

Marc Henzelin and Sonja Maeder*

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

* LALIVE Attorneys-at-Law, Geneva, Switzerland: <http://www.lalive.ch/>. For any correspondence: mhenzelin@lalive.ch or smaeder@lalive.ch.

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 à 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.

can be raised before the national Courts of the requesting State and progressed to the European Court of Human Rights.³³

The Federal Supreme Court considers pursuant to the principle of good faith between nations that States with which Switzerland has concluded an agreement of mutual judicial assistance will, in principle, respect their human rights commitments, usually provided for in the respective agreement.³⁴ Indeed, as mentioned previously, the Swiss Federal Court usually considers that the Swiss competent authorities can rely on the information provided by the requesting State.³⁵ Where a doubt is raised, the Swiss Federal Supreme Court requires the Federal Office of Justice to request specific guarantees from the requesting State, relating to the human rights of the suspect and in particular the right to a fair trial. Thus, in a topical decision regarding the provision of judicial assistance in Taiwan, the Federal Office for Justice sought clarification on certain aspects of the judicial system of Taiwan, and guarantees that the criminal procedure would be fair.³⁶ Again this requirement does not normally apply when the requesting State is a Party to the ECHR.

3. Dual Criminality

The most important reservation made by Switzerland in MLA cases is that assistance is conditional on respect of the principle of dual criminality. According to this principle the conduct being investigated must also constitute an offence under Swiss law.³⁷

When determining the issue of dual criminality, Swiss authorities will not assume that the offence for which mutual judicial assistance is sought is included in Swiss criminal law. Authorities will instead consider whether the case presented in the request for judicial assistance is punishable under Swiss law.³⁸

This reservation has important consequences in the framework of tax offences, since a distinction is made in Swiss law between tax evasion and tax fraud: Switzerland grants judicial assistance in criminal matters only when the foreign procedure involves elements of an offence tantamount to tax fraud in Switzerland.³⁹ This is developed below.

³³ Swiss Federal Supreme Court decision ATF 109 Ib 165.

³⁴ Swiss Federal Supreme Court decision ATF 115 Ib 373; 107 Ib 271.

³⁵ Swiss Federal Supreme Court decisions ATF 123 II 511; 122 II 140.

³⁶ Swiss Federal Supreme Court decision 1A.237/2005 /svc.

³⁷ Swiss Federal Supreme Court decisions ATF 124 II 184; 122 II 140; 118 Ib 448.

³⁸ Swiss Federal Supreme Court decisions ATF 124 II 184; 129 II 462.

³⁹ Swiss Federal Supreme Court decision ATF 115 Ib 68.

4. Specialty Doctrine

Pursuant to the IMAC, evidence delivered in connection with a request for judicial assistance can only be used in accordance with the stated purpose for which it was obtained. If judicial assistance is granted in criminal matters such evidence shall only be used in connection with the offence cited in the letters of requests and no other purpose. The speciality doctrine also applies if the requesting State wishes to use the evidence in the framework of civil or administrative proceedings.⁴⁰

This principle may create some problems where the requesting authorities are obliged, by law, to refer to the competent authorities any tax offence subsequently discovered. The speciality principle is, however, firmly established between Switzerland and European countries and where any suspicion arise, the Swiss authorities will seek specific guarantees from the requesting authorities for this purpose.

5. Proportionality principle

One important limitation to the willingness of Swiss authorities to assist foreign States in criminal matters, is the principle of proportionality. The proportionality principle prevents, on one hand, the requesting authorities to seek assistance in measures unrelated to their investigations and, on the other hand, the executing authorities to act beyond the scope of their mandate.

Foreign authorities often ask the Swiss authorities to take measures that in practice are either too costly in implementation or impose a disproportionate burden on the Swiss authorities, the financial institutions, the suspect or third parties. Therefore, the Swiss authorities will not admit requests that amount to so called *fishing expeditions*. In particular, Switzerland will not facilitate criminal investigations that seek evidence to substantiate unrelated criminal suspicions that are too vague or simply exploratory. For example, a request to the Swiss authorities to find "any bank account" of a suspect in the country would normally be considered too broad given the thousands of banking institutions in Switzerland. Substantiated suspicion has to precede the request; not the contrary. But a precise indication of the reasons for the request, and of the particular measures to be taken, is usually sufficient to prevent possible abuses. Furthermore, the requesting State must establish a sufficient connection between the facts under investigation and the requested assistance.⁴¹

Finally, according to jurisprudence of the Federal Supreme Court, mutual judicial assistance can be granted only to the extent necessary to confirm

⁴⁰ Swiss Federal Supreme Court decisions ATF 126 II 316; 125 II 258; 128 II 305.

⁴¹ Swiss Federal Supreme Court decisions 1A.189/2006; ATF 129 II 462; 122 II 367; 121 II 241.

the suspicions of prosecuting authorities of the requesting State. The principle of proportionality therefore prevents Swiss authorities from going beyond the scope of the request received.⁴²

6. Spontaneous Transmission of Information

The Swiss legal authorities may, under certain conditions, spontaneously transmit information directly to the relevant legal authorities of another country (Article 67a IMAC) when they consider that disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings, or might lead to a request for judicial assistance by that Party to Switzerland.⁴³ This facility is increasingly incorporated into international agreements. For example both the Second Additional Protocol to the ECMA (Article 11) and the Schengen Agreements permit the spontaneous transmission of information to foreign authorities. Independent of these instruments Swiss law permits spontaneous transmission of relevant information to all EU Member States.

7. Due Process

Previously almost all decisions relating to judicial assistance by Swiss authorities could be appealed to the Federal Supreme Court. This right has been narrowed in two ways. Firstly only the decision to end assistance and transmission of requested information can be appealed. This is subject to those measures that have the potential to harm the direct and immediate interests of a person, such as freezing assets (Article 80e IMAC). The right of appeal has even been restrained to the extent that the Federal Supreme Court will only consider the appeal against a judgment by the Federal Penal Court or a Cantonal Court where leave to bring the appeal was granted. Therefore, the previous tendency of the parties in cases of judicial assistance to systematically appeal to the Federal Supreme Court as a delay tactic is frustrated.

Secondly, locus standing to bring an appeal is narrowed pursuant to case law of the Federal Supreme Court. According to the jurisprudence of the Federal Supreme Court, only a person directly affected by a measure of mutual assistance may appeal a decision. For example, the Court recognizes an appeal by the holder of a bank account on which information is requested,⁴⁴ the person who must personally submit to a search or seizure⁴⁵ or a witness called to provide information personal

⁴² Swiss Federal Supreme Court decision ATF 121 II 241.

⁴³ See F. R. Micheli, 'L'entraide spontanée (art. 67a EIMP): le contrôle de la transmission spontanée d'informations', 2 *PJA* 2002, p. 156-164.

⁴⁴ Swiss Federal Supreme Court decision ATF 118 Ib 547.

⁴⁵ Swiss Federal Supreme Court decisions ATF 118 Ib 442; 121 II 38.

to them.⁴⁶ The Federal Supreme Court denied standing to the financial beneficiary of a bank account and the author of documents seized from the control of a third party, even where transmission of the information would lead to his identity being revealed.⁴⁷

III. Schengen Agreements and Tax Offences

1. Adhesion of Switzerland to Schengen Agreements

Despite the fact that Switzerland is not an EU Member, Switzerland adhered to the Schengen Agreements in 2004. The foreign ministers of the European Union endorsed an Agreement on 28 January 2008 that permits Switzerland to integrate into the Schengen area from 1 November 2008.

The 1990 Convention implementing the Schengen Agreement of 14 June 1985 also known as Schengen II or CIS includes provisions relating to mutual judicial assistance which will reinforce cooperation between EU Members and Switzerland.⁴⁸ As we have seen, IMAC already provides for most measures of assistance in criminal matters which are provided by CIS, and it is not the purpose of this article to undertake analysis of a Treaty well known by the European readers of this Journal. These agreements may however have an impact in the framework of tax offences, which remain a difficult topic in the Swiss-EU relations, and will be considered subsequently.

2. Distinction between Tax Evasion and Tax Fraud in Swiss Law

In Switzerland the international exchange of information in tax matters is possible only in the case of tax fraud (*escroquerie fiscale, Abgabebetrag*); as defined under Swiss law. Switzerland will not grant mutual judicial assistance on the base of tax evasion. These definitions need clarification.

Tax evasion occurs when a taxpayer fails to submit a tax return or submits an incomplete tax return (e.g. as a result of false or incomplete entries).⁴⁹ It is generally punishable under Swiss law by fine and is therefore an infraction rather than a criminal offence, under the Swiss Criminal Code. It is a matter for the tax authorities to pursue cases of tax evasion and not the prosecuting authorities.

⁴⁶ Swiss Federal Supreme Court decision ATF 121 II 459.

⁴⁷ Swiss Federal Supreme Court decision ATF 116 Ib 106.

⁴⁸ Article 48, n. 1, 59, n. 1, and 67 CIS.

⁴⁹ See 'The Basis for International Mutual Legal and Administrative Assistance', available at: <http://www.eda.admin.ch/eda/e/home/foreign/ecopo/chfin/chap4.html>.

Tax fraud is committed, according to Swiss law, when for the purposes of tax evasion, falsified or non-genuine records including accounts, balance sheets or income statements and other statements of third parties are used to deceive. A tax return is not of itself considered a document. Tax fraud can arise without the falsification of documents where wilful deceit is employed for the purpose of evading tax. Tax fraud is treated as a crime and is punishable by fine or imprisonment. It is the prosecuting authorities of the respective canton, rather than tax authorities, that handle these cases. For purely domestic purposes tax fraud is the use of forged or falsified documents,⁵⁰ excluding tax declarations.

3. MLA for Indirect Tax Offences

Pursuant to Article 50 para. 1 CIS, Parties undertake to afford each other, in accordance with the ECMA, mutual assistance as regards infringements of their laws and regulations regarding indirect taxes; being excise duties, value added tax and customs duties.

The First Additional Protocol to the ECMA already made provisions for an obligation to grant mutual judicial assistance in tax matters. As mentioned previously, this Protocol was, however, never ratified by Switzerland.

As Switzerland was not a party to the First Additional Protocol, it had no obligation to grant mutual judicial assistance in the framework of tax evasion. Until now, Switzerland has never granted mutual judicial assistance in the framework of tax evasion although it has offered assistance in cases of tax fraud.

In the light of Article 50 para. 1 CIS however, Switzerland will in the future grant mutual judicial assistance in the framework of indirect tax offences.

Article 8 of the Protocol to the Convention on Mutual Assistance in Criminal Matters of the EU will replace this provision. Article 8 will form part of the Schengen *acquis*, upon entry into force of the Protocol. Accordingly, mutual judicial assistance will no longer be denied solely because the request relates to offences of a financial nature. Mutual judicial assistance should therefore theoretically be provided in relation to direct taxation.

4. Dual Criminality and Direct Tax Offences

According to Article 5 of the ECMA, contracting States may reserve the right to execute letters of request for search or seizure of property on the

⁵⁰ Art. 186 Federal Income Tax Act ('FITA').

condition that the offence in question is punishable under the law of both the requesting and requested Party; that it is an extraditable offence in the requested country; or that it is consistent with the law of the requested Party.

Article 51 CIS limits the scope of this provision since it provides that the Contracting Parties may not make the admissibility of letters of request for search or seizure dependent on an other condition than that

the act giving rise to the letters rogatory [being] punishable under the law of both Contracting Parties by a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months, or is punishable under the law of one of the two Contracting Parties by an equivalent penalty and under the law of the other Contracting Party by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters (...).

This clearly limits the principle of dual criminality, required by Switzerland to grant mutual judicial assistance.

Furthermore and as mentioned above, with the entry into force of the EU Convention on Mutual Assistance, in particular Article 8, which replaces Article 50 CIS, letters of request may require search and seizure under Article 51 CIS for crimes of tax evasion related to direct taxation. Switzerland would therefore have to grant mutual assistance for all tax offences.

It has always been a political choice of Switzerland not to grant mutual judicial assistance for tax offences and while negotiating Switzerland's adhering to the Schengen Agreements, this matter was under debate. The scope of judicial and administrative assistance in tax matters was settled pursuant to the Association Agreement of Switzerland with Schengen (AAS) on interpretation of Article 51 CIS.⁵¹

The solution reached with the EU provides that in the event of full implementation of the provisions relating to mutual assistance for crimes of direct taxation evasion, Switzerland will comply with the provisions on mutual judicial assistance of the Schengen acquis and its understanding at the time of signing the AAS.⁵²

⁵¹ See 'Overview of bilateral agreements II', April 2005, Integration Office DFA/DEA, available at www.europa.admin.ch.

⁵² Feuille Fédérale 2004 p. 5783.

Under this agreement, Switzerland may rely on Article 51 CIS to refuse mutual judicial assistance and not respond to letters of requests for search and seizure for direct tax offences. This exception is based on Article 51 let. a CIS, since in Switzerland, decisions on direct tax evasion cannot be appealed to a competent court in criminal matters.

Switzerland will therefore give mutual judicial assistance not only - as it did previously - in cases of tax fraud pursuant to its domestic law, but also in cases of tax evasion resulting from a breach of legal provisions and regulations relating to indirect taxes and as listed in Article 50 CIS. Under Article 51 CIS it will also grant mutual judicial assistance for the purpose of search and seizure for crimes of tax evasion arising from indirect tax. It will, however, not grant mutual judicial assistance for direct tax offences.

5. Extradition for Tax Offences

Article 63 CIS provides for extradition for offences relating to indirect taxation pursuant to Article 50 CIS. Extradition for tax offences is envisaged in the Second Additional Protocol to the European Convention on Extradition, which has been ratified by Switzerland with a reservation entered for the application of Chapter II on tax offences. Therefore, Switzerland has not until now permitted extradition to EU States on the basis of indirect tax offences. Extradition on the basis of indirect taxation offences is therefore a novelty to Switzerland.

Furthermore, after the entry into force of the Convention on Extradition of the EU, there will be an obligation to extradite for all offences in tax matters, namely in the field of direct taxation. The Contracting Parties may however limit by unilateral declaration, extradition for indirect tax offences (Article 6 para. 3 of the Convention). The Swiss Federal Council intends to make such a reservation.⁵³

Moreover, the obligation to extradite under the Convention on Extradition of the EU, is limited to offences punishable under the law of both the requesting Member State (by imprisonment or detention for a minimum of 12 months) and under the law of the requested State (by imprisonment or detention for a minimum of six months) (Article 2, para. 1 of the Convention).

Following the entry into force of the Convention on Extradition of the EU, Switzerland must in principle grant extradition for direct tax offences insofar as the offences are punishable in Switzerland by deprivation of liberty of at least six months. Save for limited exceptions tax evasion does not give rise to imprisonment.⁵⁴ Accordingly, Switzerland will, in the future, grant extradition to EU States only in case of indirect tax fraud.

⁵³ Feuille Fédérale 2004 p. 5780

⁵⁴ T. Keshelava, 'Rechtshilfe in Steuerstrafsachen nach dem Schengen -Assoziierungsabkommen', *Revue de l'Avocat* 3/2003, p. 98.

IV. Conclusion

In many respects, Switzerland already provides judicial assistance to EU countries, usually highly appreciated by the latter. In practice Switzerland often exceeds the approach of many EU Members. Assistance procedures are now occupying less time than in the past and most of the standard objections to assistance can be met where a requesting state complies with the applicable certain frameworks and practices.

The residual obstacle to assistance relates to requests pertaining to tax evasion rather than tax fraud. Switzerland continues to practice a certain leniency (some would call it 'pragmatism') as far as tax evasion is concerned; even so far as it applies to Swiss citizens. However the implementation of the Schengen Agreements will to some extent see changes in this practice.

