conference are supervised by a representative of the requested (judicial) authority. Such supervision is not absolutely necessary for telephone conferences in which the witness participates voluntarily. The transcript of the interview is normally produced by the requesting authority. The requested authority states only facts such as the identity of the interviewee and the other persons physically present for the interview<sup>557</sup>. As an exception to the principle of no-charge mutual assistance, the attendant costs – specifically those for operating the video conferencing system, connection charges and any interpreter's fees – are met by the requesting state<sup>558</sup>.

Where control over the proceedings lies primarily with the requesting authority, the taking of evidence by video or telephone conference exceeds the bounds of the IMAC. Specifically, it cannot be regarded as a variation on the presence of participants in foreign proceedings (Art. 65a IMAC). The taking of evidence in this way thus requires a treaty basis, such as the AP II ECMA<sup>559</sup>. Given the control that a foreign authority would have over proceedings, combined with the possible coercion of witnesses, the Convention was subject to a voluntary referendum in Switzerland<sup>560</sup>.

Where a foreign request to interview persons by video or telephone conferences is to be accommodated as per a treaty, certain interventions in the mutual assistance proceedings are required as they are in the case of covert investigation methods<sup>561</sup>. The requesting authority may produce the transcript, and information gained may be used immediately only if legal assistance proceedings in Switzerland are conducted in advance of execution, i.e. the interviewing of witnesses.

In the view of the FoJ, this is justified where all of the following conditions are met:

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<sup>554</sup> See in particular Art. 8 and Art. 11 point 1 a ECMA, Art. 69 para. 1 IMAC.

<sup>555</sup> See 3.4.2, p. 65.

<sup>556</sup> e.g. Art. 9 and 10 AP II ECMA and Art. VI AP/I-ECMA, as well as Art. 22 of the mutual assistance treaty between Switzerland and the Philippines of 1.12.2005 / SR 0.351.964.5.

<sup>557</sup> Art. 9 point 5 c and Art. 9 point 6 AP II ECMA.

<sup>558</sup> Art. 5 point 2 AP II ECMA.

<sup>559</sup> BGE 131 II 132 deliberations 2.2 and 2.3.

<sup>560</sup> Dispatch on the AP II / FG 2003 3267 ff. point 6.

<sup>561</sup> See 3.6.1 p. 71 on the admissibility of intervention, in particular.

- To the extent that confidential information is concerned and the matter is not urgent, the requesting authority must be an adjudicating court;
- Where confidential information is concerned, any related documentation must have been handed over previously in the context of mutual assistance;
- The persons concerned – who are generally, but not always those being interviewed – must have been identified;
- The issue to be raised at the interviews must be outlined clearly in the mutual assistance request, and
- The requesting authority must state expressly that it will uphold the principles laid down as per.

It goes without saying that the person concerned must be granted a legal hearing before any such direct final ruling is issued.

If these conditions are not met, then whether or not the requesting authority is able – as applies to the presence of foreign representatives under Art. 65a IMAC and regardless of who is in charge of proceedings – to dispense with any physical records, specifically protocols, must be examined, as must the authority's ability to undertake not to use the findings until legal assistance proceedings have been completed. In such cases, witness interviews may be ordered by means of an interim ruling. The final ruling will then be issued after such interviews have taken place. Unlike cases in which foreign representatives are present under Art. 65a IMAC, the FoJ considers this interim ruling **always** to be subject to appeal<sup>562</sup> because the foreign authority is in charge of proceedings. It must therefore be notified to the person concerned.

If neither of these two routes may be taken in a given case, the request must be rejected with reference to the "fundamental principles" of Swiss law in the sense of Art. 9 point 2 AP II ECMA.

The Office of the Attorney General of Switzerland has modern video-conference rooms in Bern, Zurich, Lausanne and Lugano that may also be made available to cantonal authorities.

### **3.6.3 Telephone surveillance and other technical surveillance measures**

The monitoring of telecommunications is covered by Art. 20 UNTOC, although this provision refers to the conditions laid down under national law. The CCC, which has been signed by Switzerland but not yet ratified, will codify the obligation to cooperate in the real-time monitoring of telecommunications traffic.

Art. 18a para. 2 IMAC permits mutual assistance in response to a request for the surveillance of mail and telecommunications services. The corresponding criteria and procedures are laid down in the SPTA. As described in 3.6.1, p. 69 above, however, surveillance measures (especially in real time, which by their nature must remain secret) conflict with the provisions of the IMAC. Furthermore, the reference to the procedure provided for in the SPTA means that the Swiss authority must guarantee the appeal pro-

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<sup>562</sup> On limited appeal options in cases in which foreign officials are present, see Art. 80e para. 2 b IMAC and 3.4.2 S. 61.

cedure arising from the Act. Coordinating the two procedures has so far proven problematic.

In practice, the procedure is that described under 3.6.1. When the Swiss authority executes a request that involves surveillance measures, once it is decided to consider the request it must then obtain any authorisation that is required under Art. 7 or 9<sup>563</sup> SPTA. Once the authority has received the information, it must conduct a triage process. In doing so it should not be too strict, because the person under surveillance might be using an unfamiliar language or dialect, or even code words. The only information that really must be separated out at this stage is that which falls under professional confidentiality regulations. Where necessary to protect the foreign investigations, information may be forwarded without the person concerned being notified. In this case, the Swiss authority must be guaranteed that this information will not be used in evidence before the mutual assistance proceedings have been concluded, and that the foreign authority will remove the information from the files if an appeal is admitted. As explained under 3.6.1, the FoJ must be informed in advance of every decision to pass information on to a foreign authority, so that it may file an appeal or formally waive its right to do so.

The notifications prescribed by the SPTA must be made at the end of the foreign proceedings, although this is not necessary if the criteria set out in Art. 10 para. 3 SPTA are fulfilled. SPTA-required notifications that are to be made outside Switzerland must be instigated by the foreign authority. Since mutual assistance proceedings are administrative in nature, the Swiss authorities have no basis in law on which to request mutual assistance from third countries so that such notifications can be made.

Once the notifications provided for in the SPTA have been completed, the Swiss authority will issue a final ruling in which it confirms the grant of mutual assistance and its scope or, where an appeal against the surveillance order is successful, in which it refuses such assistance. The FoJ has the authority to appeal against the refusal of mutual assistance<sup>564</sup>. The appeal relates to the final ruling, as well as to earlier interim rulings to execute the request, including those issued under the SPTA<sup>565</sup>. This legal remedy is intended to guarantee the cogency of Swiss law and compliance with Switzerland's obligations under international law after the CCC comes into force.

In addition to the FoJ, the final ruling is released only to those persons who have been personally and directly affected by the surveillance measures, i.e. the subscriber to the line that was monitored<sup>566</sup>. The subscriber will not be notified if they do not live in Switzerland or are unknown, and if the executing authority is not required to make any notification under Art. 10 para. 3 IMAC.

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<sup>563</sup> This applies in particular if the foreign authority is requesting access to the records of telephone surveillance ordered as part of Swiss criminal investigations. The case law that the person affected by surveillance measures has no right to appeal against them (BGE 1A.154/2003 of 25.9.2003) applies to surveillance measures in place before the PTMA entered into force. They therefore do not fall under the strict rules of use laid down in the PTMA.

<sup>564</sup> Art. 80h IMAC.

<sup>565</sup> As is the case with other interim decrees in execution proceedings, such as those related to the sealing of documents (BGE 126 II 495 delib. 5e dd).

<sup>566</sup> In accordance with the rules on banking documents, persons using a line that is registered under the name of a third party are not protected.

Surveillance measures are extremely expensive in Switzerland. The executing authority must inform the requesting authority that executing the request will result in high costs. These costs may be borne by the requesting authority if they agree or are contractually obliged to do so<sup>567</sup>. In all other cases the costs must be borne by the executing authority<sup>568</sup>.

The principles described above apply *mutatis mutandis* to other surveillance activities in which technical monitoring equipment is used and for which the applicable procedural law refers to the criteria laid down in the SPTA.

The technical surveillance of vehicles<sup>569</sup> poses particular problems. For one thing, the foreign authority has no control over the journeys made by the vehicle in question, which may cross through Swiss territory without any advance notice<sup>570</sup>. Furthermore, practices differ widely between the cantons and the Confederation, and may not necessarily require the mechanisms laid down in the SPTA. Finally, the Swiss authorities have no control whatsoever over the data collected in this way, since they are forwarded directly to the foreign authority without the Swiss authorities being able to intervene. Essentially, executing such a request involves tolerating investigations on Swiss territory rather than Swiss authorities conducting investigations themselves. The most effective solution at the present time is to nominate as lead canton a cantonal authority which is under no obligation to approve the surveillance<sup>571</sup>.

### 3.6.4 Covert investigations

Neither the Federal Act on Covert Investigations (ACI<sup>572</sup>) or the IMAC contain any specific provisions on the use of covert investigations in the context of mutual assistance. This type of cooperation is nonetheless admissible under treaties such as the AP II<sup>573</sup>. Pursuant to its Article 19, the states parties may agree to support each other in criminal investigations by officials acting covertly or under a false identity. An official acting covertly is no longer required to restrict their radius of action to national borders, but should be able to investigate abroad in the context of a given case. With the exception of criminal and civil law responsibility governed expressly in Art. 21 ff. AP II, this commission must be laid down in a special agreement. It must consider the domestic laws of both states parties. The decision on the request and its execution, however, is governed by the law of the requested state.

The ACI thus applies to the review and execution of requests addressed to Switzerland. The conditions laid down in the law include a list of criminal acts, as well as the admission of one investigator only who is employed at least temporarily for a police task, who is not paid any performance-related bonus and whose intervention must be limited to

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<sup>567</sup> e.g. Art. 5 AP II.

<sup>568</sup> The FoJ is to be informed in such cases so that it may claim reciprocal rights where an equivalent Swiss request is executed in the state in question.

<sup>569</sup> e.g. the fitting of GPS or listening devices on suspects' vehicles.

<sup>570</sup> In practice, the border is generally crossed before the request for legal assistance is made. The request will simply ask the Swiss authorities to confirm the information that has been received.

<sup>571</sup> This approach will no longer apply when the new Federal Code of Criminal Procedure enters into force, as it requires that authorisation be obtained for surveillance activities (Art. 280 of the draft CCP).

<sup>572</sup> SR 312.8.

<sup>573</sup> BGE 132 II 1 delib. 3. It is uncertain whether the "special relationship of trust" with the requesting state constitutes a cumulative or an alternative pre-requisite.

providing further details on a criminal act that has already been established. The executive provisions of the ACI state that the approval procedure must be laid down, as must the condition that the covert official must report regularly and fully to the (foreign) contact person. Finally, the suspect must be informed no later than when the investigation has been concluded or the proceedings suspended that they have been the subject of covert investigations.

A copy of the reports of the covert official who has been authorized to investigate in Switzerland on the basis of a request for mutual assistance must be sent to the competent Swiss executing authority. As described in detail under 3.6.1, p. 69, proceedings under the IMAC must be observed as closely as possible in the case of covert investigations. This means that control over the proceedings should be retained wherever possible, and that the Swiss authority must at least be informed of the progress of investigations. To comply with the procedure laid down in the IMAC, legal assistance must be restricted by conditions that prevent the reports being used in evidence before proceedings have been concluded. From the procedural perspective, the executing authority must, of course, obtain the permission of a court in accordance with the ACI. The agreement with the requesting state defines the content and the execution of the request for legal assistance. The object of the request must be established in this agreement in the form of an interim ruling which – like all rulings – must be submitted to the FoJ immediately. Under Art. 80h letter b IMAC, once issued rulings must be served on the persons concerned, except where their residential address or registered office is outside Switzerland. In our view, notification to the accused person stipulated in the ACI is not subject to the IMAC, meaning it must be made regardless of residential address or registered office. It would therefore seem permissible to leave this task to the requesting authority<sup>574</sup>.

### 3.6.5 Joint investigative groups

The aim of this form of cooperation is to combat organized and cross-border crime more effectively and to fulfil the new requirements for judicial cooperation. A legal foundation for joint investigative groups was created in Art. 20 AP II<sup>575</sup>, in Art. XXI of the Additional Agreement to the ECMA with Italy<sup>576</sup> and in Art. 19 of the United Nations Convention on Transnational Organised Crime<sup>577</sup>.

Art. 20 AP II lays down the conditions for the creation and working methods of joint working groups. The use of such a group requires that criminal proceedings have been com-

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<sup>574</sup> see 3.6.1, p. 75 for further information on the process and the legal foundation.

<sup>575</sup> SR 0.351.12, which adopts Art. 13 of the EU Convention almost in its entirety (explanatory report to the second additional protocol to the ECMA, point 156).

<sup>576</sup> SR 0.351.945.41. Art. XXI AP/I-ECMA, which precedes AP II, does not lay down the criteria for this form of cooperation exhaustively. The practical treatment of the provision should therefore favour the relevant international regulations. This provision states that, having been briefed in advance by the central authorities (the Ministry of Justice in the case of Italy, and the FoJ for Switzerland), judicial authorities may cooperate in joint investigative groups (see TPF RR.2008.277 of 1 March 2010 as a case in practice).

<sup>577</sup> SR 0.311.54. The criteria for this form of cooperation are not laid down in this provision either. See also Art. 20 of the treaty between the Swiss Confederation and the Federal Republic of Germany on cross-border police and judicial cooperation (SR 0.360.136.1), Art. 13 of the treaty between the Swiss Confederation, the Republic of Austria and the Principality of Liechtenstein on cross-border cooperation between security and customs authorities (SR 0.360.163.1) and the agreement between the Federal Department of Justice and Police and the Justice Department of the United States of America, acting on behalf of the competent criminal prosecution authorities of the Swiss Confederation and the United States of America, on the use of joint investigative groups to combat terrorism and its financing (SR 0.360.336.1).

menced in at least one of the states concerned, and that one of the two states has submitted a request for legal assistance<sup>578</sup>. The request for legal assistance and the (as yet unsigned) agreement on the creation of the investigative group form the subject of an interim ruling which must be notified immediately to the FoJ.

The competent authorities in the states concerned agree the objective, the duration of work and the composition of the group. The agreement must state the names of the persons who belong to the group<sup>579</sup>, as well as provisions on costs and on the per diem expenses that are to be paid to the group members. The group and its seconded members act under the responsibility of a representative of the competent authority of the contracting party on whose sovereign territory the group is to work<sup>580</sup>. The group leader acts within the authority accorded to them under domestic law<sup>581</sup>. The group must observe in all respects the law of the state in which it is active. The group leader will issue instructions to the members of the group, who must carry them out in observance of the conditions laid down in the agreement creating the group<sup>582</sup>. The seconded members are entitled to be present for investigative measures that fall within the sovereignty of the state in which they are working. The group leader may nonetheless decide otherwise for specific reasons<sup>583</sup> in accordance with the law of the state party on whose sovereign territory the group is active<sup>584</sup>. On the instructions of the group leader, the seconded group members may conduct certain investigations in the state in which they are active on the basis of that state's domestic laws, provided such investigations have been approved by the competent authorities of that state and those of the seconding state<sup>585</sup>. Furthermore, members seconded to the group may request that the competent authorities in their country take action that the investigative group as a whole deems necessary. Such requests will be considered by the state party concerned in accordance with the conditions that would apply to measures requested in the context of domestic investigations<sup>586</sup>. The state in which the group is active does not need to submit a request for mutual assistance in such cases. This aspect of the article is particularly new<sup>587</sup>.

Art. 20 point 10 AP II governs the limited use of the information that is gathered by members and seconded members during their time with the joint investigative group. Should these joint investigations result in the foreign authorities having access to evidence or to information held in the files on the Swiss criminal proceedings as a result of national in-

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578 Federal Council Dispatch of 26 March 2003 concerning the second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (FG 2003 3267, 3290).

579 I.e. police officers, public prosecutors, judges and other persons.

580 This means, specifically, that responsibility for the group may change depending on objective where the group conducts investigations in several countries.

581 Art. 20 para. 3 a AP II.

582 Art. 20 para. 3 b AP II.

583 According to the [Explanatory Report on the AP-II](#), point 164, the term "specific reasons" was not defined, but may be interpreted to cover cases, for example in which witness statements must be taken in proceedings against sex crimes, especially where the victims are minors. In certain cases, such decisions may also be prompted by operational reasons. The presence of a seconded group member may not be prohibited on the grounds of their foreign citizenship alone.

584 Art. 20 para. 5 AP II.

585 Art. 20 para. 6 AP II.

586 Art. 20 para. 7 AP II.

587 [Explanatory Report on the AP-II](#) point 166.

vestigations, then the procedure set out for the unsolicited handover of evidence and information is to be applied *mutatis mutandis* (Art. 67a IMAC<sup>588</sup>).

In certain cases, this may be jeopardised by criminal investigations being announced at too early a stage<sup>589</sup>. It is essential under such circumstances to maintain confidentiality with regard to the request for legal assistance, and to limit access to documents and participation in the proceedings. This is, in fact, permitted under the terms of Art. 80b para. 2 IMAC and Art. V para. 6 of the additional agreement to the ECMA with Italy<sup>590</sup>.

### 3.7 Costs of mutual assistance

In principle, states provide each other with assistance free of charge, with the exception of fees for experts and the expenses incurred in the handover of objects or assets for restitution to their rightful owners<sup>591</sup>. Where there is no international agreement, the only exception to this principle is where Switzerland has not been able to obtain free assistance in the requesting state. In such cases, the Swiss authorities may require reimbursement from the requesting state of all expenses incurred in the execution of the request<sup>592</sup>. However, no invoice will be submitted if the total costs do not exceed 200 Swiss francs<sup>593</sup>.

The sharing of costs between the Confederation and the cantons is also based on the principle of no reciprocal fees or compensation for expenditure or the costs of work<sup>594</sup>. If the Confederation takes over proceedings merely because a canton does not issue a ruling within an appropriate period of time, it will charge that canton with the costs thereby incurred<sup>595</sup>.

The entitled parties will generally receive the ruling on whether to consider the request, as well as the interim and final rulings, free of charge. Fees may be charged only in cases of capriciousness and those which constitute an abuse of the law<sup>596</sup>. Since the IMAC contains no ruling in this respect, the cantons may apply their individual cantonal tariffs, while the Ordinance on Fees and Costs in Administrative Proceedings (SR 172.041.0) applies at the federal level.

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<sup>588</sup> As in Art. V para. 6 AP-I/ECMA.

<sup>589</sup> This may occur, in particular, in investigations concerning organised crime, or where investigations being revealed too early runs the risk of the proceeds of crime being concealed (money laundering) or collusion, of evidence being destroyed or of the intimidation or threatening of witnesses.

<sup>590</sup> Cf. 3.6.1, p. 71 on this point.

<sup>591</sup> Art. 31 and 80q IMAC, Art. 20 ECMA and Art. 5 AP II, Art. 34 TUS.

<sup>592</sup> Art. 12 O-IMAC.

<sup>593</sup> Art. 12 para. 3 O-IMAC.

<sup>594</sup> Art. 13 O-IMAC.

<sup>595</sup> Art. 13 para. 1bis O-IMAC.

<sup>596</sup> CCR RR 2008.243 delib. 7.1 and case law cited.

## 4 Service of Judicial Documents and Summonses

### 4.1 Channels of Transmission and Form of Service

Service of documents is a formal act of jurisdiction and thus an official act. However, according to the customary practice of the Federal Supreme Court,<sup>597</sup> it is "not a binding and mandatory regulation of a concrete legal relationship in accordance with administrative law" and it does not constitute intervention in the rights of the recipient. Consequently, the order of the requested Swiss authority to serve documents for the benefit of a foreign state is not a ruling and therefore not subject to an appeal.

Service may be effected in several ways. Not all options are permitted in all cases. On the individual country pages of the Guide to International Mutual Assistance, the FoJ recommends the simplest of the following forms in each case (the favourability principle). In addition, the individual country page also list the possible alternative transmission channels, the applicable legal foundations, practical information, the regulations concerning translation and notarisation, other special considerations and the necessary forms, addresses or links to establish the competent local authority abroad<sup>598</sup>. No charge is made for service in Switzerland. Service abroad is also generally free of charge, unless a note to the contrary appears under the "Caution" heading on the country page.

#### 4.1.1 Direct service by mail to the recipient

Direct service by mail from abroad is deemed equivalent to the undertaking of official acts on Swiss territory<sup>599</sup> and is permitted only to the extent that it is laid down in treaties<sup>600</sup>, providing the recipient state requests this type of service or (unilaterally) permits it, or if the Federal Council declares it permissible<sup>601</sup>. The Federal Council has done so<sup>602</sup> in respect of all services (with the exception of summonses) to persons who are not themselves being prosecuted abroad. Direct service by post to recipients in Switzerland of documents for minor traffic offences is permitted in all cases<sup>603</sup>. The procedural documents and court rulings that are served directly will be accompanied by a letter which

<sup>597</sup> Unpublished BGE of 9.9.93; unpublished BGE of 1.3.96

<sup>598</sup> <http://www.rhf.admin.ch/rhf/fr/home/rechtshilfefuehrer/laenderindex.html>

<sup>599</sup> Art. 271 of the Swiss Criminal Code concerning foreign authorities in Switzerland, as well as Art. 299 SCC concerning Swiss authorities abroad

<sup>600</sup> Art. 16 AP II (0.351.12), Art. 52 [CISA](#) (this text was not published under the SR classification system. It may be accessed via the following link: <http://www.rhf.admin.ch/rhf/fr/home/strafrecht/rechtsgrundlagen/multilateral/sdue.html>), Art. 28 Anti-Fraud Agreement (SR 0.351.926.81) and previously Additional Agreements to the ECMA with France (Art. X; SR 0.351.934.92), Italy (Art. XII; SR 0.351.945.41), Germany (Art. IIIA; SR 0.351.913.61 and Austria (Art. IX, SR 0351.916.32) in conjunction with Article 32 of the treaty of 27 April 1999 between the Swiss Confederation, the Republic of Austria and the Principality of Liechtenstein on cross-border cooperation between security and customs authorities, SR 0.360.163.1).

<sup>601</sup> Art. 68 para. 2 IMAC.

<sup>602</sup> Art. 30 O-IMAC.

<sup>603</sup> Special service regulations may also exist abroad in respect of road traffic offences. The details are given on the corresponding country pages in the Guide to International Mutual Assistance.

states that the recipient has received information on their rights and obligations in connection with the service of documents from the authority designated in that letter<sup>604</sup>.

Procedure in practice: the requesting Swiss authority may decide whether service should be made by normal post, registered mail, registered mail plus written acknowledgement of receipt, or an appointed private courier service (DHL, FEDEX etc.). No duress may be applied. Should service be unsuccessful, the procedure described in 4.1.2 or 4.1.3 below should be followed.

#### **4.1.2 Service through official channels**

The applicable treaty basis governs how the documents are sent from the requesting authority to the requested authority. This results in a wide variety of transmission channels. Many treaties provide for direct contact between authorities (requesting authority → requested authority)<sup>600</sup>. If only the ECMA applies, for example, then the usual route will be via the ministries of justice of the two countries concerned.

In Switzerland, documents transmitted via official channels will be served by the executing Swiss authority either by mail against confirmation of receipt, by personal delivery to the addressees or, on specific request, in accordance with the laws of the requesting state<sup>605</sup>. Service is deemed effected if acceptance of the document or refusal to accept has been confirmed in writing<sup>606</sup>. To establish **confirmation of service**, it is necessary to produce a dated acknowledgement of receipt signed by the recipient or, if service is refused, a declaration from the serving officials that attests to the form and date of service or the fact that acceptance was refused<sup>607</sup>.

#### **4.1.3 Service through diplomatic channels**

In the absence of any treaty basis, service must generally be conducted via diplomatic (possibly consular) channels. This is the most complicated method of handover. In practice, it is used only where the options described above prove impossible. The documents are handed over to the competent representation in the recipient state in accordance with national law. This representation will then forward the documents to the foreign ministry of the recipient state. The next links in the chain are governed by the domestic law of the recipient state, with service being documented in the same way as transmission via official channels.

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<sup>604</sup> Art. 16 para. 2 CP II and Art. 28 para. 4 Anti-Fraud Agreement (this type of form is provided in several languages on the relevant country pages).

<sup>605</sup> Art. 68 para. 1 IMAC, Art. 7 point 1 para. 2 ECMA, Art. 22 point 1 TUS.

<sup>606</sup> Art. 68 para. 3 IMAC.

<sup>607</sup> Art. 29 O-IMAC.

#### 4.1.4 Service by the Swiss representation to the recipient by post

Transmission and service in this way is not provided for in any treaty. Certain states have nonetheless asked our representations to effect service in this way for certain types of documents (e.g. those relating to road traffic offences) or in general. It is almost impossible, however, to offer reciprocity to the representation of the recipient state in Switzerland. Service via the Swiss representation may also be used in cases concerning Swiss citizens, although more simplified formal requirements apply in the majority of cases<sup>608</sup>.

Procedure in practice: the submission of such requests for service must be instigated by the FoJ in all cases. The FoJ will then forward the request to the competent Swiss representation, which will send the documents direct to the recipient by post against confirmation of receipt. No duress may be applied. Should service be unsuccessful, the procedure described in sections 4.1.2 or 4.1.3.

## 4.2 Summonses

The summoning of persons living in Switzerland to appear as defendants or witnesses in foreign criminal proceedings is a special type of service. Switzerland requires that summonses for defendants reach the requested authority<sup>609</sup> at least thirty days before the date set for their appearance<sup>610</sup>. Persons who have been summoned<sup>611</sup> may not suffer legal or material prejudice in either the requesting or the requested state if they do not comply with the summons<sup>612</sup>. Consequently, anyone accepting a summons to appear before a foreign authority is under no obligation to appear abroad<sup>613</sup>. Summonses containing threats of compulsion will not be served<sup>614</sup>. If the summons is unsuccessful, it is still possible via legal assistance channels to request that the person concerned be interviewed.

Travel and accommodation expenses, as well as the witness's allowance, must be paid by the requesting state. Anyone appearing as a witness in the requesting state enjoys safe conduct; their personal liberty may not be restricted on the grounds of acts or convictions which occurred prior to their departure from the requested state. This immunity ends upon departure from the requesting state or, at the latest, fifteen days after the person is discharged from their duties as a witness<sup>615</sup>. According to the Swiss point of view,

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<sup>608</sup> E.g. for translation and notarisation. This channel is not permitted if it is forbidden by the country of residence, or if a treaty exists with this state and no translation is required. Similarly, this option is not used where the Swiss authority may serve documents direct to the recipient by post. Please contact the FoJ for further information.

<sup>609</sup> The canton in the case of direct contact, otherwise the Federal Office of Justice.

<sup>610</sup> See Swiss reservation in respect of Art. 7 ECMA (similar rules also apply to Swiss authorities in the case of summonses for recipients domiciled abroad. The time period set in the declarations of the recipient states may not exceed fifty days [Art. 7 para. 3 ECMA]), see also Art. 22 point 3 TUS. These periods must be taken into account by the authority issuing the summons if it is served directly by post (see 4.1.2 above).

<sup>611</sup> With the exception of US citizens in cases of summonses from the USA.

<sup>612</sup> Art. 8 ECMA, Art. 24 TUS.

<sup>613</sup> Art. 69 para. 1 IMAC.

<sup>614</sup> Art. 69 para. 2 IMAC. Exception: summonses for US citizens to appear before US authorities. In practice, any threats of compulsion are omitted in the summons served by the Swiss authority, and the summons is still served in this modified form.

<sup>615</sup> Art. 12 ECMA. For the USA: 10 days: Art. 27 TUS.

anyone who has not been summoned through official channels is also entitled to this immunity<sup>616</sup>. However, any and all offences committed by a summoned person after they have entered the requesting state will not be covered by the immunity clause. As such, a witness who knowingly commits perjury before the foreign authority and is subsequently arrested does not enjoy any protection. In the case of summonses to appear in states with which Switzerland has not concluded an agreement on mutual legal assistance in criminal matters, the recipient may require that the Swiss authority effecting service obtain an appropriate written assurance before returning proof of service to the requesting authority<sup>617</sup>.

Where a person is **transferred** to the requesting state as an accused person, the rules applying to extradition<sup>618</sup> must be observed.

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<sup>616</sup> BGE 104 Ia 463.

<sup>617</sup> Art. 69 para. 3 IMAC.

<sup>618</sup> Temporary extradition, Art. 19 point 2 ECE, Art. 58 para. 2 IMAC.

## 5 Cooperation with International Courts

The international community of states has decided to entrust the prosecution of serious violations of international law (genocide, crimes against humanity, war crimes) to courts with supranational jurisdictions. There are three types of court:

- a) **The two international criminal tribunals, ad-hoc** criminal courts to try those responsible for the grave violations of international humanitarian law committed in the former Yugoslavia<sup>619</sup> (**ICTY**) and in Rwanda<sup>620</sup> (**ICTR**). These ad-hoc tribunals have a certain (primary) authority and duration.
- b) **The Special Court for Sierra Leone<sup>621</sup> (SCSL)** is a **mixed** criminal court which combines the law of Sierra Leone with international human rights law. Its task is to try those responsible for serious breaches of international humanitarian law, as well as certain crimes under the national law of Sierra Leone. It is part of the Sierra Leone justice system.
- c) **The International Criminal Court<sup>622</sup> (ICC)** is a **permanent** tribunal. It is responsible for prosecuting violations of international humanitarian law committed on the sovereign territory of one of its member states or by a citizen of one of those states. The ICC holds subsidiary authority, i.e. it intervenes only where the national courts concerned are unable or unwilling properly to prosecute violations of international humanitarian law committed on their territories.
- d) **The Special Tribunal for Lebanon<sup>623</sup> (STL)**, which has been active since 1 March 2009, has assumed the extended mandate of the UNIIIC (United Nations International Independent Investigation Commission). In particular, it is intended to investigate the 14 February 2005 assassination of Lebanese Prime Minister Rafik Hariri, and to prosecute those responsible. Like the UNIIIC, it is **national** in nature (applying Lebanese criminal law, with the exception of certain penalties). However, given its mixed composition, especially, it also **international<sup>624</sup>**.

States are obliged to cooperate with these courts. Since the IMAC provides for cooperation on criminal matters with national foreign authorities only (the sole exception being the European Court of Human Rights<sup>625</sup>), **specific legal foundations** have been adopted to permit cooperation with several of the aforementioned international courts.

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<sup>619</sup> Resolution 827 (1993) of the UN Security Council.

<sup>620</sup> Resolution 955 (1994) of the UN Security Council.

<sup>621</sup> Resolution 1315 (2000) of the UN Security Council.

<sup>622</sup> Rome Statute of the International Criminal Court of 17 July 1998 (SR 312.1).

<sup>623</sup> Resolution 1757 (2007) of the UN Security Council.

<sup>624</sup> It is also worth mentioning the **Extraordinary Chambers in the Courts of Cambodia** which have been set up to try crimes committed during the time of the Khmer Rouge (Extraordinary Chambers or ECCC / see esp. Resolutions 57/228 of the UN General Assembly of 18 December 2002 and 13 May 2003). The independent tribunal, established by the Cambodian government and the UN, is intended to prosecute those responsible for crimes committed under the Khmer Rouge regime. It is a Cambodian court with international participation, and applies national Cambodian law and international norms.

<sup>625</sup> Art. 64 para. 4 IMAC.

- a) Mutual assistance involving the **international courts** and the **Special Court for Sierra Leone** is governed by the Federal Act of 21 December 1995<sup>626</sup>. **Cooperation under this Act is based on cooperation under the IMAC**. The Act nonetheless contains exceptions to make mutual assistance simpler and faster (e.g. the exclusion clauses under Art. 2-8 IMAC do not apply).
- b) Cooperation with the **International Criminal Court is governed exclusively by the Federal Act of 22 June 2001 (ICCA)**<sup>627</sup> and the **Rome Statute**<sup>628</sup>. Cooperation with the ICC is ensured first and foremost by a central office under the aegis of the FoJ<sup>629</sup>. The ICCA takes into account the fact that cooperation with the Court is compulsory. Grounds for refusing legal assistance are thus kept to a minimum. Persons affected by the Court's investigations are not permitted to file an appeal and the dual criminality condition no longer applies.
- c) The **Special Tribunal for Lebanon** is largely a national court. The legal foundation for cooperation with it is therefore the **IMAC**<sup>630</sup>.

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<sup>626</sup> Federal Act on Cooperation with International Courts for the Prosecution of Serious Breaches of International Humanitarian Law (SR 351.20), and Ordinance of 12 February 2003 on Extending the Applicability of the Special Court for Sierra Leone (SR 351.201.11).

<sup>627</sup> Federal Act on Cooperation with the International Court of Justice (ICCA/SR 351.6).

<sup>628</sup> Art. 2 ICCA: "*sui generis*" cooperation.

<sup>629</sup> Art. 3 ICCA.

<sup>630</sup> The Federal Council has not extended the application of the Federal Act on Cooperation with International Courts for the Prosecution of Serious Breaches of International Humanitarian Law to the STL (Art. 1 para. 2), or to the ECCC (see footnote <sup>624</sup>).

## 6 Annexes

### 6.1 Summary Bibliography with New Publications (as of 2000)

- **MOREILLON**, Laurent (pub). **Entraide internationale en matière pénale.** - Basel, Helbing & Lichtenhahn, 2004. - ISBN 3-7190-2182-3
- **POPP**, Peter. **Grundzüge der Internationalen Rechtshilfe in Strafsachen.** - Basel, Helbing & Lichtenhahn, 2001. - ISBN 3-7190-1933-0
- **ZIMMERMANN**, Robert. **La coopération judiciaire internationale en matière pénale.** – 3. ed. - Bern, Stämpfli, 2009. - ISBN 978-3-7272-9796-0

### 6.2 List of Most Common Abbreviations

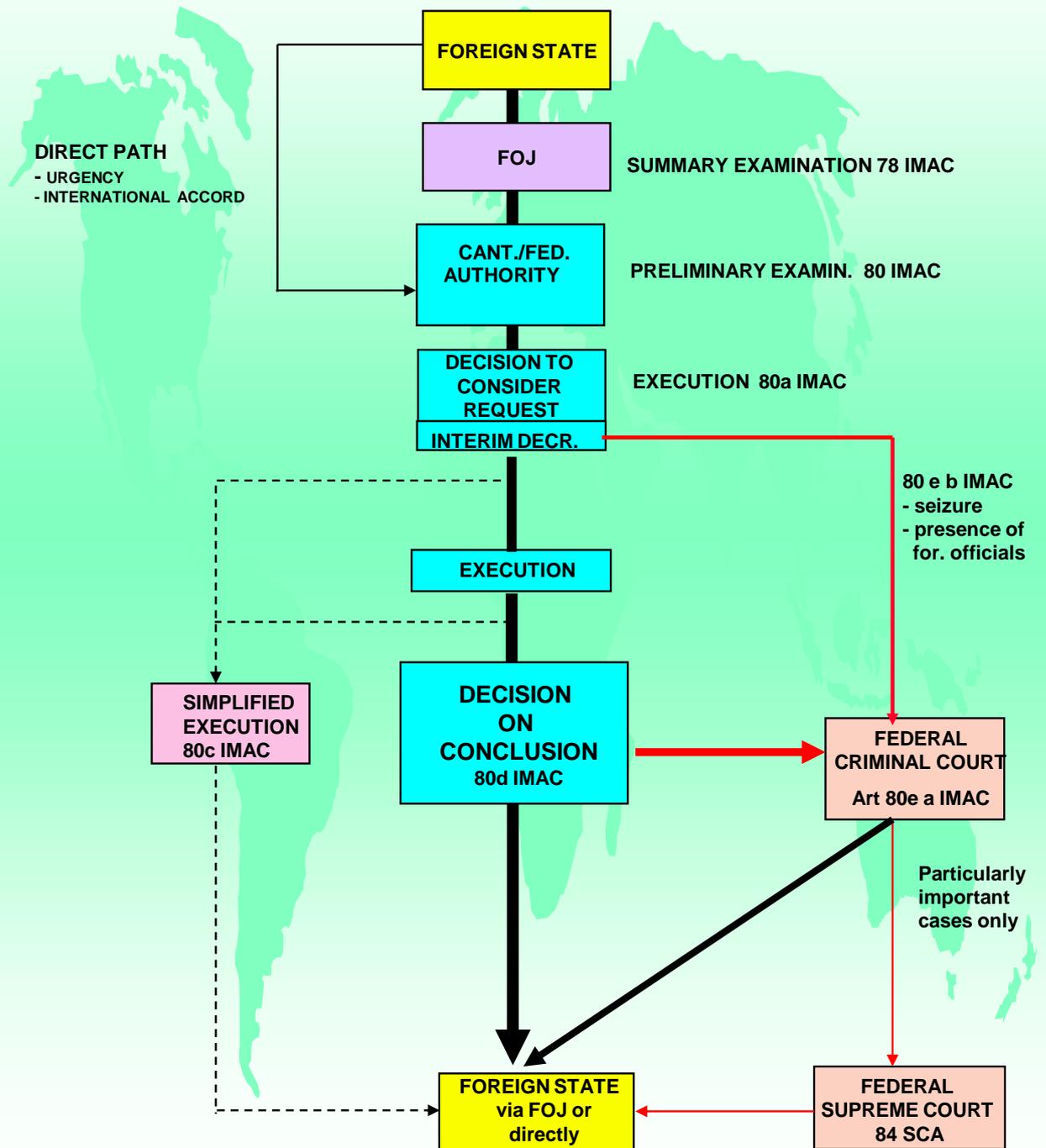
- Federal Act of 22 March 1974 on Administrative Criminal Law [ACLA](#)
- (Additional) Protocol [AP](#)
- Second Additional Protocol of 17 March 1978 to the ECE [AP II ECE](#)
- Second Additional Protocol of 8 November 2001 to the European Convention on Mutual Assistance in Criminal Matters [AP II ECMA](#)
- Treaty of 13 June 1972 between the Swiss Confederation and the Republic of Austria on supplementing the ECMA and facilitating its application [AP-A/ECMA](#)
- Additional Protocol of 15 October 1975 to the ECE [AP-ECE](#)
- Treaty of 28 October 1996 between the Swiss Federal Council and the Government of the French Republic on supplementing the ECMA [AP-F/ECMA](#)
- Treaty of 10 September 1998 between the Swiss Confederation and Italy on supplementing the ECMA and facilitating its application [AP-I/ECMA](#)
- Supreme Court Ruling [BGE](#)
- Cooperation Agreement of 26 October 2004 between the Swiss Confederation, of the one part, and the European Community and its Member States, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests [CAFIA](#)
- Convention on Cybercrime of 23 November 2001 [CCC](#)
- Federal Criminal Court Ruling [CCR](#)

- Schengen Implementation Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [CISA](#)
- Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [CLau](#)
- Swiss Criminal Procedure Code of 5 October 2007 [CPC](#)
- Conference of Swiss Prosecution Authorities [CSPA](#)
- Federal Constitution of the Swiss Confederation of 18 April 1999 [Cst](#)
- Convention of 21 March 1983 on the Transfer of Sentenced Persons [CTSP](#)
- Federal Act of 14 December 1990 on Direct Federal Taxation [DFTA](#)
- Federal Act of 19 March 2004 on the Division of Seized Assets [DSSA](#)
- Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea [ECCC](#)
- European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters [ECMA](#)
- European Convention on the Suppression of Terrorism of 27 January 1977 [ECST](#)
- Federal Act of 17 June 2005 on the Federal Administrative Court ; Federal Administrative Court Act) [FACA](#)
- Financial Action Task Force [FATF](#)
- Federal Department of Foreign Affairs [FDFA](#)
- Federal Office of Justice [FoJ](#)
- Federal Act of 17 June 2005 on the Federal Supreme Court (Federal Supreme Court Act) [FSCA](#)
- Government and Administration Organisation Act of 25 November 1998 [GAOO](#)
- International Criminal Court [ICC](#)
- Federal Act of 22 June 2001 on Cooperation with the International Criminal Court [ICCA](#)
- International Criminal Tribunal for Rwanda [ICTR](#)
- International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [ICTY](#)
- Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters [IMAC](#)
- Federal Act of 3 October 1951 on Narcotics and Psychotropic Substances (Narcotics Act) [NarcA](#)

- Ordinance of 24 February 1982 on International Mutual Assistance in Criminal Matters (Mutual Assistance Ordinance) [O-IMAC](#)
- "Politically exposed persons" [PEPs](#)
- Swiss Criminal Code of 21 December 1937 [SCC](#)
- Special Court for Sierra Leone [SCSL](#)
- Federal Act of 24 March 1995 on Stock Exchanges and Securities Trading (Stock Exchange Act) [SESTA](#)
- Federal Act of 6 October 2000 on the Surveillance of Postal and Telecommunications Traffic [SPTA](#)
- Special Tribunal for Lebanon [STL](#)
- United Nations Convention of 30 October 2003 Against Corruption [UNCAC](#)
- United Nations International Independent Investigation Commission [UNIIC](#)
- United Nations Convention of 15 November 2000 Against Transnational Organized Crime [UNTOC](#)
- Treaty of 25 May 1973 between Switzerland and the USA Concerning Mutual Legal Assistance in Criminal Matters [USAT](#)
- Federal Act of 3 October 1975 on the Treaty with the USA Concerning Mutual Legal Assistance in Criminal Matters [USATA](#)
- United Nations Convention of 20 December 1988 Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [Vienna Convention](#)

### 6.3 Mutual Assistance Process

## MUTUAL ASSISTANCE PROCESS IMAC



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## **6.4 Unsolicited Provision of Evidence and Confidential Information. Wording of the Text on Restriction of Use**

Article 67a IMAC: Restriction on use to which reference must be made with every unsolicited provision of confidential information (Art. 67a para. 5 IMAC)<sup>631</sup>:

- The information contained in the present communication may be used to commence investigations in your country or to make a request for legal assistance to Switzerland to obtain the corresponding evidence.
- The present information may not be used as evidence.
- The direct or indirect use of this information for fiscal or economic policy purposes is forbidden.

## **6.5 Submission of Guarantees from Participants in Foreign Proceedings within the Framework of Article 65a IMAC**

Wording of the undertaking:

- *The participants in foreign proceedings undertake to conduct themselves passively and to follow the instructions of the Swiss authorities.*
- *The participants in foreign proceedings undertake that they will not use the information which they obtain in Switzerland in the course of the execution of their request in any way for either investigative or evidence purposes, until such time as this information has been formally handed over on the basis of a legally enforceable Swiss ruling (final ruling or approval of simplified handover).*
- *The information obtained in the execution of the request in Switzerland may on no account be used for investigative or evidence purposes for proceedings for which mutual assistance is not permitted or for which it has been refused.*
- *Participants in foreign proceedings must personally sign the present undertakings before participating in any of the planned events.*

(CCR RR 2008 106/107)

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<sup>631</sup> Proposal of 10 June 2004 from the [KSBS](#) white-collar crime commission.