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Together with Norway, Iceland and the States emerging from the breakup of the former Yugoslav Republic, Switzerland is one of the few countries in Europe that is not an EU member. The question posed by the editors of this journal is to what extent this has contributed to the perception of Switzerland as a safe haven for criminals and their assets; in light of the understanding on mutual judicial assistance in criminal matters (thereafter 'MLA') that binds EU members following the Tampere Summit in 1999. This article considers the elements of MLA in force in Switzerland, the effect this has on the practice of the Swiss authorities and the development of MLA between the EU Member States and Switzerland under the Schengen Agreements, in particular in the framework of tax offences. In anticipation of the conclusion the reader may be reassured that far from being a shadowy refuge for crime and its proceeds, Switzerland has since the 1990s undertaken a shift from a country promoting 'bank-secrecy' to being one of the most transparent states in Europe, if not the world, in relation to mutual judicial assistance in criminal matters. The reader will note that, in many aspects, Switzerland is more cooperative than countries bound by the political cement of the European Union.¹

I. Legal Bases for Swiss Mutual Judicial Assistance in Criminal Matters

1. Conventional Agreements

a. Multilateral Agreements on Judicial Assistance

Primarily Switzerland grants and is in receipt of mutual judicial assistance from EU Member States on the basis of the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe, 1959 (thereafter: ECMA).² Switzerland also ratified the Second Additional Protocol to the ECMA 2001³ which enlarges the possibility to grant

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¹ On mutual assistance in criminal matters in Switzerland, see in particular L. Moreillon (ed.), *Entraide internationale en matière pénale* (Basel: Helbing & Lichtenhahn, 2004), P. Popp, *Grundzüge der internationalen Rechtshilfe in Strafsachen* (Basel: Helbing & Lichtenhahn, 2001), R. Zimmermann, *La coopération judiciaire internationale en matière pénale* (2nd ed., Bern: Stämpfli; Bruxelles: Bruylant, 2004).

² CETS No.: 030, Strasbourg 20.4.1959.

³ CETS No 182, Strasbourg 8.11.2001.

judicial assistance for administrative procedures, in certain conditions⁴ and facilitates the direct cooperation between enforcement authorities of the ratifying States⁵. Switzerland has consistently expressed reluctance to grant judicial assistance for tax offences on the basis that tax evasion does not constitute a criminal offence in Switzerland. Accordingly, Switzerland has made an important reservation to the ECMA, pursuant to Article 23 ECMA⁶ on double criminality and has not ratified the first Additional Protocol to the ECMA.

Notably, Switzerland is also party to the European Convention on Extradition, 1957;⁷ its two Additional Protocols;⁸ and the Convention on the Transfer of Sentenced Persons of the Council of Europe.⁹

b. Multilateral Agreements with Provision on Judicial Assistance

As well as generic MLA treaties Switzerland has ratified or adheres to various Treaties and Conventions on the repression of certain crimes that oblige State parties to grant judicial assistance upon request. Switzerland is amongst other instruments party to the European Convention on the Suppression of Terrorism, 1977,¹⁰ the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990¹¹, the European Criminal Law Convention on Corruption, 1999,¹² and its Additional Protocol, 2003,¹³ as well as to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997,¹⁴ the UN Convention for the Suppression of Unlawful Seizure of Aircraft (or The Hague Convention), 1970, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, the International Convention against the Taking of Hostages, 1979, the International Convention for the Suppression of Terrorist Bombings, 1997, the International Convention

⁴ Article 1 para. 3 Additional Protocol provides that parties will afford mutual assistance in proceedings brought by administrative authorities in respect of acts punishable under the national law of the requesting or requested Party by virtue of being infringements of the rules of law, if the decision may give rise to an appeal before a court having jurisdiction in criminal matters.

⁵ Article 4 provides that Contracting States may forward requests for mutual assistance directly to the judicial authorities of the requested Party and return the executed request through the same channels.

⁶ Article 23 ECMA allows Parties to make a reservation in respect of any provision or provisions of the Convention.

⁷ CETS No 024, Paris, 13.12.1957.

⁸ CETS No 086, Strasbourg, 15.10.1975; CETS No 098, Strasbourg, 17.03.1978.

⁹ CETS No 112, Strasbourg, 21.03.1983.

¹⁰ CETS No 090, Strasbourg, 27.01.1977.

¹¹ CETS No 141, Strasbourg, 8.11.1990.

¹² CETS No^o173, Strasbourg, 27.01.1999.

¹³ CETS No^o191, Strasbourg, 15.05.2003.

¹⁴ http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

for the Suppression of the Financing of Terrorism, 1999 and the United Nations Convention against Transnational Organized Crime, 2000 and its Additional Protocol, 2000.¹⁵ Switzerland is considering accession to the UN Convention against Corruption in light of the requisite adjustments to Swiss law this would require. All these treaties and conventions reinforce the obligation to cooperate between Switzerland and EU on the subject-matter of these instruments. This is particularly important in the field of identification and tracing of instrumentalities, proceeds and other property liable to confiscation or forfeiture given that Switzerland plays a significant role in the management of global finances.¹⁶

c. Bilateral Agreements with EU Countries

After the refusal of Switzerland, by referendum, to enter into the European Economic Area in 1992, Switzerland entered into a vast framework of bilateral agreements with its neighbours, in particular Germany, Austria, France and Italy, in order to reinforce mutual judicial assistance with these countries. These bilateral agreements enlarge the scope of cooperation of Switzerland with these countries by allowing mutual judicial assistance in the framework of administrative decisions. At the time of ratifying these bilateral treaties, the Second Protocol of the ECMA which incorporates a commensurate provision, had not entered into force.

Moreover, these bilateral agreements enable judicial and administrative authorities in the respective countries to engage in direct contact with the competent authorities of the requested State, usually investigating judges or prosecutors. In practice, this capability is commonly employed, so facilitating the communication and transmission of information. It provides a significant increase in flexibility by comparison with the traditional channel through Ministries of Justice and judicial authorities, enabling efficient response in cases of urgency (freezing of assets, etc.).

Pursuant to these bilateral agreements, the requested State must permit officials of the requesting State to be party to the execution of letters of request. These bilateral provision treaties are commonly used as the presence and participation of the authorities of the requesting State is perceived to facilitate the execution of the letters of request.

The entering of Switzerland into the Schengen area, and therefore the application of the Schengen agreements to Switzerland, will considerably reduce the importance of these bilateral treaties. This is due to the fact the Schengen agreements provide for direct exchange between the judicial

¹⁵ The list of all international treaties in criminal matters of which Switzerland is a Party can be consulted on <http://www.admin.ch/ch/f/rs/0.35.html#0.353.21>.

¹⁶ See Article 9 and 13 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and Article 15 and 16 of the European Convention on the Suppression of Terrorism.

authorities of the Schengen States and the possibility for foreign officials to participate in the execution of the mutual judicial assistance request (Article 53 CIS).

2. Unilateral Assistance – Federal Law on International Mutual Judicial Assistance in Criminal Matters

The Swiss Federal Law on International Mutual Assistance in Criminal Matters, 1981 (hereafter IMAC)¹⁷ provides for rules applicable to judicial assistance even when no international or bilateral agreement applies between Switzerland and another State.¹⁸ It also completes existing agreements. As a matter of fact, to a large extent IMAC grants judicial assistance more broadly than most of the applicable international agreements. Under this law and the case law of the Federal Supreme Court, Switzerland may grant judicial assistance where the requesting party in question is not a recognised State by Switzerland, which was the case of Taiwan¹⁹ or with the MINUC that was in charge of Kosovo prior to independence.²⁰

A liberal interpretation of Article 1 III IMAC permits Switzerland to offer judicial assistance in certain administrative decisions on the condition that the decision made by that authority can be appealed before a court of competent jurisdiction in criminal matters.²¹ Switzerland recognises that the criminal authority of one State and the administrative authority of another may punish certain offences.²²

Similar provision is made in the Second Additional Protocol of the ECMA and the bilateral agreements concluded between Switzerland and its neighbouring countries and is included under the Schengen Agreements that enter into force for Switzerland at the end of 2008 (Article 49 CIS). In the near future such mutual judicial assistance between Switzerland and the EU States will primarily be based on the Schengen agreements.

¹⁷ This law can be consulted in three of the four national languages of Switzerland (German, French, Italian) on the website of the Confederation: http://www.admin.ch/ch/f/rs/c351_1.html.

¹⁸ See Art. 1, IMAC: 'provided that international agreements do not provide otherwise, this Act shall govern all procedures of international cooperation in criminal matters. ... This Act shall confer no right to demand international cooperation in criminal matters'. See also the following decisions of the Swiss Federal Supreme Court ATF 130 II 337 n. 1, p. 339 ; 128 II 355 n. 1 p. 357 ; 123 II 134 n. 1a p. 136 ; 122 II 140 n.c. 2 p. 142.

¹⁹ Case *Wang et consort c. Office des juges d'instruction fédéraux*, Swiss Supreme Court, 1st Court of Public Law, 3 May 2004, ATF 130 II 217.

²⁰ Decision of the Swiss Federal Penal Court, 25 November 2005. Cour des plaintes. N° BH.2005.39.

²¹ Swiss Federal Supreme Court decisions ATF 118 Ib 437 ; 123 II 161. See also R. Roth, B. Amirdivani, 'L'entraide judiciaire suisse en matière pénale à un tournant? : Etat de la question a la veille d'une adhésion à Schengen' in *Sécurité et justice : enjeu de la politique extérieure de l'Union européenne* (Bruxelles : Institut d'études européennes, 2003), p. 254.

²² Feuille Fédérale (hereafter : FF) 2004 5778

The application of IMAC requires reciprocity between the requesting State and Switzerland (Article 8 para. 1, first sentence, IMAC). The Federal Office of Justice has a wide discretion to consider the extent to which the requesting State will cooperate with Switzerland. In general, a declaration of reciprocity will be required in most cases where a treaty is lacking. The Federal Office of Justice may, pursuant to case law of the Federal Supreme Court, waive the requirement of reciprocity when the execution of the request is imperative due to the nature of the act and the necessity in combating certain types of offence (Article 8 para. let 2. a EIMP). This applies typically to organized crime, economic crime,²³ money laundering and corruption.²⁴

II. Basic Characteristics of MLA under IMAC

1. Reliance on the Facts Presented by the Requesting States

It is established case law of the Swiss Federal Court, that there is flexibility in the requirements on presentation of a request for mutual judicial assistance. A request pursuant to Article 14 ECMA will be sufficient if it allows the Swiss authorities to establish that the application is within the criminal law of the requesting State and, on the hypothesis that the offence had been committed in Switzerland, within Swiss law as well.²⁵

The Swiss competent authority for MLA does not undertake as standard practice a *prima facie* review of the case presented in the letter of request; as is the case in the UK. Indeed, Switzerland considers itself bound by the principle of good faith between nations to accept the case presented by the requesting State, unless there are obvious errors, omissions or contradictions. Furthermore, Switzerland will give effect to a request even if the facts presented by the requesting State are not yet proven, but presented as probable, or in the least as raising sufficient suspicion that further investigation is required. This is often the case when the requesting State at that point of the investigation is unable due to the complexity of the case and the nature of offences pursued to present an unequivocal case.²⁶

This practice, while favourable to judicial assistance, has reduced in recent history. For example, in a decision dated 13 August 2007, the Federal Supreme Court refused to cooperate with Russia in the *Khodorkovski* case due to the presentation of a case by the Russian Authorities that was

²³ ATF 115 Ib 517 consid. 4b p. 525; 110 Ib 173 consid. 3a p. 176.

²⁴ Swiss Federal Supreme Court decisions 1A.49/2002, 05.23.2003, n. 4.1 not published at ATF 129 II 268.

²⁵ Swiss Federal Supreme Court decisions ATF 118 Ib 111; 116 Ib 96; 115 Ib 68; 110 Ib 179.

²⁶ Swiss Federal Supreme Court decision ATF 120 Ib 251.

flawed by confusion, suspicions, violations of defence rights, a cumulative effect of general irregularity, the political nature of the prosecution and the fiscal nature of the allegations.²⁷ In support of the decision of the Federal Supreme Court it can be noted that the Parliamentary Assembly of the European Council (the primary organ of the ECHR) had previously adopted various statements denouncing the treatment of the 'Yukos' case by the Russian authorities.²⁸ It is assumed that such a decision by the Federal Supreme Court would in principle not apply to present members of the European Union and that the Swiss authorities will continue to grant MLA to these States without reviewing the facts.

2. The Respect of Human Rights in the Requesting Country

Swiss law does not permit mutual assistance in criminal matters if the foreign procedure in question does not comply with principles established under relevant instruments relating to human rights protection.²⁹ Indeed, Swiss assistance is conditional on the guarantee of minimum standards of protection particularly as defined by the European Convention on Human Rights (thereafter: ECHR) or the UN Covenant II.³⁰ This requirement is articulated pursuant to the case law of the European Court of Human Rights, in particular the *Soering* case.³¹

The Swiss Supreme Court has issued numerous decisions on the requirement that the requesting State respects the human rights of the suspect, in particular the right to a fair trial.³²

However, in relations between Switzerland and the EU Member States, this requirement is a 'non issue', as all EU Member States are parties to it. Therefore, Switzerland considers that grievances expressed in opposition to a request for extradition or judicial assistance on the basis of the ECHR,

²⁷ Swiss Federal Supreme Court decision of 13 August 2007 1A. 15/2007

²⁸ See the press release 581(2004) by the Parliamentary Assembly: 'Yukos executives 'arbitrarily singled out' by Russian authorities, according to PACE Human Rights Committee'.

²⁹ See Art 2(a), IMAC: 'A request for cooperation in criminal matters may not be granted if the foreign procedure] does not meet the standards of the European Convention of 1950 on the Protection of Human Rights'.

³⁰ Article 2 IMAC; Swiss Federal Court decision 123 II 161.; 123 II 511; 122 II 140

³¹ *Soering v. United Kingdom*, Series A, No 161 ; Application No. 14038/88, European Court of Human Rights (1989) 11 EHRR 439, 7 July 1989. On this case, see S. Breitenmoser, G. E. Wilms, 'Human Rights v. Extradition: the Soering Case', 11 *Michigan JIL* (1990), 845-886 ; M. Frankowska, 'The Soering Case', 85 *AJIL* 1991, 128-149 ; F. Sudre, 'Extradition et peine de mort: arrêt Soering de la Cour Européenne des Droits de l'Homme du 7 juillet 1989', 94 *RGDIP* 1990, 103-121 ; S. Williams, 'Extradition to a State that Imposes the Death Penalty', 28 *Canadian YBIL* 1991, 117-168. See also Ch. Van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' in J. Dugard, C. Van den Wyngaert (eds), *International Criminal Law and Procedure* (Dartmouth: Adelshot, 1996), p. 757-779, as well as R. J. Currie, 'Human Rights and International Mutual Judicial assistance: Resolving the Tension', 11 *Crim. LF* 2000, 143-181.

³² Swiss Federal Supreme Court decisions ATF 123 II 511; 123 II 161; 122 II 373; 112 Ib 215.

