

INTERNATIONAL MUTUAL LEGAL ASSISTANCE IN SWITZERLAND

*Pascal Gossin**



I. DEFINITION

Whereas borders do not create barriers for criminals, they do present obstacles to authorities who are prosecuting offences. A foreign judicial authority may not, for example, order a bank in Switzerland to freeze a deceiver's account and hand over the relevant banking documents as evidence. Sovereignty precludes the carrying out of an official act on behalf of a foreign state. However, thanks to the instrument of international mutual assistance in criminal matters, states may help each other in the fight against international criminality. If a judge has to investigate a case abroad, he or she will ask the judicial authorities of the country concerned to handle the case on his or her behalf. The requested state will give mutual assistance by executing on its territory the official acts requested and by forwarding the results to the requesting state in a specific criminal case. Mutual assistance comprises the hearing of witnesses, securing and handing over of evidence and documents as well as objects and assets, search of premises and seizure of property, and the confrontation and service of summons, judgments and other court documents.

Within the meaning of active mutual assistance a Swiss judge may spontaneously transmit information or evidence which he or she has gathered during his or her own investigation to a foreign prosecuting authority. However, he or she may not transmit evidence which is within the scope of secrecy (banking documents, for example). However, the Swiss judge may also transmit information which is within the scope of secrecy if it is of such a nature as to enable his or her foreign colleague to make a request for mutual assistance to Switzerland.

There is a difference between the mutual assistance between judicial authorities and the exchange of information on a police-to-police basis, as no coercive measures are applied, and it is simply information that is supplied (for example, interview of informants by police, supplying extracts from public records and the crime register, information about telephone subscribers, the holders of post office boxes, owner of vehicles, the identity of persons or enquiries regarding addresses).

II. PRINCIPLES OF MUTUAL ASSISTANCE

The condition for granting mutual assistance is that a criminal procedure is in existence in the requesting state. Switzerland may grant mutual assistance to any state by virtue of its Federal Act on International Mutual Assistance in Criminal Matters (IMAC). If Switzerland has not concluded a mutual assistance treaty with the requesting state, it will, as a rule, only grant the request if the requesting state guarantees reciprocity.

Coercive measures may be ordered in the execution of a mutual assistance request (search of premises, seizure of evidence, summons to appear with a warning of compulsion in the event of non-appearance, hearing of witnesses as well as the lifting of the legal obligation to keep certain facts secret) if the offence described in the request is also punishable in Switzerland (principle of dual criminality). Therefore, Swiss banking secrecy is not absolute. This banking secrecy does not, for example, protect a suspect in a case of corruption, as the requested state would receive banking documents (extracts from bank accounts) as evidence.

Mutual assistance will not be granted if the subject of the investigation or procedure is an act which is

* Head, International Legal Assistance Section, Federal Office of Justice, Swiss Confederation.

regarded by Switzerland as a political offence. Assistance will therefore be denied if the proceedings abroad are carried out to prosecute or sentence a person on account of his or her political opinions, his or her belonging to a certain social group, or his or her race, religion or nationality. IMAC stipulates however that crimes will not be regarded as political offences if they were aimed at the extermination or suppression of an ethnic group, or if the crime is particularly reprehensible (aircraft hijacking, hostage taking). A request will also not be granted if the subject matter is a military offence (insubordination, desertion).

Grave defects in the foreign procedure (violation of the principles contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights) will lead to mutual assistance not being granted.

Mutual assistance is no longer possible for the same offence if the defendant was acquitted or if the sentence was served either in Switzerland or in the state where the offence was committed (*non bis in idem* – the principle of double jeopardy).

As a rule, no mutual assistance is granted for fiscal offences (withholding taxes or fiscal duties). However, mutual assistance may be granted in cases of excise or tax fraud (fraudulent evasion of duty and taxes by using false, forged or untrue information, documents, etc). In cases of doubt the FOJ will ask the Federal Tax Administration for advice. Further exceptions are applicable in cases with the USA concerning organized crime, in order to exonerate the defendant, as well as in cases of administrative assistance in customs offences.

Mutual assistance is granted under the reservation that the authorities of the requesting state will only use the information obtained for investigative purposes, or as evidence for the prosecution of offences for which mutual assistance is admissible (rule of speciality). Also excluded is the indirect use of the results obtained through mutual assistance by prosecuting authorities giving unofficial information to tax or customs authorities.

Mutual assistance is governed by the principle of proportionality. However, this does not mean that a requesting State may only seek assistance after it has exhausted its own internal means of investigation. Mutual assistance proceedings should help the criminal proceedings in a requesting state; therefore all documents will be handed over if a connection with the charges brought forward cannot be excluded.

Objects and assets (valuables) deriving from the offence (proceeds of crime) may be surrendered to foreign authorities so that they can be forfeited by a foreign court, or returned to the rightful owner, if, as a rule, a final, executable order has been made by a criminal, civil or administrative court in the requesting state. In exceptional cases, Switzerland may waive this requirement if the criminal source is obvious, as in the *Abacha Case*.

III. MUTUAL ASSISTANCE PROCEDURES IN SWITZERLAND

A. Channel of Transmission

There are different channels for the transmission of mutual assistance requests to Switzerland:

- Member states of the European Convention on Mutual Assistance in Criminal Matters (ECMA) send their requests directly or via their Ministry of Justice to the Swiss Federal Office of Justice (FOJ).
- If no treaty is in existence, then as a rule, transmission should be through the diplomatic channel. The representative of the foreign state in Switzerland sends the request directly to the FOJ.
- Direct contact between the foreign authority and the competent Swiss authority is provided in the Additional Treaties to the ECMA concluded with Germany, Austria, France and Italy, and it is also possible with all other States in urgent cases.

Swiss authorities transmit their requests - if no direct contact is provided for - via the FOP to the relevant foreign authority.

B. Form and Contents of Mutual Assistance Requests

These requests shall contain the following information:

- The name of the authority making the request. As a rule these requests are made by judicial authorities; in common-law countries requests for mutual assistance are made by the police as they have no examining magistrate (investigating judge) and the public prosecutor is only competent when the indictment is filed.
- The subject matter of the foreign proceedings and the reason for the request (description of the official acts requested).
- Identifying data of the person who is the object of the criminal proceedings.
- Legal evaluation of the facts in the requesting state.
- Description of the essential facts (place, time and circumstances). The requesting authority does not have to prove that its description is accurate; it is sufficient if reasonable suspicion is shown. The requesting authority may not be required to explain what should be revealed by the request. However, so-called fishing-expeditions to obtain evidence are inadmissible. Evidence may not be collected at random and without material clues (for example the freezing of all assets in Switzerland and the handing over of the banking documents without information regarding the whereabouts of these assets).

C. Handling of Mutual Assistance Requests

The FOJ (Unit for Mutual Legal Assistance) summarily examines if the request for mutual assistance meets the necessary formal requirements. If not, the FOJ asks the requesting authority to rectify or amend the request. In urgent cases the FOJ may order provisional measures (for example the freezing of accounts or seizure of assets) as soon as a request has been announced. The FOJ then fixes a time limit to the requesting state within which the formal request must be submitted.

If the request meets the requirements and if mutual assistance is not obviously inadmissible (for example in the case of military offences), the FOJ will forward the request as a rule to the competent cantonal judicial authority for execution. If investigations are required in several cantons, the FOJ may charge one single canton with the execution (the managing canton). In practice most of the requests for mutual assistance are executed by the cantons. However, the FOJ may also delegate the execution of a request to the federal authority which would be competent had the offence been committed in Switzerland. For example, the request can be transmitted to the Federal Public Prosecutor of Switzerland (in cases of acts of terrorism or corruption of federal civil servants) or to the Federal Customs Administration (in cases of violation of the Federal Customs Act). If several cantons are involved as well as if the canton charged with the execution does not render a decision within the appropriate time, or if the case is complex or of particular importance, the FOJ may execute the request for mutual assistance itself.

The executing authority examines whether the substantive requirements to grant mutual assistance have been met and orders in the decree to enter into the case the mutual assistance measures that were requested and which are admissible. With this decree, the mutual assistance proceedings start and shall, as a matter of principle, be executed to conclusion without interruption. If all measures are executed and the proceedings are completed, the executing authority shall issue a final decree stating in detail the reasons for which mutual assistance was granted and to what extent, i.e. which documents or assets may be surrendered to the requesting state. A simplified execution of the mutual assistance proceedings, without a final decree, is possible if the holder of documents, information or assets consents in writing to their being handed over to the requesting state.

The parties to the foreign proceedings (police officers, examining magistrates, defendants, legal representatives) may be allowed to attend the execution of the request provided that the law of the requesting state would only admit the evidence obtained by mutual assistance if said persons were present (common-law practice) or if their presence would considerably facilitate the foreign criminal proceedings. Their presence simply means that the parties to the foreign proceedings may be present at the execution of the request. They are not allowed to officiate themselves; official acts are the sole prerogative of Swiss civil servants.

D. Legal Remedies

The decree to enter into the case may not be appealed against. In principle, appeals may only be made against the conclusive (final) decree. Also incidental (interim) decrees are subject to appeal only at the conclusion of the proceedings together with the appeal against the conclusive decree. Therefore legal remedies for the persons affected by mutual assistance measures are possible at the end of such proceedings. Excluded are those incidental decrees which - by seizure of assets or valuables, or because of the presence of persons involved in foreign proceedings - cause immediate and irreparable prejudice (for example if a company is closed because its bank account had been frozen). The rulings of the cantonal as well as federal authorities providing mutual assistance may be challenged before the Federal Criminal Court. Furthermore, an appeal against the decision of the Federal Criminal Court may be lodged with the Federal Supreme Court, but only if that decision concerns the seizure or release of objects or assets or the transmission of confidential information, and the case in question is a particularly important one. Mutual assistance to the requesting state is granted as soon as the conclusive decree is enforceable.

The FOJ as federal supervising authority is entitled to appeal as are persons who are directly affected by a mutual assistance measure. Therefore, a bank which was asked to surrender bank account documents regarding a particular customer is not entitled to appeal for its client; only the account holder has that right. The deadline for the appeal against the conclusive decree is 30 days (Federal Criminal Court) or 10 days (Federal Supreme Court).

IV. STATISTICS

	Foreign request for mutual assistance*	Swiss request for mutual assistance
1996	1437	974
1997	1953	1206
1998	1628	1189
1999	1713	1229
2000	1532	1106
2001	1575	1050
2002	1593	1169
2003	1589	1276
2004	1670	1250
2005	1609	1287

* The requests for mutual assistance emanating from neighbouring States that are transmitted directly to the competent Swiss judicial authority (direct contact) are only partially contained in these statistics.