Federal Act on International Mutual Assistance in Criminal Matters

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TABLE OF CONTENTS

Art. 1 IMAC 5
Art. 1a IMAC 23
Art. 3 para. 1 and 2 IMAC 31
Art. 8 IMAC 49
Art. 8a IMAC 61
Art. 11b IMAC 71
Art. 16 IMAC 83
Art. 17 IMAC 95
Art. 17a IMAC 115
Art. 32 IMAC 125
Art. 35 IMAC 141
Art. 47 IMAC 175
Art. 48 IMAC 187
Art. 54 IMAC 197
Art. 56 IMAC 207
Art. 55a IMAC 215
Art. 63 IMAC 229
Art. 65 IMAC 251
Art. 67 IMAC 269
Art. 67a IMAC 293
Art. 74 IMAC 331
Art. 74a IMAC 345
Art. 80 IMAC 375
Art. 80a IMAC 383
Art. 80b IMAC 393
Art. 80c IMAC 411
Art. 80d IMAC 421
Art. 80h IMAC 429
Art. 80k IMAC 451

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COMMENTARY ON

Art. 1 IMAC

A commentary by Gaelle Mieli

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Part One General Provisions

Chapter 1 Scope of Application

Section 1 Subject and Limits of Cooperation

Art. 1 Subject matter

[1] Unless other federal acts or international agreements provide otherwise, this Act shall govern all procedures of international cooperation in criminal matters, and in particular:

a. the extradition of persons who are the subject of criminal prosecution or have been convicted (Part Two);

b. assistance aimed at supporting criminal proceedings abroad (Part Three);

c. the transfer of proceedings and punishment of offences (Part Four);

d. the execution of foreign criminal judgments (Part Five).

[2] ...

[3] This Act applies only to criminal matters in which recourse to the courts is permitted under the law of the requesting State.

[3bis] Unless other legislation or international agreements provide otherwise, this Act applies by analogy to proceedings for cooperation in criminal matters with international courts or other inter- or supranational bodies with criminal justice functions if the proceedings relate to:

a. offences under the Twelfth Title[bis], Twelfth Title[ter] or Twelfth Title[quater] of the Swiss Criminal Code; or

b. offences under other provisions of the criminal law and the court or the body concerned is established by a resolution of the United Nations that is binding on or supported by Switzerland.

[3ter] The Federal Council may also stipulate in an ordinance that this Act applies by analogy to procedures for cooperation on criminal matters with other international courts or other inter- or supranational bodies with criminal justice functions if:

a. the court or body is established on the basis of legal provisions that clearly define the powers of court or body in terms of criminal law and criminal procedure;

b. the procedure before the court or body guarantees compliance with the principles of the rule of law; and

c. cooperation serves to safeguard Switzerland's interests.

[4] This Act confers no right to cooperation in criminal matters.

CONTENT

I. General information 8
II. Scope of application 9
A. Materials covered (para. 1) 9
1. Extradition 10
2. Mutual legal assistance in the strict sense 11
3. Delegation of criminal prosecution 11
4. Enforcement of criminal decisions 11
B. Subsidiary nature (para. 1) 12
1. With regard to treaties 12
2. With regard to domestic law 12
3. Exceptions 13
a. Preferential principle 13
b. Complementary application 13
C. Criminal cases in which a judge may be called upon (para. 3) 14
1. Criminal cases 14
2. Possibility of appealing to a judge 15
D. Cooperation with international penal institutions 15
1. Ex officio cooperation (para. 3bis) 15
2. Para. 3ter: extension of cooperation to certain international penal institutions by ordinance 18
a. General 18
b. Conditions 18
c. Federal Council ordinances 20
III. Potestative nature (para. 4) 20
Bibliography 21

I. GENERAL INFORMATION

1 In an increasingly globalized world, people and goods in particular move across borders with ease. Criminals too are taking advantage of this. As a result, criminal proceedings increasingly involve one or more foreign elements. If crime is to be effectively combated, states need to cooperate with each other. Indeed, criminal law, and in particular the use of coercion, is a sovereign competence of States. As such, if a State requires evidence or a person who is not on its territory or under its jurisdiction, in order to advance criminal proceedings on its territory, it cannot exercise its prerogatives of coercion without being assisted by the State on whose territory or under whose jurisdiction the person or item sought is located. Cooperation must therefore be established. The IMAC regulates these procedures. This notion of territorial sovereignty is challenged by the emergence of new types of evidence, in particular electronic evidence, and their collection. The location of such evidence is uncertain. The United States, for example, has passed a law giving American criminal authorities extraterritorial access under certain conditions. However, the IMAC remains rooted in traditional notions of territorial sovereignty.

2 Art. 1 IMAC defines the material scope of the law, namely international cooperation in criminal matters. This covers all measures, including coercive measures, that a State may take to assist another State in its criminal proceedings, at any stage of the proceedings. Cooperation can take place at the investigative stage, during the proceedings, but also after the judgment has been handed down, particularly with regard to the enforcement of decisions.

3 Since its adoption, art. 1 IMAC has been amended three times. The first was to separate the scope from the limits of cooperation. To this end, art. 1 para. 2 IMAC has been incorporated into a new art. 1a IMAC. The second amendment dates from July 1, 2002. As part of Switzerland's accession to the Rome Statute, the LCPI was adopted. Art. 1 IMAC was amended to give the LCPI precedence. Finally, the June 1, 2021 amendment opens up the possibility of applying the IMAC by analogy to cooperation with "international tribunals or other interstate or supranational institutions exercising functions as criminal authorities". This point will be discussed in greater detail below.

In its current version, art. 1 IMAC contains five paragraphs. The first delimits the various matters covered by international criminal cooperation (cf. point II. A.) and specifies the subsidiary nature of the IMAC (cf. point II. B.). Paragraph 2 has been repealed, as mentioned above. Paragraph 3 specifies that the law applies only to criminal matters (see point II. C.). Paragraphs 3bis and 3ter deal with cooperation with international penal institutions (cf. point II. D.) and the last paragraph recalls the potestative nature of the IMAC (cf. point III.). 4

II. SCOPE OF APPLICATION

A. Materials covered (para. 1)

Art. 1 para. 1 IMAC specifies that the law governs international cooperation in criminal matters as a whole. 5

Cooperation is international in the sense that it generally involves at least two States. The notion of state is defined by public international law. Three criteria are used: territory, people and government. International recognition is not a necessary condition for a state to qualify as such under international law. States whose status is disputed nevertheless send requests for international cooperation in criminal matters. Switzerland cooperates with certain states whose recognition is contested by part of the international community. This is the case with Kosovo, which is recognized by Switzerland but not by the international community as a whole, and with which two bilateral treaties have been signed. The same is true of Taiwan (Republic of China), which is not recognized by the international community as a whole, nor by Switzerland. However, requests for mutual assistance have been accepted and confirmed by the Federal Court. However, it is not possible to conclude international agreements, such as bilateral treaties, with states that Switzerland does not recognize. Cooperation is granted on the basis of the IMAC. In the context of the transfer of sentenced persons, this can pose particular problems, as a treaty is generally required in addition to the IMAC. 6

International cooperation in criminal matters therefore involves at least two States, but may also involve more. This may be the case in a complex case where evidence is available in different states. In this case, several requests will be issued between the different states concerned. This is also the case for joint investigation teams, which may involve more than two States. In both cases, however, requests will always be issued from one state to another. In 7

Switzerland, the creation of joint investigation teams is based on a request for mutual legal assistance (art. 80dter IMAC). If several states participate in a joint investigation team, a request for mutual assistance is required between Switzerland and each participating state.

8 Recent developments in international law have seen the emergence of international criminal tribunals and other international penal institutions set up by States or international organizations on the basis of international agreements or United Nations resolutions. These international criminal institutions have their own legal personality and powers of prosecution. However, they do not always have their own investigative services, as states do, and cannot operate on the sovereign territory of a state. As such, these institutions are dependent on the cooperation of other States, and are led to request international criminal cooperation from States. This cooperation must also be considered international within the meaning of the IMAC.

9 The cooperation covered by the IMAC is cooperation in criminal matters (art. 1 para. 1 and 3 IMAC). It must be requested in the context of criminal cases and not for civil or administrative matters. This point will be discussed in greater detail below (see point C.).

10 Art. 1 para. 1 IMAC also lists the four main areas governed by the IMAC, namely extradition, mutual legal assistance in the strict sense, delegation of criminal prosecution and enforcement of foreign criminal judgments. These are governed in detail by Parts 2 to 5 of the IMAC. This list is not exhaustive, and other areas of international cooperation in criminal matters may come within the scope of the IMAC in future revisions of the law. This leaves a certain amount of flexibility for future revisions of the law.

1. Extradition

11 Extradition (art. 32 et seq. IMAC) refers to the surrender of a natural person from one state to another for the purposes of criminal proceedings. The person concerned by an extradition request may be the subject of criminal proceedings in the requesting state, and will then be extradited for the purposes of such proceedings. Extradition may also be requested when a person has been convicted in one state but has not completed serving his sentence in the convicting state. The person will then be extradited with a view to enforcing the criminal penalty.

2. Mutual legal assistance in the strict sense

Mutual legal assistance in the strict sense (art. 63 et seq. IMAC) refers to all measures taken by one state on behalf of another in order to gather evidence useful for the prosecution of a criminal offence by the requesting state. This includes, for example, the taking of evidence, searches, the transmission of documents useful to the proceedings, the freezing and return of assets or the notification of judicial acts. 12

3. Delegation of criminal prosecution

The delegation of criminal prosecution (art. 85 ff IMAC) is aimed at situations where punishable acts have been committed abroad but are being punished in Switzerland, or conversely where the offence has been committed in Switzerland but is being prosecuted abroad. The reasons may be that extradition is not possible, or that delegation of criminal prosecution offers better chances of social rehabilitation, for example. The requested state then prosecutes the person in place of the state in which the events took place. The aim is to avoid a situation where a person who cannot be surrendered through extradition goes unpunished, thus giving concrete form to the principle aut dedere aut judicare. In some cases, it also promotes social rehabilitation by enabling the person to be prosecuted in the State where he or she has the most ties. 13

4. Enforcement of criminal decisions

Finally, the fourth type of procedure governed by the IMAC is the enforcement of foreign criminal judgments (art. 94 ff). This involves a State enforcing, on its territory, a criminal judgment handed down by another State. This differs from extradition for the enforcement of a sentence in that, in the case of extradition, it is the State that has rendered the decision that requests the extradition of the convicted person to serve his or her sentence in the territory of the sentencing State. In the case of enforcement of a criminal judgment, the judgment has been handed down by the sentencing state, which requests that the sentence be enforced in another state where the convicted person is located. Enforcement of a criminal judgment may involve a custodial sentence, as well as the enforcement of a financial penalty, for which extradition is not a consideration. The purpose of enforcing a custodial sentence on the territory of another State is to offer the convicted person a better chance of social rehabilitation. 14

B. Subsidiary nature (para. 1)

15 The EIMP is a subsidiary law. Art. 1 para. 1 IMAC makes this clear: the law applies only where no other law or treaty is applicable. This is repeated in art. 1 par. 3bis IMAC. The IMAC thus complements existing law.

1. With regard to treaties

16 In Switzerland, international law takes precedence over national law, and Switzerland undertakes to respect its international commitments in accordance with the principle of pacta sunt servanda. Treaties concluded by Switzerland will take precedence over the IMAC. This is the case, for example, with European conventions on extradition and mutual legal assistance, or with conventions adopted under the Schengen Agreement, or with United Nations conventions. Thus, the provision of the AP II on joint investigation teams will take precedence over that of the IMAC with States party to this protocol, for example. This is also the case for bilateral treaties that Switzerland concludes with other States. Two exceptions are mentioned below.

2. With regard to domestic law

17 As far as domestic law is concerned, application of the general principle lex specialis derogat legi generali generally means that special laws take precedence over general laws. This means two things: that the IMAC has the character of a special law in relation to other provisions of Swiss criminal law or procedure which might regulate certain similar aspects, and that certain laws have the character of a special law in relation to the IMAC in the areas they regulate.

18 Thus, in mutual assistance proceedings, the provisions of the IMAC must take precedence over the rules of other, more general Swiss laws, in particular those of the Swiss Criminal Code or the Swiss Penal Code, which regulate points also applicable to mutual assistance. The IMAC, for example, governs the status of parties and the rights of appeal of persons involved in mutual assistance proceedings.

19 This principle also means that special laws governing certain subjects of international criminal cooperation law take precedence over the IMAC. Examples include the Federal Act on the Sharing of Confiscated Assets, which lays down

specific rules on this subject, or the LCPI, which governs cooperation with the International Criminal Court.

3. Exceptions

Two exceptions to this subsidiarity must be mentioned. 20

a. Preferential principle

The first is the application in Switzerland of the principle of favor, which provides for the application of the IMAC if it is more favorable to cooperation than international law. This principle derives from Switzerland's objectives in the fight against crime. The aim of international mutual assistance in criminal matters is to promote the suppression of criminal offences, which is important to Switzerland. This is why Switzerland provides the widest possible range of assistance. This also follows from the fact that the purpose of a treaty in this field is to promote mutual assistance, and that it would therefore be paradoxical to grant more restricted mutual assistance to a state with which Switzerland has concluded a treaty than to a state with which it cooperates only on a reciprocal basis under the IMAC. This means, for example, that revisions to the IMAC providing for new measures may also apply to states with which Switzerland has concluded a treaty, even if the treaty does not expressly provide for such measures. This is the case with the new provisions on joint investigation teams (art. 80dter et seq. IMAC). These provisions may allow the creation of such a joint investigation team between Switzerland and a State with which it has concluded a treaty, even if such a possibility is not directly provided for in the treaty. 21

The principle of favor applies unless it is specifically excluded by a law or convention. This is the case of the LCPI, which provides that "cooperation with the Court shall be carried out exclusively in accordance with the provisions of the present law and the Statute". It should also be pointed out that this principle of favor applies against the State, but is not necessarily favorable to the person concerned by the mutual assistance measure. 22

b. Complementary application

The second exception is the complementary application of the IMAC to matters not governed by other laws or agreements, again provided that the cooperation is not governed exclusively by the other agreements or laws. Interna- 23

tional treaties, for example, do not regulate questions of procedure, appeals, time limits and so on. It is the IMAC that applies.

24 Complementary application of the IMAC is also only possible if a law does not exclusively govern an area. For example, although cooperation with the International Criminal Court may now fall within the scope of art. 1 para. 3bis IMAC, it will continue to be governed exclusively by the LCPI.

C. Criminal cases in which a judge may be called upon (para. 3)

25 Art. 1 para. 3 IMAC stipulates that international cooperation in criminal matters may only be granted (1.) in criminal cases (2.) in which it is possible to have recourse to a judge.

1. Criminal cases

26 The EIMP applies only to criminal proceedings. Thus, proceedings to punish a criminal offence must have been initiated or completed in the requesting state. The notion of a criminal case must be interpreted broadly. The main element is the prosecution of a criminal offence. The term "criminal offence" refers to criminal offences punishable in Switzerland under the Swiss Criminal Code, as well as criminal offences punishable under ancillary criminal law. A criminal offence must be punished by a penalty. Penalties involving deprivation of liberty are penal sanctions par excellence, but the other sanctions provided for in the Swiss Criminal Code (art. 34 ff. Swiss Criminal Code) also attest to the penal nature of an offence.

27 The notion of a criminal case may encompass ancillary criminal proceedings or administrative measures. Similarly, requests for mutual assistance are generally made by judicial authorities, but may sometimes be transmitted by administrative authorities in the requesting state, provided that these administrative authorities are competent to initiate criminal proceedings.

28 For a case to be considered criminal within the meaning of the IMAC, the person concerned by the proceedings does not necessarily have to have been indicted. It is sufficient that an investigation has been opened against the person in the requesting state. However, this investigation must be likely to end up before the competent judge (see point 2 below).

The State must also be competent to prosecute the offence which is the subject of the request. The requesting State may only submit a request for mutual assistance if it is itself competent to prosecute the offence which is the subject of the request. Such competence is presumed, however, insofar as the judicial organization of a State falls within its sovereign competence. Switzerland can only examine this point if it is clear that such competence is lacking. 29

2. Possibility of appealing to a judge

The second condition of art. 1 para. 3 IMAC is that the person concerned by the criminal proceedings must have the possibility of appealing to a judge in the requesting state. The purpose of this condition is to guarantee the right to a fair trial guaranteed both by the Federal Constitution and by the international agreements that Switzerland has ratified. 30

International cooperation in criminal matters enables the requesting state to ask the requested state for coercive measures. Such measures must be subject to judicial review in the criminal proceedings initiated. Thus, the person concerned by the proceedings for which mutual assistance is requested must have the possibility, during the course of the proceedings, of appealing to the competent judge in the requesting state. This is generally a criminal court, although in some cases an administrative court may be involved, provided it is competent to impose criminal penalties. 31

Finally, the IMAC only requires the possibility of appealing to a judge. It is sufficient that the person has such a possibility under the law applicable to the proceedings initiated in the requesting state, even if he or she does not ultimately make use of it. 32

D. Cooperation with international penal institutions

1. Ex officio cooperation (para. 3bis)

Paragraph 3bis governs ex officio cooperation with international criminal tribunals or other international, mixed or supranational institutions with criminal law functions (hereinafter referred to as international criminal institutions), insofar as they prosecute serious crimes under international law or are based on a United Nations resolution binding on Switzerland. 33

34 International criminal institutions include international criminal tribunals such as the former International Criminal Tribunal for the former Yugoslavia and the former International Criminal Tribunal for Rwanda, as well as the International Mechanism for the Residual Mechanism of the International Criminal Tribunals, which carries out the residual functions of these two Tribunals, and any other similar tribunals that may be set up in the future. This also applies to mixed tribunals or institutions, i.e. those with both national and international components, such as the Extraordinary Chambers in the Courts of Cambodia, the Special Criminal Court of the Central African Republic or the Specialized Chambers in Kosovo (CSK) and the Specialized Prosecutor's Office. These courts are based on both national and international law, and are supported by an international organization such as the United Nations. Finally, commissions of inquiry set up by the United Nations, such as the International, Impartial and Independent Mechanism to Facilitate Investigations into the Most Serious Violations of International Law Committed in the Syrian Arab Republic, or by the Council of Europe, such as the "Marty Commission", are also covered by art. 1 para. 3bis IMAC. The condition is that these international penal institutions exercise functions of criminal authorities, i.e. that they investigate or prosecute criminal offences.

35 Cooperation with some of these institutions was already governed by the Federal Act on Cooperation with International Tribunals for the Prosecution of Serious Violations of International Humanitarian Law. However, certain new tribunals or institutions were not covered by this law. This was the case, for example, with the Special Tribunal for Lebanon, with which cooperation was impossible before the amendment to the IMAC came into force on June 1, as it did not prosecute serious violations of international humanitarian law.

36 Art. 1 para. 3bis IMAC stipulates that cooperation with international penal institutions will be carried out automatically on the basis of the IMAC in two specific cases. The first (let. a.) is where the international criminal institution is investigating or prosecuting serious violations of international law. The serious violations of international law referred to in this article are those punishable under sections 12bis, 12ter or 12quater of the Swiss Criminal Code, namely genocide, crimes against humanity and war crimes. The crime of aggression, if transposed into Swiss law, would also fall within the definition of serious violations of international law. These crimes are prosecuted by the International Criminal Court. These crimes are so serious that cooperation is

required ex officio. The international criminal institution referred to in letter a. must not have been established by the United Nations. It may be an institution supported or set up by another international organization.

37 The second case (let. b.) is cooperation with international penal institutions investigating and prosecuting ordinary offences, i.e. offences under the Swiss Criminal Code, excluding those punishable under titles 12bis, 12ter or 12quater of the Swiss Criminal Code. The best-known example is the Special Tribunal for Lebanon, which was set up by a United Nations resolution to prosecute those accused of perpetrating the attack of February 14, 2005. The offences prosecuted by this institution were acts of terrorism, crimes and misdemeanors against the life and physical integrity of persons, unlawful associations and failure to disclose crimes and misdemeanors. In this case, cooperation is only automatic if the institution is based on a UN resolution that is binding on Switzerland, or is supported by Switzerland. Switzerland's support is analyzed according to its official positions, such as its vote, if the resolution emanates from a body in which Switzerland was able to vote. If Switzerland has not been able to vote on the resolution, notably because the resolution emanates from a body in which it is not represented, its official opinions are decisive. By body in which Switzerland is not represented, the law refers primarily to the United Nations Security Council, where Switzerland is not a member. The special status accorded to the United Nations stems from the multilateral and even global role of this organization, as well as its ability to adopt resolutions that are binding on its member states.

38 It should also be added that the IMAC applies by analogy to cooperation with international penal institutions. This law has not been amended in its entirety to take account of the specific features of international criminal institutions. It is drafted in such a way as to govern inter-state cooperation. Thus, application by analogy means that when the law uses notions relating to the State, such as "interstate", "requesting State", "requested State", etc., the same rights are granted to international penal institutions as to States. As a result, the case law, doctrine and practice developed on the basis of the IMAC will also be applicable to cooperation with international penal institutions. Applying the IMAC by analogy to cooperation with these institutions means that not only mutual legal assistance in the narrow sense can be granted to these institutions, but also the other measures provided for in the IMAC, such as extradition, delegation of proceedings and enforcement of criminal decisions.

39 Finally, the application of the IMAC to cooperation with international penal institutions is also subsidiary. If cooperation with such an institution is governed by another law or by an international agreement, the IMAC will not apply (see point B. above for more details on the notion of subsidiarity). Thus, cooperation with the International Criminal Court remains governed exclusively by the ICPA. The international instruments setting up these institutions, if they provide for certain directly applicable standards of cooperation, will also be applied as a matter of priority to cooperation with these institutions.

40 With regard to the Federal Act on Cooperation with International Tribunals for the Prosecution of Serious Violations of International Humanitarian Law, its scope has been fully taken over by art. 1 para. 3bis IMAC. As such, this law was repealed when the new article came into force.

2. Para. 3ter: extension of cooperation to certain international penal institutions by ordinance

a. General

41 Para. 3ter allows the Federal Council to extend the scope of application of the IMAC to other international penal institutions by ordinance, irrespective of the type of offences prosecuted by these institutions. At the time of the 2021 revision, the legislator decided that, for the sake of simplicity, the IMAC should be able to govern international criminal cooperation with all international penal institutions. Indeed, the IMAC has been the basis for a long-standing practice and detailed case law. The application of this law to cooperation with all international penal institutions that may emerge in the future provides answers to most of the questions that could possibly arise.

42 The delegation of competence provided for in art. 1 para. 3ter IMAC is similar to that provided for in the former law on cooperation with international tribunals for the prosecution of serious violations of international humanitarian law, which enabled this law to be applied to cooperation with the Special Court for Sierra Leone (SCSL).

b. Conditions

43 Three different cumulative conditions must be met before the Federal Council can issue such an order: the tribunal or institution must have a legal basis that clearly defines its powers in terms of criminal law and procedure, the

proceedings before the tribunal or institution must guarantee respect for the principles of the rule of law, and the cooperation must serve to safeguard Switzerland's interests.

The EIMP stipulates first of all that the international criminal institution concerned by the ordinance must have been set up by a legal act defining the institution's powers. Both the material powers, i.e. the offences prosecuted by the international criminal institution, and the procedural powers, i.e. the rules governing the conduct of investigations, proceedings, the appointment of judges, etc., must be laid down in the constituent instrument. This act must have been adopted according to a transparent process that meets the criteria of the rule of law. However, this process stems from an interstate organization. The criteria may not be the same as in domestic law. 44

Secondly, the procedure before the international criminal institution must guarantee the principles of the rule of law. This means that the procedure must guarantee the fundamental rights enshrined in the ECHR. These include, in particular, the right to a fair trial, the rights of the defense, the presumption of innocence, assurances linked to detention, and the prohibition of torture and inhuman or degrading treatment or punishment. Thus, the institution's constitutive act must contain such safeguards or refer to an instrument preserving these rights within the framework of the procedures to be carried out by the institution. 45

Thirdly, cooperation with the international penal institution must contribute to safeguarding Switzerland's interests. In particular, this means taking into account the foreign policy objectives set out in the Swiss Constitution, as well as those set out in the foreign policy strategy adopted by the Federal Council at the beginning of each legislature. Switzerland's interests include, for example, its commitment to peace and security, which entails investigating and prosecuting serious crimes under international law in order to combat impunity, as well as the general objective of combating transnational crime, which contributes to Switzerland's prosperity, as described in the Federal Council's strategy. 46

These could be institutions set up outside the UN framework to prosecute ordinary crimes. In fact, the first ordinance adopted by the Federal Council is aimed at an institution created by the European Union and which, at least at 47

the time of entry into force of this ordinance, prosecutes rather financial offences.

c. Federal Council ordinances

48 The Federal Council first made use of the possibility provided for in para. 3ter for the first time on December 21, 2022. It adopted the Ordinance on Cooperation with the European Public Prosecutor's Office to regulate international cooperation in criminal matters between the Swiss authorities and this new body. The message gives examples of other institutions for which such an ordinance could be adopted, such as the Khmer Rouge Tribunal or the Marty Commission, or even other international criminal institutions that already exist or may emerge in the future, depending on the needs of the authorities.

49 The Federal Council Ordinance consists simply of two articles. The first sets out the purpose of the ordinance, while the second provides for its entry into force. The Federal Council Ordinance provides for application by analogy of the IMAC to cooperation with such a new institution. As mentioned above, application by analogy allows existing practice and jurisprudence to be taken over without extensive amendment of the IMAC, since the terms relating to the notion of State are to be interpreted in such a way that they also include international penal institutions.

III. POTESTATIVE NATURE (PARA. 4)

50 Paragraph 4 is the cornerstone of the IMAC, which is a potestative law. It enables Switzerland to cooperate both with other States and with the international penal institutions included within its scope. However, no obligation to cooperate can be derived from it. In this sense, it does not go as far as the bi- or multilateral international agreements that Switzerland has been able to conclude, since some of these provide for an obligation to cooperate. Thus, the IMAC allows Swiss authorities to grant cooperation to States or international criminal institutions, but does not allow other States or international criminal institutions with which Switzerland has no agreement to demand cooperation.

51 An obligation to cooperate with certain States may derive from international agreements that Switzerland has ratified. An obligation to cooperate with certain international institutions, on the other hand, may derive from the consti-

tutive act of that institution. For example, certain Security Council resolutions establishing international criminal tribunals have provided for such an obligation to cooperate. While the IMAC applies to cooperation with these tribunals on the basis of the new art. 3bis, the obligation to cooperate derives from the applicable international law, i.e. from the resolution establishing the institution, and not from the IMAC.

The view expressed reflects the personal opinion of the author and does not bind the Federal Office of Justice.

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Art. 1*a* Limitation of cooperation

In the application of this Act, Swiss sovereignty, security, public order or similar essential interests must be taken into account.

CONTENT

I. History of origins 25
II. Subject Matter of the Norm 25
III. Decision-Makers 25
IV. Scope of Application 26
A. Public Order 26
B. Essential interests of Switzerland 28
Bibliography 29

I. HISTORY OF ORIGINS

Art. 1a IMAC was inserted by the Federal Law of 4 October 1996 and has been in force unchanged since 1 February 1997. Previously, it was part of Art. 1 para. 2 IMAC, old version. The transfer to a separate article was made in order to clearly distinguish between the subject matter of the law and the limitation of international cooperation. Art. 1a IMAC is modeled on Art. 2 lit. b EUeR. 1

II. SUBJECT MATTER OF THE NORM

Art. 1a IMAC stipulates that the application of the Mutual Assistance Act must take into account Switzerland's sovereign rights, security, public order or other essential interests. Art. 1a IMAC is not formulated as an actual ground for refusal, but represents a general restriction on intergovernmental cooperation. The provision is very broadly worded and, through the catch-all element of essential interests, sets a political reservation on the application of the Mutual Legal Assistance Act. It is intended to permit the refusal of cooperation, which is otherwise permissible, if mutual legal assistance could harm the interests mentioned in the provision. In terms of its content, Art. 1a IMAC complements the grounds for exclusion and refusal of Art. 2-5 IMAC. While the latter aim to protect the individual, Art. 1a focuses on the interests of Switzerland. 2

III. DECISION-MAKERS

In contrast to the grounds for exclusion and refusal, which are decided by the executive authorities and are subject to judicial review, the existence of the grounds for exclusion under Art. 1a IMAC is decided by the FDJP (Art. 17 para. 1 IMAC). The Department may intervene ex officio or be asked for a decision within 30 days of the final ruling being issued. This can be appealed to the Federal Council (Art. 26 IMAC). The person concerned may not raise any objections that can be challenged using the ordinary legal remedies. The examination of Art. 1a IMAC is limited to the question of whether the provision of mutual assistance, which is permissible in itself, should be refused because substantial Swiss interests would thereby be impaired. 3

The proceedings before the FDJP have no suspensive effect on the mutual assistance proceedings. As a matter of practice, the FDJP shall decide on such 4

appeals only after it has been legally clarified whether and to what extent the relevant treaty and statutory law otherwise permits mutual assistance. Only Swiss and foreign nationals domiciled in Switzerland and companies with registered offices or permanent establishments in Switzerland can invoke Art. 1a IMAC.

5 In the first instance, therefore, the political authorities are to decide whether sovereign rights, security, public order or other essential interests of Switzerland stand in the way of cooperation - this is a purely political act. This does not mean, however, that the essential interests of Switzerland may not be taken into account by the enforcement authorities within the scope of their decision-making discretion. Thus, on several occasions, the Federal Supreme Court took into account Switzerland's reputation and, in the sense of a balancing exercise, contrasted this with possible reasons for refusing mutual assistance. For example, the Federal Supreme Court ruled that waiving the condition that Switzerland provide mutual assistance only if the foreign state makes a counter-law declaration could be in Switzerland's interest if it thereby prevented Switzerland from becoming a hoard of criminal assets.

6 Art. 1a IMAC is rarely applied in practice.

IV. SCOPE OF APPLICATION

7 Article 1a IMAC is applicable to all forms of mutual assistance regulated in the Mutual Assistance Act, i.e. to extradition and accessory mutual assistance as well as to vicarious prosecution and execution. The grounds for refusal set out in Art. 1a are not applicable if Switzerland has concluded a bilateral or multilateral mutual assistance treaty with the requesting treaty that does not contain a corresponding provision.

8 As mentioned above, the granting of mutual assistance must take into account Switzerland's sovereign rights, security, public order or other essential interests. In addition to the concept of essential interests, which is a catch-all provision within Art. 1a IMAC, the concept of public order in particular requires explanation.

A. Public Order

9 The concept of public policy was not provided for in the Federal Council's draft and was inserted by the Council of States. Its content is not immediately

comprehensible in the context of Art. 1a IMAC. In some cases, it is equated with the concept of ordre public or the latter is generally included under the concept of public policy of Art. 1a IMAC. "Public order" and "ordre public" are, however, two terms with different content in the German language. While public order usually refers to a police property, ordre public encompasses the foundations of the legal order. In French and Italian wording, on the other hand, the term ordre public or ordine pubblico is used for both cases.

Art. 1a ISRG was modeled on Art. 2 lit. b EUeR, which also uses the term ordre public in its original French version, but "öffentliche Ordnung (ordre public)" in the German translation. With Art. 2 lit. b EUeR, a reservation should be granted to the foundations of the national legal order, whereby at least the national ordre public could be covered by the concept of public order. The national ordre public comprises the totality of principles and institutes which are considered fundamental for a society and are consequently recognized by law. These can be of a material or formal nature. In Switzerland, these include in particular the prohibition of corporal punishment and the death penalty, and to a certain extent also the appropriateness of penal sanctions and essential procedural maxims. A violation of these principles and institutes constitutes a breach of the national ordre public, as do serious deficiencies of the foreign proceedings, as they are expressly mentioned in Art. 2 lit. d IMAC. National ordre public thus describes the extent to which Switzerland's involvement in the enforcement of foreign criminal law contradicts fundamental views of the Swiss legal system. 10

It is undisputed that a violation of the national ordre public leads to a denial of mutual assistance. However, the classification has practical significance insofar as it determines which body will rule on a possible violation of ordre public. If serious deficiencies in the foreign proceedings are included as a violation of public policy under Art. 2 lit. d IMAC, the executive authorities decide on this and the decision is subject to judicial review. If, on the other hand, public policy is the subject of Art. 1a IMAC, the decision falls to the FDJP and, as the appeal authority, to the Federal Council. 11

The ordre public, as it is used in German, aims at protecting individual rights by protecting the person concerned from serious procedural defects. According to Popp, for example, the question of whether to deny an extradition request because of a threat of corporal punishment is a purely legal one that cannot depend on political considerations such as general relations with the 12

country in question, countervailing considerations in other fields, or domestic political importance. In contrast, Art. 1a IMAC involves a political balancing that pursues the protection of Switzerland's interests. In other words, a violation of public policy in an individual case is not to be determined according to Art. 1a IMAC, but according to Art. 2 lit. d IMAC, whereby the decision is incumbent on the executive authorities and thus subject to judicial review.

13 However, to understand the concept of public order only as a police asset and part of internal security (Art. 57 FC) falls short. Finally, situations are also conceivable in which the systematic violation of fundamental rights in the requesting state could endanger public order in Switzerland. If the content of Switzerland's national ordre public is systematically violated in the foreign state beyond the individual case, the granting of mutual assistance would hardly be compatible with public order and the interests of Switzerland within the meaning of Art. 1a IMAC.

B. Essential interests of Switzerland

14 By "essential interests of Switzerland" is meant interests that are crucial to the existence of Switzerland. This includes, in particular, the protection of the Swiss economy in its entirety, whereby this can only be considered to be at risk in particularly serious situations. According to the case law of the Federal Supreme Court, banking secrecy as such cannot prevent the granting of mutual assistance. However, mutual assistance may be refused if the execution of the request would virtually undermine banking secrecy or cause disadvantages to the Swiss economy as a whole. The granting of legal assistance that is limited to the provision of information on certain banking relationships of a few clients does not violate banking secrecy. Furthermore, according to the Federal Supreme Court, the functioning of international supervision of financial services must also be counted among Switzerland's essential interests.

15 In principle, there is no threat to the Swiss economy as a whole if a foreign authority is provided with information on assets stored in Switzerland that may be of criminal origin. This is because the Swiss financial center must not be abused for criminal purposes. On the contrary, Switzerland's essential interests would be adversely affected if assets potentially representing the proceeds of crime could be invested in Switzerland without the foreign authorities being able to obtain information about them. In this sense, the consideration of essential Swiss interests can also speak in favor of cooperation: The

idea that it is contrary to the national interest if Switzerland becomes a haven for flight assets or criminal funds, and that this damages Switzerland's reputation, may also be taken into account in favor of providing mutual legal assistance within the scope of the decision-making leeway available to the law enforcement authorities.

In this commentary, the author reflects her personal assessment.

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COMMENTARY ON

Art. 3 para. 1 and 2 IMAC

A commentary by Olivier Peter

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Art. 3 para. 1 and 2 Nature of the offence

[1] A request shall not be granted if the subject of the proceedings is an act which, in the Swiss view, is of a predominantly political nature, constitutes a violation of the obligation to perform military or similar service, or appears to be directed against the national security or military defence of the requesting State.

[2] The plea that an act is of a political nature shall not be taken into account under any circumstances:

a. in cases of genocide;

b. in cases of crimes against humanity;

c. in cases of war crimes; or

d. if the act appears particularly reprehensible because the offender, for the purpose of extortion or duress, has endangered or threatened to endanger the life or limb of persons, especially by hijacking aircraft, using means of mass extermination, causing a catastrophe or taking hostages.

CONTENT

I. Origin and purpose of the standard 34
II. Acts of a predominantly political nature 35
A. No legal definition 35
B. Types of political offence 35
1. Absolute political offence 36
2. Relative political offence 36
a. Circumstances 37
b. Proportionality 38
3. Related offence 39
C. Exceptions to depoliticization 40
1. Crimes under international law 40
2. Terrorism and other particularly reprehensible acts 41
a. Intent to extort or coerce 41
b. Endangerment of life and limb 41
c. Violation of international humanitarian law 42
III. Military obligations 43
Bibliography 45

I. ORIGIN AND PURPOSE OF THE STANDARD

1 The prosecution of political offences is at the origin of the first extraditions and the legislation of this mutual assistance procedure. For centuries, international cooperation in criminal matters, in the form of extradition, mainly, if not exclusively, concerned political figures or persons prosecuted for political offences.

2 This practice underwent an upheaval in the 19th century, when European states modified their approach by granting "special indulgence" to the "crimes of honest people". Scholars attribute this paradigm shift to the effects of the French Revolution (1789) and the recognition of Belgian independence (1830). The first exclusion of political offenses from extradition was thus included in the Franco-Belgian treaty of 1834. Swiss law incorporated this special protection into art. 10 of the LExtr in 1892, and then took it over in art. 3 para. 1 IMAC, when it came into force in 1981, extending this protection to all acts of mutual assistance.

3 The refusal of international judicial cooperation in criminal matters for political offences was subsequently incorporated into numerous multilateral instruments binding on Switzerland, such as the European Convention on Extradition and its first additional protocol, the European Convention on Mutual Assistance in Criminal Matters, as well as into bilateral treaties with Algeria, Argentina, Australia, Brazil, Canada, Chile, Colombia, Ecuador, Egypt, Fiji, Guyana, India, Kenya, Malawi, Mauritius, Namibia, New Zealand, Pakistan, Papua New Guinea, Paraguay, Philippines, Seychelles, Solomon Islands, Tanzania, Uganda, United States and Uruguay.

4 The rationale behind the exclusion of international judicial cooperation in criminal matters does not lie in the need for protection against the authoritarianism or arbitrariness of certain States. The exclusion of extradition for the prosecution of political offences is in fact provided for in numerous conventions binding member states of the Council of Europe and/or third-party states regarded as states governed by the rule of law. This protection is based on the conviction that, in exceptional circumstances, any State may have to prosecute a person for political offences, a prosecution with which third States have a duty not to associate themselves. What's more, when it comes to acts of a political nature that may be considered acts of aggression against the

very existence of a State, the latter is both judge and party, which prevents it from treating the facts with the requisite impartiality and ensuring the individual a fair trial. As Fiolka puts it, this means not extraditing an accused person to a state that "bites like a wounded animal".

Finally, we would point out that the prohibition on prosecuting political offences does not only apply to perpetrators who are in Switzerland and wanted by a foreign state, but also to persons prosecuted by the Swiss authorities in proceedings requiring the cooperation of a foreign state. In such cases, the federal authorities refuse to issue a request for mutual assistance. 5

II. ACTS OF A PREDOMINANTLY POLITICAL NATURE

Political offences, or acts of a predominantly political nature according to the definition chosen by Parliament, which exclude international cooperation in criminal matters, are not defined in positive Swiss or international law (A). This lacuna has been the subject of major doctrinal and jurisprudential developments, which have categorized three types of political offence (B). Swiss and international law have then added a number of exceptions (C). 6

A. No legal definition

Neither the Swiss parliament nor international treaties define what is to be considered a "political offence", both in terms of mutual assistance and extradition procedures and the prosecution of political offences by domestic courts. 7

This uncertainty leaves the administrative and judicial authorities with a wide discretionary power to determine what they consider to be a political offence, allowing decisions to be influenced by considerations that go beyond the strict legal framework. As a result, the concept of a political offence bears some similarities to the margin of appreciation granted to criminal prosecution authorities when deciding on the mitigating factor of "honourable motive" (CP 48 I a). 8

B. Types of political offence

In the absence of a legal definition, the notion of political offence has long been the subject of debate between two main theses: on the one hand, the objectivist thesis, which defines political offence on the basis of the nature of 9

the reprehensible act, i.e. in particular the constituent elements of the offence; on the other, the subjectivist thesis, which focuses on the perpetrator's motive .

10 Federal case law has opted for a mixed approach, distinguishing between three different types of political offence: the absolute political offence (1), the relative political offence (2) and the fact associated with a political offence (3), all three of which may fall within the scope of art. 3 para. 1 IMAC.

1. Absolute political offence

11 An absolute political offence, also known as a purely political offence, a purely political offence or simply a political offence, is one which is directed exclusively against the institutional, political and legal organization of the State. The perpetrator's intention is to "destroy, modify or disturb the political order in one or more of its elements".

12 According to doctrine and case law, this "aim" ("Ziel") must be mentioned among the constituent elements of the offence, and must be exclusive. This must be clear from the qualification provided for under Swiss law, irrespective of the law or case law of the requesting state.

13 In this respect, the term "special purpose" is used in case law to refer to a particular intention on the part of the offender to perform a future action or obtain a certain result. For the sake of uniformity and consistency, the notion of "purpose" should be preferred to that of "aim". The pure criminal offence thus constitutes an "Absichtsdelikte".

14 Absolute political offences include measures aimed at the overthrow of the state, such as sedition, coup d'état and high treason, as well as acts of espionage or political intelligence. In the opinion of the Office of the Attorney General of Switzerland, the offences described in Titles 13 to 16 of the Swiss Penal Code are to be regarded as political offences.

2. Relative political offence

15 The second category concerns relative political offences, also known as complex offences or politically motivated offences.

16 According to long-standing case law, a relative political offence is an ordinary offence which acquires a predominantly political character in view of the cir-

cumstances in which it was committed, in particular the motive and the aim pursued.

This means proceeding in two stages, firstly by examining the circumstances surrounding the alleged offence, in order to determine whether the political elements outweigh those of ordinary law. Secondly, it will be necessary to examine whether there is an adequate relationship of proportionality between the means employed and the aim pursued. 17

a. Circumstances

In examining the political elements, account must be taken of both the internal circumstances (purpose, motive, etc.) and the external circumstances (conduct, way of acting of the perpetrator) of the act pursued. 18

With regard to internal circumstances, we suggest examining successively the purpose of the act (aim) and the reason that led the perpetrator to act (motive). 19

With regard to the purpose, it is necessary to consider the result sought by the perpetrator. In the past, federal case law has indicated that a political offence is conditional on the perpetrator's intention to bring about a political change. The act in question "must always have been committed in the context of a struggle for or against power", and must be "closely and directly connected, clearly and unmistakably, with the object of this struggle". This applies above all to acts aimed at overthrowing or otherwise seizing legislative or executive power. A political aim must also be accepted for acts intended to provoke or otherwise influence policy changes, including those aimed at denouncing the violation of fundamental rights and demanding their implementation, or obtaining recognition of new rights, without their perpetrators being motivated by the desire to seize legislative or executive power. This view appears to be shared by the Swiss Federal Prosecutor's Office, which has recognized that a politically motivated appeal not to pay military taxes should be classified as a "political offence". 20

As regards motive ("Beweggrund"), in criminal law this is defined as "the psychological cause of a manifestation of will, a cause which represents the expression of conscious or unconscious feelings, impulses or reasoning which have an immediate or mediate action on the action". In other words, the first question to be asked is whether the perpetrator was "motivated by a political 21

intention", and then whether this intention exerted a "predominant influence on the act complained of". This involves determining whether the perpetrator was motivated by ideological convictions, or whether, on the contrary, the act was motivated by a desire for enrichment or revenge. In other words, it is a question of determining whether the act was motivated by altruistic sentiment or other convictions of general interest, or whether it responded to a selfish motive and personal interest on the part of the perpetrator.

22 The distinction between purpose and political motive is not always clear-cut, as these two elements often coexist, but not always. A case in point is the extradition request against a mercenary who is alleged to have worked to overthrow a foreign government, acting with a political aim but out of greed, i.e. without any political motive. Other examples include acts of reprisal or revenge against people who have betrayed a political organization, or worked for a deposed government, for political reasons, but without the aim of bringing about change.

23 For external circumstances that may attest to the political nature of the act, it will be necessary to examine the conduct complained of, in particular to determine the means employed and the objective chosen, as well as the link between the aim sought and the means employed. This question may be particularly important when dealing with acts of an artistic nature, such as performances that may offend religious feelings, symbols or the honor of a head of state.

b. Proportionality

24 The fact that an act is politically preponderant is not a sufficient condition to exclude international criminal cooperation. There must be a reasonable relationship of proportionality between the infringement of legally protected property and the aim pursued by the perpetrator. The more serious the infringement of other people's rights, in particular because of the degree of violence used, the more it will be necessary to demonstrate that the aim pursued could not have been achieved by a less incisive means. Conversely, the lesser the infringement and the damage caused, the more the political nature of the act will have to be accepted.

25 In this context, jurisprudence calls for the political regime of the State targeted by the acts complained of to be taken into account, as well as its possible

authoritarian nature. Among the criteria mentioned by legal writers are the political, legislative and constitutional situation in the requesting State, its conception of fundamental rights and the independence and impartiality of its judiciary.

Long-standing case law holds that when the requesting State "happens to be a democratic country", the political offence exception must be accepted restrictively. In our view, this principle should now be qualified. As noted above (I.), the existence of a "democratic" regime in the liberal sense of the term does not preclude recognition of the political nature of an offence. Even a state with reliable institutions that generally operate in accordance with the rule of law may, in cases of existential urgency, be faced with a crisis situation that may justify the commission of political offences. 26

3. Related offence

The term "offence connected with a political offence" refers to an act punishable under ordinary law which is granted a certain degree of immunity because it was committed in parallel with a political offence (absolute or relative), generally in order to prepare, facilitate, ensure or conceal the commission of the latter, or even to subsequently procure immunity from it. 27

Jurisprudence and doctrine consider that such an act would not have a "political component". Others give as examples acts that do not have a direct causal link with the intended political aim, such as stealing weapons to prepare an armed insurrection or committing banditry to finance political activities. On the other hand, the mere fact that a common law offence has been committed in a certain political context, has had a "major impact on public opinion" and "aroused political agitation", or has been committed by a politically exposed person, is not such as to confer special protection on the act. The consequence of this imprecise definition is that the related offence is almost never used in practice. 28

In our view, a related political offence should refer to an act whose purpose is to enable or facilitate the commission of a political offence, whether absolute or relative, but which is committed by a perpetrator who does not act out of a political motive, but is guided by other considerations. For example, the perpetrator might have acted in exchange for remuneration, such as having sold arms or agreed to help political activists cross a border illegally, or a close rel- 29

ative of a wanted political activist, providing logistical support on the basis of personal ties rather than rallying to the cause. Depending on the circumstances, such a situation may give rise to doubts about the impartiality of the requesting state's courts, and thus justify a refusal to cooperate.

30 On the other hand, the mere risk of reprisals by the authorities following the commission of an offence under ordinary law is not such as to give it a political character, even as an incidental matter. Such a situation would have to be examined under art. 2 a and d IMAC.

C. Exceptions to depoliticization

31 Swiss law has provided for a depoliticization exception to apply to certain acts, on account of their seriousness, so that they cannot benefit from the protection afforded to political offences. This is the case for crimes under international law (1) and certain "terrorist" crimes (2). These exceptions are also provided for in the international law by which Switzerland is bound.

32 Application of the depoliticization exception does not imply denying the political nature of the act complained of, but rather depriving it of any special protection, by treating it in the same way as ordinary offences.

1. Crimes under international law

33 Amended following ratification of the Rome Statute of the International Criminal Court, Swiss law now excludes the protection afforded to political offenses when they constitute the most serious crimes under international law, i.e. genocide (IMAC 3 al. 2 let. a), crimes against humanity (IMAC al. 3 let. b) and war crimes (IMAC 3 al. 2 let. c).

34 The crime of aggression is not included in art. 3 para. 2 IMAC. This is due to its inclusion in the Statute of the International Criminal Court at a later stage, following lengthy debate, and to its failure to be transposed into Swiss positive law. As it stands, the crime of aggression is not a crime for which the qualification of political offence can be systematically refused. There have been several parliamentary interventions on this subject, and it seems likely that this offence will soon be incorporated into the penal code. Should this be the case, it would make sense to revise the IMAC at the same time, in order to include this offence in the list of international crimes for which the political nature does not exclude extradition.

2. Terrorism and other particularly reprehensible acts

Switzerland has ratified the European Convention on the Suppression of Terrorism (CERT), one of whose aims is to "reduce the scope of political offences as an exception to extradition". 35

Adopting the exclusion provided for in Art. 1 and 2 of the CERT, the Swiss Parliament amended Art. 3 IMAC to deny the protection afforded to political acts in the case of any act "particularly reprehensible in that the perpetrator, with a view to coercion or extortion, has endangered or threatened to endanger the life or physical integrity of persons, in particular by hijacking an aircraft, using mass extermination methods, triggering a disaster or taking hostages" (art. 3 para. 2 let. d IMAC). Parliament has chosen to broadly echo the terms used in art. 2 para. 1 CERT, by excluding political protection for certain acts, rather than a general exclusion of any act described as "terrorist". This wording reflects the difficulty of defining the notion of "terrorism" in such a way as to avoid it encompassing persons who might be considered "freedom fighters". 36

The protection of the political offence must be denied when three cumulative conditions are met: a willingness to extort or coerce, endangerment or the threat of endangerment, and - in the case of armed conflict - a violation of international humanitarian law. 37

a. Intent to extort or coerce

The purpose of the act must be "to exert coercion or extortion", as co-perpetrator or accomplice. 38

This excludes from the scope of art. 3 al. 2 let. d IMAC recruitment or public declarations of support for organizations using violence as a means to achieve their political aims. Mere membership of an organization described as "terrorist" does not further meet this condition. 39

b. Endangerment of life and limb

Only acts of coercion or extortion involving the endangerment of life or limb, or the threat of such endangerment, fall within the scope of art. 3 para. 2 let. d IMAC. On this point, the Swiss Parliament has rejected the possibility offered by the CERT of extending the depoliticization exception to acts of political 40

violence directed exclusively against the freedom of individuals or acts against property, but creating collective harm for individuals.

41 An exception to this principle exists in the case of acts of financing, for which the classification as a political offence is excluded under the 1999 Convention for the Suppression of the Financing of Terrorism.

42 There must be a sufficiently close causal link between the conduct of which the person concerned is accused and the endangerment or threat of endangerment of life or limb. Such a solution also derives from respect for the principle of legality, which prescribes an extensive interpretation of the legal provisions on criminal matters against an accused person.

43 In Swiss case law, this has been reflected in decisions in favor of extradition of a person accused of having supplied arms and explosives to an Albanian-speaking separatist organization which was carrying out attacks in Serbia, of an ETA supporter accused of renting accommodation used as a cache for weapons and explosives, which were then used to carry out attacks, or of a member of the Kurdistan Workers' Party (PKK) for his involvement in the murder of a "village watchman" and for personally ordering the commission of murderous attacks.

44 Acts that do not involve the commission or threat of a violent act against persons do not fall within the scope of art. 3 para. 2 let. d IMAC. Such an interpretation is all the more necessary given that it is not uncommon for prosecutions for "terrorism" to be brought for acts relating to the exercise of fundamental rights, including within the Council of Europe. It is precisely in this context that the protection afforded to political offences comes into its own. The depoliticization exception for acts of "terrorism" should thus not apply to support given to a fugitive who has no intention of committing acts of violence, the publication of press articles referring to the activities of illegal organizations, actions providing material and legal support to people detained for terrorist offences or calling for their release, and participation in ceremonies in memory of members of an organization killed by the forces of law and order.

c. Violation of international humanitarian law

45 In the context of armed conflicts, including non-international ones, the mere use of violence to achieve a political goal, including against individuals, does

not qualify as "terrorism" or a particularly reprehensible act. Where the act complained of takes place in such a context, the exception in art. 3 para. 2 let. d IMAC applies only to acts involving a violation of international humanitarian law.

III. MILITARY OBLIGATIONS

Art. 3 IMAC also provides for another exception, less frequently invoked, excluding extradition for acts which constitute a violation of military or similar obligations, or acts directed against the national defense or defensive power of the requesting state (IMAC 3 I). 46

The wording chosen by the federal legislator differs from that adopted by the Council of Europe. The latter has chosen a negative definition, considering military offences to be those which do not constitute offences under ordinary law (CEExtr 4). The subsidiary nature of the IMAC is reiterated in art. 1 para. 1. Federal case law states that in the event of a conflict between national and treaty law, Swiss law must be interpreted in accordance with international law. When the request comes from an EEC member state, the negative definition therefore applies. In such a case, international cooperation is excluded for an offence whose constituent elements derive solely from a law relating to an obligation to serve, and which concerns conduct not punishable in an equivalent manner under general criminal law. Where the request comes from a third country, the positive definition will apply. We believe, however, that this contradiction should be resolved by adapting the wording of domestic law to that chosen by the Council of Europe. 47

In Swiss law, purely military offences are incorporated into the Military Penal Code. These include refusal to serve, desertion, treason and service in a foreign army, as well as drunkenness, mutilation and violation of military contractual obligations. As Parliament has chosen to include them in the Penal Code, espionage and political and military intelligence are not military offences, but may constitute political offences. 48

Violation of similar obligations is to be understood primarily as other obligations to serve. Judicial cooperation in criminal matters is therefore excluded for breaches of civil service or civil protection provisions. The question of the exclusion of cooperation in respect of infringements of the War Material Act, 49

concerning goods for exclusive military use, has not yet been settled, but should be clarified.

50 Contrary to what is asserted by the majority of legal writers, and in line with long-standing case law, exclusion is determined by the nature of the act and not by the status of the perpetrator. A military offence is therefore not necessarily an offence in its own right ("echte Sonderdelikt"), which can only be committed by an individual with certain objective characteristics ("intraneus"). It is therefore not decisive whether the person being prosecuted is subject to a military or similar obligation, or would have been at the time of the offence, unless this is a constitutive element of the offence concerned. This question is particularly topical at a time when private companies are increasingly taking on military tasks in the context of national or international conflicts.

51 On the one hand, a person subject to an obligation to serve can, in principle, be extradited if the alleged offence falls within the scope of ordinary law. For example, homicide committed by a person in the exercise of his duty to serve does not constitute a military offence.

52 On the other hand, the Military Penal Code expressly provides that "civilians" may be subject to military criminal law. Civilians" can be prosecuted for the commission of certain military offences, such as breach of military duty, founding a group aimed at undermining military discipline, obstructing military service or insulting a member of the military. In such cases, the exception of art. 3 IMAC would apply.

53 In certain special cases, extradition should also be refused in application of the fundamental right to conscientious objection, based on the right to freedom of thought, conscience and religion. The aim is to prevent a person being prosecuted from being handed over to a State where, immediately after serving a sentence for an ordinary offence, he or she could be forced to perform military service on pain of being deprived of his or her liberty. The person must be able to justify that his or her opposition is based on a serious and insurmountable conflict between the obligation to serve in the army and his or her sincere and deep-rooted convictions, religious or otherwise. Not all convictions are protected, and it is legitimate to require the person concerned to provide proof of the seriousness of his or her convictions.

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COMMENTARY ON

Art. 8 IMAC

A commentary by Maha Meier

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Art. 8 Reciprocity

[1] As a rule, a request shall be granted only if the requesting State guarantees reciprocity. The Federal Office of Justice (FOJ) shall obtain a guarantee of reciprocity if this is considered necessary.

[2] Reciprocity is in particular not required for the service of documents or if the execution of a request:

a. seems advisable due to the type of offence or to the necessity of combating certain offences;

b. is likely to improve the situation of the defendant or the prospects of his social rehabilitation; or

c. serves to clarify an offence against a Swiss national.

[3] The Federal Council may, within the scope of this Act, provide other States with a guarantee of reciprocity.

CONTENT

I. General 52
II. Historical background 52
III. Principle of reciprocity in the IMAC 53
A. Requirement of reciprocal guarantees (para. 1) 53
1. General 53
2. Guarantee of reciprocity 54
3. Scope 55
B. Exceptions to guarantees of reciprocity (para. 2) 57
Bibliography 58

I. GENERAL

1 The principle of reciprocity in international mutual assistance in criminal matters, enshrined in Art. 8 IMAC, is a condition for the granting of mutual assistance. However, it only applies in the absence of an international cooperation agreement or treaty in criminal matters between the states concerned, in which case requests for mutual assistance are governed exclusively by Swiss law and the general principles of public international law.

2 The principle of reciprocity may also apply in exceptional cases where there is a bilateral or multilateral treaty on international mutual assistance in criminal matters, in particular where the offense covered by the request for assistance is not covered by the treaty. Therefore, in order for mutual assistance to be granted beyond the scope of the treaty, the principle of reciprocity must be guaranteed. Consequently, an international agreement on mutual legal assistance does not preclude the obtaining of an assurance for an area not covered by it.

3 The guarantee of the principle of reciprocity must not be considered in a given situation but rather as a practice between States granting mutual assistance in criminal matters. The requested State, granting mutual assistance in accordance with the principle of reciprocity, expects the requesting State to provide the same assistance in a similar situation. The principle of reciprocity may arise from treaty negotiations, previous practice between States, or the granting of an assurance by the requesting State.

II. HISTORICAL BACKGROUND

4 The principle of reciprocity is a general rule of international law which allows a State to make the advantage it grants to another State conditional on the absolute assurance that it will obtain the same advantage if necessary. The principle of reciprocity is generally based on customary international law. The condition of reciprocity is an expression of the sovereignty of a State, which considers the granting of mutual assistance to another State to be a political act and not a legal act. With the evolution of the understanding of state sovereignty and criminal policy objectives, the condition of reciprocity is tending to become more flexible, due to a broad interpretation of the grounds for exception, resulting from various factors, such as the evolution of state

sovereignty, respect for human rights, the rise of international conventions, and the mutual recognition of judicial decisions of other states. The competent authorities have broad discretion in this area. The principle of reciprocity may be subject to political considerations; the text above should therefore be followed, which means that the promotion of international cooperation must be weighed against the preservation of sovereignty and other interests mentioned above.

In accordance with Art. 8 para. 1 IMAC, mutual assistance in criminal matters is subject to the principle of reciprocity, in particular depending on the circumstances, including the seriousness of the offense. However, the law provides for exceptions to reciprocity (Art. 8 para. 2 IMAC): simple notification, the nature of the act committed or the fight against certain forms of crime (letter a), improvement of the situation of the person being prosecuted or their chances of social rehabilitation (letter b) and, finally, the clarification of an act directed against a Swiss citizen (letter c). Only the Federal Council is competent to guarantee reciprocity to other states (Art. 8 para. 3 IMAC). 5

III. PRINCIPLE OF RECIPROCITY IN THE IMAC

A. Requirement of reciprocal guarantees (para. 1)

1. General

In accordance with Art. 8 para. 1 IMAC, Switzerland shall only grant a request for mutual assistance from a foreign state if that state grants reciprocal guarantees. This is a principle of international law which allows the requested State to make the granting of mutual assistance conditional on the requesting State guaranteeing it, where appropriate, the same advantage, i.e. the same type of judicial assistance for the same purposes (*do ut des*). 6

Reciprocity is therefore a principle that is "essential to the granting of mutual legal assistance, extradition, delegation of prosecution and the enforcement of decisions." Consequently, mutual assistance cannot be granted if the requesting State does not grant reciprocity and there are no grounds for exception within the meaning of Art. 8 para. 2 IMAC. 7

The principle of reciprocity plays an essential role, *but* only when cooperation is based on the Mutual Assistance Act (IMAC): reciprocity plays a very 8

limited role in international mutual assistance agreements, since these are, in accordance with the principle of *pacta sunt servanda* (Article 26 of the Vienna Convention on the Law of Treaties), binding on the States party to the treaty, subject to a fundamental breach (Article 60 of the Vienna Convention on the Law of Treaties).

9 The requirement of reciprocity as a prerequisite for mutual legal assistance is primarily in the interest of the State and not of the person concerned by the request for assistance. Nevertheless, under Swiss law, the latter may invoke it when it is in their favor. For this reason, the reduction in the importance of reciprocity or the broad interpretation of the exceptions in Art. 8 para. 2 IMAC play *de facto* to its disadvantage by allowing the scope of mutual assistance to be extended.

10 The provision of Art. 8 IMAC deals with incoming requests, but Switzerland has a symmetrical system for outgoing requests under Art. 30 para. 1 IMAC, which reads as follows:

"The Swiss authorities may not make a request to a foreign State which they would not be able to comply with under this Act."

2. Guarantee of reciprocity

11 As mentioned above, the principle of reciprocity is based on mutual expectations between States to grant each other the same advantages for the same purposes; these may result from contractual negotiations, previous practice or assurances given to that effect. The OEIMP specifies that the condition of reciprocity is also fulfilled when mutual assistance can be obtained from the foreign State without the involvement of its authorities (Art. 1 OEIMP). Each situation must be analyzed to determine whether or not reciprocity is lacking in the case in question.

12 The granting of reciprocity does not pose any difficulty when the requesting State has already granted Switzerland the same mutual assistance that it is requesting. This can be defined as mutual assistance where the purpose and content of the cooperation are identical, in particular with regard to the offense in question. Thus, reciprocity is presumed with regard to States with which Switzerland cooperates regularly and is based on the principle of trust and international good faith.

In cases where the requesting state has never granted similar mutual assistance, it is necessary to analyze the state's behavior, taking into account its national legislation on mutual assistance and, more broadly, its practice in cases with a similar purpose and content with Switzerland but also, where applicable, with other states. It follows that if the requesting State generally grants the mutual assistance it has requested, reciprocity is deemed to exist, whereas if it does not grant mutual assistance in similar situations, mutual assistance should not be refused *de facto* but should be made subject to a declaration of reciprocity. The Federal Office of Justice (FOJ) of the Federal Department of Justice and Police (FDJP) has the authority to assess whether a declaration of reciprocity should be requested in its capacity as central authority. Thus, in accordance with the wording of Art. 8 para. 1 *in fine* IMAC, *"the FOJ shall request a guarantee of reciprocity if the circumstances so require."* It therefore has broad discretion in this matter. The FOJ is competent to examine the validity of the guarantee of reciprocity provided by the requesting State. It should be noted that this guarantee must be given before Switzerland decides on the granting of mutual assistance, in accordance with the ordinary rules on international guarantees. In accordance with the principle of trust that underpins relations between states, the Swiss authorities are not required to verify that the declaration of reciprocity complies with the formal requirements of foreign law or that the authority issuing the declaration of reciprocity is competent to do so, except in cases of manifest abuse. In cases of manifest abuse, the Swiss authorities may refuse to recognize the declaration of reciprocity made by the requesting State, which constitutes an exception to the principle of trust. Consequently, a case of manifest abuse suspends the presumption of validity attached to state declarations and reestablishes review by the FOJ. In such a case, the FOJ may refuse to grant mutual assistance, request clarification, or demand a new declaration of reciprocity. 13

3. Scope

The requested state may require the requesting state to provide a guarantee of reciprocity whereby it undertakes to grant mutual assistance in the future to the same extent and under the same conditions as that granted to it. By this guarantee, the requesting state undertakes to grant mutual assistance to the requested state for a specified period. It may do so in the form of an individual guarantee or global guarantees. 14

15 The scope of the guarantee must at least cover the purpose and content of the mutual legal assistance requested: in this case, it is an individual guarantee. The individual guarantee has the legal nature of a unilateral act whose binding nature is attributed, in public international law, to the protection of trust. However, it is subject to the condition that the requested mutual legal assistance is granted.

16 It is also possible for the guarantee to cover an entire area, such as extradition in general, but to be limited to aspects of the offense, such as the threat of a minimum penalty: in this case, we speak of comprehensive guarantees. Global guarantees fall within the scope of reciprocity in the broad sense and have the characteristics of a treaty under public international law, often constituting a minimum prior mutual legal assistance agreement, which may, however, be of a certain duration.

17 The guarantee of reciprocity is not subject to any particular formal requirements, but it must be in writing. It may, for example, take the form of an exchange of letters. The national law of the requesting State determines who is competent to grant the guarantee of reciprocity. In Switzerland, in accordance with Art. 8 para. 3 IMAC, the Federal Council is responsible for guaranteeing reciprocity to other states. The FOJ has the power to assess whether it is appropriate to request a declaration of reciprocity in its capacity as central authority. In practice, it is the International Mutual Assistance Division of the FOJ that requests a guarantee of reciprocity if circumstances so require. The Federal Department of Foreign Affairs (FDFA), in particular the Directorate of International Law (DIL), may be consulted if political or diplomatic considerations so warrant.

18 It is clear that the requesting state, which agrees to provide a guarantee of reciprocity, is bound by it only if the requested state accepts it. Acceptance is preceded by an examination to determine whether the declaration guarantees reciprocity at least to the extent of the request for assistance. Acceptance depends on the form and content of the requesting State's declaration, but also on its reliability and the political context.

19 As the FOJ is responsible for determining whether a guarantee is necessary, it is also responsible for examining it in accordance with Art. 80p IMAC and, if necessary, accepting it.

B. Exceptions to guarantees of reciprocity (para. 2)

In certain exceptional cases, Switzerland may grant mutual assistance even if reciprocity is lacking, in accordance with Art. 8 para. 2 IMAC. Reciprocity is not required for simple notifications. Nor is it required where the execution of the request is in the interest of criminal prosecution, in the interest of the person being prosecuted, or even where it serves to clarify an act directed against a Swiss citizen. 20

The FOJ is responsible for determining whether the request for assistance can be exempted from the guarantee of reciprocity because it falls within the scope of Art. 8 para. 2 IMAC. In doing so, it also has broad discretion. The opinion of the person concerned by the request for assistance has limited weight in the assessment of reciprocity, since this requirement is primarily in the interest of the state, not of the person concerned by the request. The person concerned cannot demand that a guarantee of reciprocity be provided, but may invoke its absence when it is favorable to them, in particular to challenge the legality of the mutual assistance. However, they cannot oppose the granting of mutual assistance on the sole ground that reciprocity is ensured but would be unfavorable to them. 21

Reciprocity is not necessary where the execution of the request appears to be required by the nature of the act committed or by the need to combat certain forms of crime, the prosecution of which is in the international public interest. This exception applies in particular to the suppression of organized crime and economic crime, money laundering and corruption, as well as international crimes. In other words, in certain cases, Switzerland has an interest in granting mutual legal assistance for certain offenses because of their serious nature. These offenses undermine the peace, security, or fundamental values of the international community. According to Popp, these must be offenses that are subject to international criminal prosecution and must be criminalized by international conventions, such as genocide, racial discrimination, hostage-taking, terrorism, slavery, counterfeiting, trafficking in children and women, or money laundering. 22

Reciprocity may also be excluded where the execution of the request is in the interest of the person being prosecuted or their prospects for reintegration. An improvement in the situation of the person being prosecuted is only conceivable in the context of minor mutual assistance and is limited to evidence 23

that is exculpatory. Whereas the situation in which the execution of the request for mutual assistance is likely to improve the chances of social rehabilitation of the person being prosecuted refers to the execution and may extend to extradition. This corresponds in particular to the content of Art. 100(b) IMAC, which provides that:

" The execution of a Swiss criminal decision may be delegated to a foreign state if the delegation is likely to improve the social rehabilitation of the convicted person or if Switzerland cannot obtain extradition."

24 Finally, reciprocity is not necessary when the purpose of the request is to investigate an offense against a Swiss citizen. This category of exception may apply to minor mutual assistance and extradition. The provision also appears to extend to the prosecution of offenses committed against legal persons domiciled in Switzerland. This exception is based on the desire to protect the fundamental interests of Switzerland and its nationals, whether natural or legal persons. However, in an international context marked by the proliferation of international mutual legal assistance treaties and the affirmation of principles of cooperation and mutual recognition, unilateral recourse to mutual assistance without reciprocity could be perceived as a weakening of the principle of reciprocity, a pillar of equality between states.

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A commentary by Gaelle Mieli

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Art. 8*a* Bilateral treaties

The Federal Council may conclude bilateral agreements with foreign States regarding the transfer of sentenced persons provided those agreements respect the principles of the European Convention of 21 March 1983[29] on the Transfer of Sentenced Persons.

CONTENT

I. General information 63
A. The transfer of sentenced persons 63
B. Legal bases 64
II. Background 65
III. Scope of application 66
A. Delegation of competence 66
B. Conditions 67
C. Practice 68
Bibliography 69

I. GENERAL INFORMATION

A. The transfer of sentenced persons

The transfer of sentenced persons is a more recent area of international mutual assistance in criminal matters, compared with mutual legal assistance and extradition. For reasons of national sovereignty, criminal sanctions used to be enforced on the territory of the State that imposed the sanction. The ever-increasing ease with which people can travel between different States means that some of them commit offences in a State other than their State of nationality and/or residence, and have to undergo a custodial sentence in an unfamiliar environment, far from their family and social ties. However, the aim of criminal law enforcement is also to socially reintegrate the person convicted of an offence, once the sentence has expired. Such social reintegration is not possible, or is made more difficult, if the person serves his or her sentence abroad. What's more, enforcing a criminal sanction in a state other than the one of nationality and/or residence can lead to discrimination against convicted offenders who do not speak the language, or who may be restricted in certain ways from serving their sentence, e.g. because of a greater risk of absconding. As a result, the transfer of sentenced persons has become an increasingly common practice on the international scene. 1

The transfer of sentenced persons refers to the case where a person has been sentenced in a state other than that of his or her nationality and/or residence, but would be transferred to the latter to serve the custodial sentence to which he or she has been sentenced. The sentenced person does not, however, have a right to be transferred. They can express their wish to be transferred to either the sentencing or the enforcing state, but it is these two states which then decide on the transfer. 2

The main purpose of a transfer is humanitarian, enabling the sentenced person to be better reintegrated into society. Enforcing a custodial sentence in the State of nationality and/or residence gives a better prospect of reintegration following the sentence, since it enables the person to maintain his or her family and social network, for example, and relieves the sentencing State of the costs of a person who in principle should not remain in the sentencing State on release. This is particularly the case when the convicted person has lost his residence permit as a result of his conviction. Serving a sentence in 3

the territory of a State from which the person will subsequently be expelled offers virtually no possibility of reintegration.

B. Legal bases

4 The transfer of sentenced persons is governed mainly by international agreements. The IMAC does contain a few provisions relating to the enforcement of decisions (art. 94ss). Enforcement of decisions, however, concerns cases where a person has been sentenced abroad but is still in Switzerland. In contrast, the transfer of sentenced persons is not regulated in detail in the IMAC. It involves not only the enforcement of the decision, but also a change in the place where the sentence is to be served, and therefore in the convicted person's place of residence. The transfer of sentenced persons therefore contains elements of both sentence enforcement within the meaning of art. 94 ff. of the IMAC and extradition within the meaning of art. 32 ff. Because of this second dimension, i.e. the physical transfer of the person, it is important for the two States involved to agree on the surrender of the person and on the terms and conditions thereof, and this requires the conclusion of an international agreement. The CTPC Message also specifies that the transfer of Swiss nationals sentenced abroad can only take place in very limited cases, on the basis of national law. In most cases, therefore, the transfer of sentenced persons requires an international, bi- or multilateral treaty between Switzerland and the sentencing or executing state.

5 For Switzerland, the CTPC is the main instrument for the transfer of sentenced persons. It was adopted in the early eighties, much later than the conventions on extradition and mutual legal assistance (adopted in the late fifties), and is open to ratification by non-member states of the Council of Europe (hereafter: CoE). It has been widely ratified by non-member states of the CoE: 23 non-member states have ratified it, for a total of 69 ratifications. Switzerland ratified it on May 1, 1988, and supports non-member states wishing to join the CoE. Thanks to its widespread ratification, the CTPC has acquired a special status as the most widely ratified international instrument on the transfer of sentenced persons. The Organization of American States (OAS) has adopted the Inter-American Convention on the Enforcement of Decisions Rendered by Foreign Criminal Courts. Like the CTPC, it was adopted within the framework of a regional organization, but is also open to ratification by non-member states. Switzerland, however, is not a party. The number of

states that have ratified the OAS instrument is also more limited, with 24 states having done so. The CTPC is therefore the standard applicable in Switzerland for transfers.

Other instruments also contain transfer provisions. These include the United Nations Convention against Transnational Organized Crime, Art. 17 of which states that States may consider concluding bilateral or multilateral agreements on this subject, the United Nations Convention against Corruption, Art. 45 of which states that States may consider concluding bilateral or multilateral agreements on this subject, and other international instruments in their respective fields of application. The provisions of these instruments are not very detailed, however, and encourage States to conclude bi- or multilateral treaties. The exception is the Ljubljana-Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes, adopted on May 26, 2023 in Ljubljana. The latter, not yet in force, contains a detailed chapter on the transfer of sentenced persons (Chapter V, art. 66 ff). However, this chapter is largely inspired by the principles of the CTPC. 6

As mentioned above, Switzerland generally encourages States to accede to the CTPC. However, in cases where the State does not do so, the only possibility of transferring a Swiss national sentenced to a long custodial sentence abroad is to negotiate a bilateral agreement, since the Swiss authorities must in principle be bound by a treaty with each State with which a transfer is envisaged. As a result, several transfer agreements have had to be concluded. 7

II. BACKGROUND

Following ratification of the CTPC, Switzerland mainly carried out transfers on the basis of this instrument. However, humanitarian considerations led Switzerland to conclude bilateral agreements with certain States for which ratification of the CTPC was not a prerequisite. In 1997, for example, Switzerland concluded a transfer treaty with Thailand, followed by one with Morocco in 2002. 8

However, these agreements required the approval of the Federal Assembly. The parliamentary procedure can be lengthy, as the Federal Assembly has to be consulted for each treaty, even though their content is similar and corresponds to CTPC standards. However, time is of the essence when it comes to 9

adopting these treaties, as they are often negotiated on the basis of a specific case, such as a Swiss person sentenced to a long custodial sentence in a country where detention conditions do not necessarily correspond to Swiss standards. The sooner the treaty enters into force, the sooner the person should be able to be transferred.

10 In order to facilitate the procedure, and to avoid repeatedly involving the Federal Assembly in accepting similar texts, the content of which it has already decided upon, Art. 8a has been adopted. It allows the Federal Council to adopt transfer treaties on its own, provided they are based on the CTPC. This article was submitted to the Federal Assembly in parallel with the approval of the treaty with Morocco. Art. 8a IMAC came into force on November 1, 2002.

III. SCOPE OF APPLICATION

11 Art. 8a IMAC provides that the Federal Council may conclude bilateral transfer treaties on its own, if these are based on the CTPC. This is a delegation of competence (A.) which implies the fulfilment of various conditions (B.).

A. Delegation of competence

12 Art. 8a IMAC is a regulation delegating competence. Under Swiss law, it is in principle the Federal Assembly which is competent to approve international treaties (art. 166 para. 2 first part Cst.). This stems from the fact that important legislative acts must be approved by parliament, and underpins the principle of legality. The Federal Assembly may, however, delegate this power to the Federal Council by means of a law or treaty (art. 166 para. 2 second part Cst.). This possibility of delegating authority is specified in art. 7a LOGA. It must be based on a law or treaty approved by the Federal Assembly, and be sufficiently limited and precise. It is particularly common if the treaties are, for example, technical and similar, in order to avoid overloading the work of the Federal Assembly. The Federal Council may then conclude a treaty, but only within the framework of this delegation of powers. If the treaty goes beyond what is permitted by the delegation, the approval of the Federal Assembly is required.

13 With regard to the transfer of sentenced persons, as mentioned above, Switzerland must, in principle, have a treaty in place in order to transfer a sentenced person. If Switzerland encourages states to join the CTPC, it must

conclude bilateral agreements with those that do not. This could lead to the conclusion of a large number of bilateral agreements similar in content to the CTPC. In order to relieve the Federal Assembly and facilitate the adoption of such treaties, an amendment to the IMAC has been proposed. Art. 8a IMAC has been added.

B. Conditions

As prescribed by art. 166 para. 2 Cst and art. 7a LOGA, art. 8a IMAC constitutes a norm of delegation of competence. Several conditions must be met before the Federal Council can conclude an agreement without the approval of the Federal Assembly. 14

The first is that the treaty covered by this provision must be a bilateral treaty between Switzerland and another state. Multilateral treaties remain the responsibility of the Federal Assembly, and must be approved by the latter before they can be ratified by the Federal Council. 15

The second condition is that the treaty deals with the transfer of sentenced persons. Other matters governed by the IMAC are not affected by this delegation of competence. Thus, treaties dealing with international mutual assistance in criminal matters, extradition or the delegation of criminal prosecution remain within the competence of the Federal Assembly. Treaties concerning the enforcement of other criminal decisions which do not involve the transfer of convicted persons, such as the enforcement of financial sanctions, must also be approved by the Federal Assembly. 16

The third condition is that the treaties concluded by the Federal Council must be inspired by the principles laid down in the CTPC. As mentioned above, the CTPC is of particular value in Switzerland and on the international scene, as it is an instrument that enjoys widespread ratification and to which Switzerland acceded many years ago. In addition, the CTPC was the subject of a parliamentary procedure during which the Federal Assembly was able to express its opinion on its content, and accepted its ratification. As a result, the principles enshrined in the Convention have been the subject of a democratic process in Switzerland, and are now part of Swiss law. Insofar as the Federal Assembly has already been consulted on them, a new consultation for each treaty that incorporates the principles of this instrument can be seen as superfluous. 17

18 It should be pointed out, however, that only the principles laid down in the CTPC can be included in treaties which the Federal Council is empowered to conclude alone. If the treaty includes principles from the Additional Protocols to the CTPC, it must be approved by the Federal Assembly. For example, bilateral treaties which provide for "forced" transfer, i.e. transfer without the consent of the sentenced person, as provided for in the Additional Protocol to the CTPC, must be submitted to the Federal Assembly. This is the case for the treaty with Kosovo, which was concluded in 2012 and approved by the Federal Assembly in 2013.

19 Finally, the message also specifies that the treaty must not be subject to an optional referendum. Treaties on the transfer of sentenced persons adopted prior to this delegation of competence were not subject to referendum (neither the treaty with Thailand nor that with Morocco were subject to referendum, nor indeed the CTPC). However, these treaties were approved prior to the amendment of art. 141 Cst and the addition of para. 3 to letter d., which stipulates that treaties containing important provisions establishing rules of law must be submitted to a referendum. General and abstract provisions of direct application which create obligations, confer rights or allocate powers are deemed to establish rules of law (art. 22 para. 4 LParl). Moreover, the Federal Assembly appears to interpret this rule restrictively, and to require a referendum even where treaties are similar in terms of content. Transfer treaties adopted after the constitutional amendment would, in our view, be subject to an optional referendum. This is the case with the treaty between Switzerland and Kosovo, which was subject to such a referendum.

20 In our opinion, however, this condition should not be mentioned, as it is not a condition in itself. Indeed, the optional referendum can only be requested for acts that have been approved by the Federal Assembly, and the very purpose of the delegation provided for in Art. 8a is that treaties falling within the scope of this delegation of competence should not be approved by the Federal Assembly. They will therefore not be subject to an optional referendum, by virtue of art. 8a IMAC.

C. Practice

21 Following the entry into force of art. 8a IMAC, Switzerland has concluded several bilateral treaties making use of this delegation of competence. Agreements have been concluded with Peru, Paraguay, the Dominican Republic,

Cuba, Brazil and Barbados. These agreements, insofar as they are inspired by the principles of the CTPC, were concluded directly by the Federal Council without being submitted to the Federal Assembly.

In contrast, the treaty with Kosovo, as mentioned above, provides for transfer without the consent of the person concerned. It goes further than the CTPC, since it incorporates standards contained in the Additional Protocol to the CTPC. It has therefore been approved by the Federal Assembly, as it falls outside the scope of the delegation of competence. 22

The opinion expressed reflects the personal opinion of the author and is not binding on the Federal Office of Justice.

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COMMENTARY ON

Art. 11b IMAC

A commentary by Elif Askin

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Chapter 1*b* Protection of Personal Data

Art. 11*b* Right to information in pending proceedings

[1] Where mutual assistance proceedings are pending, the person who is the object of a request for international cooperation in criminal matters shall be allowed access to the personal data related to them and the following information:

a. the purpose of and legal basis for the data processing;

b. the period that the personal data will be retained or, if this is not possible, the criteria for determining this period;

c. the recipients or the categories of recipients;

d. the available information on the origin of the personal data;

e. the information that they require to be able to assert their rights.

2 The competent authority may refuse to provide the information, limit the information provided or defer provision of the information if there are grounds for doing so under Article 80*b* paragraph 2 or if:

a. it is necessary because of overriding interests of third parties;

b. it is necessary because of overriding public interests, in particular relating to the internal or external security of Switzerland; or

c. an enquiry, an investigation, court proceedings or international cooperation proceedings in criminal matters may be prejudiced by providing the person concerned with information.

CONTENT

I. History of origin 74
II. Significance of the standard 74
III. Scope of application of Art. 11b IMAC 75
A. Scope of application of the right to information (Art. 11b para. 1 IMAC) 75
B. Addressees of the right to information 76
C. Restrictions (Art. 11b para. 2 IMAC) 78
Bibliography 79
Materials 80

I. HISTORY OF ORIGIN

1 On March 1, 2019, Art. *11b* entered into force as part of the newly introduced Chapter *1b* of the Federal Act on International Mutual Assistance in Criminal Matters (IMAC). This provision is intended to ensure the protection of personal data in pending mutual assistance proceedings by enshrining a right to information.

2 The provision was introduced as part of the total revision of the Federal Act on Data Protection (FADP) and implements the requirements of EU Directive 2016/680 . With the implementation of EU Directive 2016/680 and the introduction of Art. *11b* into the IMAC, the federal government is making use of its legislative powers, as intergovernmental cooperation in criminal matters is governed by federal law.

II. SIGNIFICANCE OF THE STANDARD

3 The FADP does not apply to international mutual assistance proceedings in criminal matters. The processing of personal data in these mutual assistance proceedings falls within the scope of application of the European legal instrument. Art. *11b* IMAC regulates the right to information in the context of pending mutual legal assistance proceedings and thus implements the requirements of Art. 14 and 18 of EU Directive 2016/680, which are also relevant for Switzerland due to Schengen cooperation.

4 Art. *11b* IMAC is a special right to information in the context of pending mutual assistance proceedings that takes precedence over other procedural provisions. In particular, the application of the provisions of the Swiss Code of Criminal Procedure (CrimPC) on data processing is excluded.

5 The application of Art. *11b* IMAC is not limited to federal authorities such as the Office of the Attorney General of Switzerland or the Federal Office of Justice. The provision applies to all authorities, including cantonal authorities, that are involved in supporting mutual legal assistance proceedings or that decide on foreign requests for mutual legal assistance.

III. SCOPE OF APPLICATION OF ART. *11B* IMAC

A. Scope of application of the right to information (Art. *11b* para. 1 IMAC)

Art. *11b* IMAC basically serves to strike a balance between procedural rights and data protection. In particular, the provision takes account of the need for special data protection regulations to protect personal data during pending mutual assistance proceedings. The right to information in Art. *11b* IMAC enables the requesting persons to obtain transparency regarding the processing of their personal data by the authorities. 6

The provision grants a person who is the subject of a request for intergovernmental cooperation in criminal matters the right to access their personal data and the information listed in Art. *11b* para. 1 lit. a-e IMAC. At the same time, the competent authorities that process personal data in the context of mutual assistance proceedings are subject to corresponding information obligations. 7

Accordingly, the person concerned has the right of access to the personal data relating to them. According to Art. 5 lit. a FADP, this includes "all information relating to an identified or identifiable natural person" and all information listed exhaustively in Art. *11b* para. 1 lit. a-e IMAC. 8

Pursuant to Art. *11b* para. 1 IMAC, the data subject has the right to obtain information about the processing of their personal data. This initially includes the right to know the purpose and legal basis of the processing. Data processing includes all operations relating to personal data, regardless of the means and procedures used, in particular the collection, storage, retention, use, modification, disclosure, archiving, deletion or destruction of data. The data subject also has the right to know how long their data will be stored or, if this is not possible, at least the criteria for determining this period. In addition, the competent authority may provide them with information about the recipients or categories of recipients of their personal data and the available information about the origin of this data. Finally, the data subject has the right of access to information that is necessary for the effective exercise of their rights. This means, among other things, that the competent authority must inform the data subject that their data protection claims are being assessed in the context of pending mutual legal assistance proceedings and are subject to the same legal remedies. 9

10 A person who is the subject of a request for international cooperation in criminal matters may object to the unlawful processing of their personal data in accordance with Art. *11d* IMAC. They may demand that the competent authorities rectify or erase unlawfully processed personal data in accordance with the provisions of the IMAC. However, the deletion of personal data is subject to exceptions in accordance with Art. 11d*para.* 2 IMAC. In certain cases, personal data cannot be deleted, but only "restricted" in its processing. This means that the data is not deleted completely, but access and processing is restricted.

B. Addressees of the right to information

11 According to Art. *11b* para. 1 IMAC, the right to information differs from that under Art. 14 and 16 of EU Directive 2016/680 in that only the "person against whom a request for intergovernmental cooperation is made" and not the "person concerned" is entitled to information.

12 In contrast to the provision in Art. 11b*para.* 1 IMAC, EU Directive 2016/680 assumes that the processing of personal data in mutual legal assistance proceedings potentially affects different categories of persons who could be entitled to the right of access. Accordingly, according to EU Directive 2016/680, all "data subjects" should have a right of access, in particular suspects, convicted offenders, victims and other parties such as witnesses, persons with relevant information or persons in contact or associated with suspects or convicted offenders.

13 However, it follows from Art. *11b* IMAC that only persons against whom a request for mutual legal assistance is directed are entitled to receive information. This shows that the Swiss legislator apparently wanted to limit the group of persons entitled to receive information to a narrowly defined group of authorized persons - similar to the eligibility for appeal in the IMAC - contrary to the requirements of EU Directive 2016/680.

14 The provision of Art. *11b* para. 1 IMAC, according to which only the persons against whom the request for mutual legal assistance is directed are entitled to the right to information, is also in conflict with other data protection provisions of the IMAC. In particular, it violates the authorization provision in Art. *11h* para. 2 lit. a IMAC, which was issued in implementation of Art. 6 of EU Di-

rective 2016/680. This provision requires the competent authorities to distinguish between different categories of persons when processing personal data.

The right to information under Art. *11b* IMAC is also handled more restrictively than in domestic criminal proceedings. According to Art. 97 CrimPC, not only the "parties" to pending criminal proceedings, but also "other parties to the proceedings" have the right to information about the personal data concerning them. These parties to the proceedings include injured persons, persons making a complaint, witnesses, persons providing information, experts or third parties adversely affected by procedural acts. Conversely, persons who do not belong to any of these categories have no right to information under Art. 97 CrimPC, even if their personal data is being processed in pending criminal proceedings. 15

From a fundamental rights and human rights perspective, the restrictive regulation of persons entitled to information under Art. 11b IMAC means that persons whose rights under Art. 13 para. 2 FC and Art. 8 ECHR are affected are denied the right to information in legal assistance proceedings. For example, witnesses or third parties adversely affected by proceedings have no right to information under Art. 11b para. 1 IMAC, even if their personal data is contained in the case files. Although Art. 8 para. 1 ECHR does not provide for an explicit right to information for individuals, the lack of legal protection in the area of data protection can lead to a violation of the right to an effective remedy under Art. 13 ECHR. 16

The right to information in the context of pending mutual legal assistance proceedings pursuant to Art. 11b IMAC is therefore more restrictive than in the relevant Swiss and EU provisions. This is contrary to the aim and purpose of Art. *11b* IMAC, which is to be interpreted as a data protection provision within the meaning of EU Directive 2016/680. The literature therefore takes the view that an overly narrow interpretation should be avoided and that the persons concerned should be granted access to their personal data in pending mutual legal assistance proceedings. In a ruling on the transfer of documents issued by lawyers, the Federal Supreme Court also pointed out that there may be exceptions in connection with the provisions on the protection of personal data (Art. *11b* et seq. IMAC). 17

C. Restrictions (Art. *11b* para. 2 IMAC)

18 The right to information under Art. *11b* para. 1 IMAC is not absolute. The possible grounds for restricting the right to information are broadly defined in the provision. According to Art. *11b* para. 2 IMAC, the competent authority may refuse, restrict or postpone the provision of information if there are grounds pursuant to Art. *80b* para. 2 IMAC or if one of the conditions pursuant to Art. *11b* para. 2 lit. a-c IMAC is met.

19 Pursuant to Art. 11b para. 2 lit. a-c IMAC, the right to information of affected persons may be restricted if overriding interests of third parties (lit. a) or overriding public interests, in particular with regard to the internal or external security of Switzerland (lit. b), so require. In addition, the right to information may be restricted if the disclosure of personal data could jeopardize an investigation, an inquiry, legal proceedings or international mutual legal assistance proceedings (lit. c).

20 The list in Art. *11b* para. 2 IMAC is not exhaustive. In individual cases, the authority may rely on further grounds to restrict the right to information in pending mutual assistance proceedings.

21 In addition to the grounds for restriction listed in Art. *11b* para. 2 lit. a-c IMAC, the grounds listed in Art. *80b* para. 2 lit. a-e IMAC also apply to the right to information. Accordingly, the right to information may be restricted if this is in the interests of foreign proceedings (lit. a). This applies in particular to cases where there is a risk of collusion and there are indications that the persons entitled to information under Art. *11b* IMAC could indirectly gain access to evidence from the mutual legal assistance proceedings and thus jeopardize the integrity of the foreign criminal proceedings. The protection of a substantial legal interest, if the requesting state so requires (lit. b), as well as the nature or urgency of the measure to be taken (lit. c) may also lead to a restriction of the right to information. This applies in particular to cases of precautionary measures in which the right to information can only be granted after such measures have been ordered, for example to secure evidence such as the blocking of a bank account. A restriction is also possible to protect essential private interests (lit. d), such as in particular private confidentiality interests or to protect the safety of persons (e.g. psychological integrity). Finally, under certain circumstances it may be appropriate not to provide information to the persons concerned if parallel proceedings are ongoing in Switzerland and the

disclosure of personal data would jeopardize the evidence in the mutual legal assistance proceedings (lit. e).

The grounds for restriction provided for in Art. 80b para. 2 and Art. *11b* para. 2 IMAC may overlap to some extent. However, the decision of the competent authority to refuse, restrict or postpone the provision of information must be justified. However, this justification must be given in such a way that the refused information is not disclosed. 22

A further restriction of the right to information pursuant to Art. *11b* IMAC arises from the general scope of the IMAC. The IMAC, including Art. *11b* IMAC, does not apply to mutual assistance proceedings in criminal matters if Switzerland is bound to the requesting state by an international mutual assistance treaty in criminal matters. 23

Thus, in a specific case of criminal mutual assistance proceedings in which Switzerland and Ukraine were bound by the European Mutual Assistance Convention (EUeR), the Federal Criminal Court held that the data protection provision - in this case Art. *11f* IMAC - was not applicable to states that guarantee an adequate level of data protection. The right to information under Art. *11b* IMAC (as well as Art. 11f IMAC) is therefore subsidiary in nature, regardless of whether it is asserted by a person directly affected by a request for mutual legal assistance or by a third party not directly affected. 24

However, an exclusion of the right to information on the basis of a treaty is only possible if the level of protection of the international mutual assistance treaty with regard to the right to information corresponds to that of the IMAC. This also follows from the principle of favorability, according to which domestic law may not provide for more restrictive conditions than treaty law. Otherwise, the data protection standards pursuant to Art. *11b* IMAC would have to be applied despite a special mutual legal assistance treaty between Switzerland and the requesting state. 25

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COMMENTARY ON

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A commentary by Lisa Harrison

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Chapter 3 Domestic Procedure

Section 1 Authorities and Powers

Art. 16 Cantonal authorities

[1] The cantons shall participate in the conduct of extradition proceedings. Unless federal law provides otherwise, they are required to execute the requests for other forms of mutual assistance and the transfer of proceedings and to execute criminal judgments. The cantons shall be subject to the supervision of the Confederation provided this Act applies.

[2] ...

CONTENT

I. General historical overview of the origin of the standard 85
II. Modification of the standard 86
III. The article in context 86
IV. Commentary on the article 87
A. General 87
B. Division of powers between the FOJ and cantonal and federal authorities 88
1. With regard to extradition 88
a. Foreign extradition requests 88
b. Swiss extradition requests 89
2. Other cases of mutual assistance 89
3. Delegation of criminal prosecution 92
a. To Switzerland 92
b. To the foreign state 92
4. Enforcement of foreign criminal judgments 93
a. By Switzerland 93
b. By a foreign state 93
Further reading 94
Bibliography 94

I. GENERAL HISTORICAL OVERVIEW OF THE ORIGIN OF THE STANDARD

Prior to the entry into force of the EIMP, the extradition procedure, depending on the nature of the allegations, allowed either the administration or the Federal Supreme Court to rule. There were no regulations governing the other types of criminal cooperation, i.e. other acts of mutual assistance (also known as "minor" or "accessory" mutual assistance), delegation of the prosecution and punishment of an offence, and enforcement of foreign criminal judgments. 1

In practice, the division of powers depended on the legal nature of the issues to be decided: cantonal authorities, empowered by cantonal procedural codes, decided on questions of the application and scope of procedural requirements, while the Police Division generally ruled on questions relating to international relations, conditions and restrictions on mutual assistance. In addition, the Police Division could challenge the decisions of the cantonal authorities by means of a denunciation addressed to the federal supervisory authority. The Police Division's decisions could be challenged by means of an administrative appeal. 2

As can be seen from the Federal Council's Message to the Federal Assembly in support of a law on international mutual assistance in criminal matters and a federal decree on the reservations relating to the European Convention on Extradition of March 8, 1976 (hereinafter referred to as "the Federal Council's Message of March 8, 1976"), this division of powers was unsatisfactory: it was possible for both the Federal Council and the Federal Supreme Court to be competent to rule in the same case. Moreover, in other acts of mutual assistance, jurisdiction was unclear, creating the risk that, if the first authority seized was incompetent, the appeal would subsequently be rejected by the other authority for late filing. In addition, public interest in certain aspects of international legal assistance - notably the protection of secrecy - was growing, and the number of appeals was increasing. It was imperative to establish "uniform and judicious regulations for all modes of collaboration". The Federal Council therefore decided that Article 12 EIMP, which later became Article 16, would grant the Federal Administration jurisdiction over extradition proceedings. As for other cases of mutual assistance, they were entrusted to the 3

cantons for reasons of expediency - the Confederation had the appropriate bodies only in special cases - and insofar as a federal authority was not competent.

4 It is interesting to note that this article, like article 17 EIMP, was largely inspired by article 3 of the Federal Act on the Treaty with the United States of America on Mutual Assistance in Criminal Matters of October 3, 1975 (hereinafter: LTEJUS).

II. MODIFICATION OF THE STANDARD

5 The only amendment to this article since the EIMP came into force on January 1, 1983, concerned paragraph 2, which was repealed on June 13, 2008 with effect from January 1, 2011, following the unification of criminal procedure law on December 21, 2005. Article 54 CPP rendered this paragraph obsolete by stipulating that, when a request for international legal assistance is received from a canton, the public prosecutor's office of the canton concerned is competent to carry out the resulting tasks.

III. THE ARTICLE IN CONTEXT

6 Article 16 EIMP is to be found in the first part of the law, more specifically in Chapter 3, which governs procedure in Switzerland and contains the provisions deriving from the special legal nature of international mutual assistance in criminal matters.

7 This first part of the law contains the general provisions of the law. Chapter 1 defines the scope of application of the law (purpose and limits of cooperation, inadmissibility of requests, special provisions, system of management of persons, files and cases, protection of personal data), Chapter 2 concerns the applicable law, Chapter 3 aims to legislate on procedure in Switzerland (authorities and powers, which are of interest here, and legal protection), while Chapter 4 concerns procedure between States.

8 Chapter 3, which contains two sections, describes the authorities competent in Switzerland for international mutual assistance in criminal matters, lists their powers (section 1), and provides for legal protection for the person prosecuted and other persons affected by a mutual assistance measure, or the injured party who assists investigations (section 2).

Article 16 EIMP, which concerns the cantonal authorities, precedes article 17, which sets out the powers of the federal authorities. It is clear from this system that ordinary mutual assistance proceedings are primarily the responsibility of the cantonal authorities. 9

For extradition proceedings, however, the jurisdiction of the cantonal authorities is collaborative, with the FOJ dealing exclusively with these before forwarding them to the competent cantonal authorities for execution. 10

For minor mutual assistance, delegated criminal prosecution and the enforcement of decisions, the cantonal authorities are competent, under the supervision of the Confederation when the EIMP is applicable. Cantonal competence is therefore provided for ab initio for other acts of mutual assistance. The FOJ has residual jurisdiction, notably for requests seeking a guarantee of reciprocity (art. 17 para. 3 EIMP) or when a treaty concluded by Switzerland establishes the FOJ's jurisdiction as a central authority, as is the case with the United States of America (art. This is the case with the United States of America (art. 28 of the Treaty between the Swiss Confederation and the United States of America on Mutual Assistance in Criminal Matters, signed on May 25, 1973) and - for mutual assistance requests relating to organized crime, corruption and other serious crimes - Italy (art. XVIII of the Agreement between Switzerland and Italy to supplement the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959, and to facilitate its application, signed on September 10, 1998). The FOJ also has an operational function in urgent cases, where it is competent to order provisional measures (art. 18 para. 2 EIMP). 11

IV. COMMENTARY ON THE ARTICLE

A. General

Article 16 paragraph 1 first sentence EIMP provides, in accordance with article 17 paragraph 2 EIMP, that the cantonal authorities collaborate in the execution of extradition proceedings for which the FOJ is competent. It is therefore understood that the FOJ is the competent authority for extradition requests. In support of this federal competence, the cantonal authorities execute the measures ordered by the FOJ. These measures are then considered to be taken in execution of the applicable federal law. In particular, the cantonal authorities are - on the orders of the FOJ - responsible for detaining the 12

person concerned by the extradition request, conducting hearings and potentially, at the end of the extradition procedure, effecting the surrender of the person concerned to the requesting state.

13 Article 16 paragraph 1 sentence 2 EIMP grants the cantonal authorities primary jurisdiction for the execution of requests concerning other acts of mutual assistance. In such cases, the FOJ has a delegating and coordinating role vis-à-vis the cantonal authorities. In certain cases, however, where a bilateral treaty so provides, the FOJ is granted primary jurisdiction to execute requests for mutual assistance (see chapter IV B 2 below).

14 Article 16, paragraph 1, third sentence of the EIMP states that the cantons are under the supervision of the Confederation when this law is applicable. The FOJ is therefore responsible for overseeing the application of the EIMP, and therefore has the right to challenge cantonal and federal decisions (art. 25 EIMP).

15 As previously indicated (see chapter II above), article 16 paragraph 2 EIMP was repealed on January 1, 2011, following the entry into force of article 54 paragraph 1 CPP, rendering this paragraph obsolete.

B. Division of powers between the FOJ and cantonal and federal authorities

1. With regard to extradition

a. Foreign extradition requests

16 The FOJ is responsible for receiving extradition requests, i.e. the surrender to the requesting state - for the purposes of criminal prosecution or enforcement of a custodial sentence - of persons to the state which has jurisdiction over the offence and is requesting extradition (art. 32 EIMP).

17 The FOJ decides whether and under what conditions to grant the request (art. 43 EIMP), entrusts the cantonal or federal authorities with any measures to be taken (art. 44 et seq. EIMP) and, in the first instance, decides on extradition (art. 55 EIMP).

18 The cantons assist this authority in executing the extradition request, by carrying out provisional measures (art. 44 ff EIMP), making arrests and seizures

(art. 47 ff EIMP) and granting the accused the right to be heard (art. 52 ff EIMP). The competence of the cantons can thus be described as operational, as the FOJ does not have the necessary means to execute extradition requests itself.

b. Swiss extradition requests

The FOJ submits search requests issued by Switzerland at the request of a cantonal or federal prosecuting or enforcement authority, and forwards them via the Schengen Information System (SIS) or Interpol (art. 30 para. 2 EIMP). Where the person's place of residence is known or presumed, the FOJ sends the search request directly to the state of residence. 19

Once the wanted person has been arrested, the FOJ submits the formal extradition request, which, depending on the treaty provisions, contains details of the wanted person, an enforceable arrest warrant or judgment, the applicable penal provisions, any evidence (a requirement, in general, for requests addressed to so-called Common Law states) and, if necessary, a translation of the documents, to the requested state within the stipulated period. 20

In particular, the FOJ may refuse to transmit an extradition request if the seriousness of the offence does not justify the procedure (art. 30 para. 4 EIMP). The cantonal authority may then appeal against the FOJ's decision not to submit a request (art. 25 al. 3 2nd phr. EIMP). 21

2. Other cases of mutual assistance

In other cases of mutual assistance, the procedure is primarily the responsibility of the cantonal authorities, who carry out a preliminary examination of the request (art. 80 EIMP) and execute it (art. 80a ff EIMP). It should be noted that the provisions of the EIMP remain applicable when Switzerland is bound to the requesting state by a mutual assistance treaty, unless the treaty contains specific provisions which would take precedence over those of the EIMP (for example, art. 9 2nd P.A. CEEJ, which governs hearings by videoconference). 22

When an international agreement, whether bilateral or multilateral, allows the judicial authorities of the requesting State to send their request for mutual assistance directly to the judicial authorities of the requested State, the competent cantonal or federal judicial authority receives the foreign request for mutual assistance directly and, once the request has been executed, forwards the 23

execution documents to the requesting State, specifying the reservation of habitual speciality (art. 78 al. 1 EIMP). Art. 4 para. 1 2nd P.A. ECCJ, which replaces art. 15 ECCJ, authorizes direct transmission between judicial authorities, without having to go through the Ministry of Justice of the requested party, i.e. the FOJ in the case of Switzerland. This exception does not, however, apply to requests for the temporary transfer of detained persons within the meaning of art. 11 ECCJ and art. 13 2nd P.A. ECCJ, which must in all cases be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State and returned via the same channel.

24 In the absence of an agreement providing for direct transmission to the competent authority, or in particular when the requesting State does not know the competent judicial authority, the FOJ receives foreign requests (art. 27 para. 2 and 78 para. 1 EIMP in fine). In such cases, the FOJ makes a summary examination of the formal admissibility of the request, and forwards it to the competent cantonal or federal authority for execution, unless the request is manifestly inadmissible (art. 78 al. 2 EIMP). In the case of summary examination and delegation to the enforcement authority, the FOJ has a wide margin of discretion, and its decision to delegate to the enforcement authority cannot be challenged separately (art. 78 para. 4 EIMP and art. 14 OEIMP).

25 In urgent cases, the FOJ is empowered to order the necessary provisional measures (art. 18 para. 2 EIMP).

26 Cantonal jurisdiction is determined primarily by the place where the enforcement measures are to be carried out. For example, cantonal authorities are competent to conduct a hearing of a person domiciled on their territory, or to search the premises of a company headquartered in their canton. The FOJ may also decide to entrust the execution of the request for mutual assistance to the canton which is conducting a national procedure linked to the request for mutual assistance, or to the authority which would be competent if the offence had been committed in Switzerland (art. 17 para. 4 and 79 para. 2 EIMP). In principle, the latter case concerns offences that are subject to federal jurisprudence (art. 23 CPP) and, consequently, to the jurisdiction of the Federal Public Prosecutor's Office (Ministère public de la Confédération).

27 If the execution of the request for mutual assistance requires investigations in several cantons, or if it also concerns a federal authority, the FOJ may designate a lead canton (art. 79 para. 1 EIMP). In addition, the FOJ may itself decide

on the execution of mutual assistance if the competent cantonal authority is unable to reach a decision within a reasonable time, or in complex cases or cases of particular importance (art. 79a para. 1 EIMP).

28 The competent cantonal authority is the Public Prosecutor's Office (art. 55 para. 1 CCP), or even the court during proceedings (art. 55 al. 2 CCP). The cantonal law implementing the CCP specifies which Public Prosecutor's Office has jurisdiction (e.g. the central Public Prosecutor's Office in the canton of Vaud is competent to receive and execute letters rogatory from an authority outside the canton, or to submit an extradition request to the FOJ).

29 The procedure for federal administrative authorities is governed by analogy with the AP, while cantonal authorities apply cantonal administrative law by analogy (art. 12 para. 1 EIMP). Procedural acts are governed by the CPP (art. 12 para. 1 EIMP), supplemented by the LOAP (art. 1 para. 1 LOAP via art. 12 para. 1 EIMP).

30 The FOJ is responsible for supervising the cantonal authorities (art. 16 EIMP). In this role, the FOJ may decide to challenge cantonal decisions before the Complaints Court of the Federal Criminal Court (art. 25 para. 1 and 3 and 80h let. a EIMP). To enable the FOJ to exercise its supervisory role, cantonal and federal decisions on international mutual assistance in criminal matters, as well as those of the Complaints Court of the Federal Criminal Court, must be communicated to it (art. 5 OEIMP). Furthermore, in the event of a delay in proceedings or refusal to take a decision, the FOJ may question the cantonal authority and request information on the status of the proceedings, the reasons for any delay and the measures envisaged (art. 17a para. 2 EIMP). In the event of an unjustified refusal, the FOJ may intervene with the competent supervisory authority (art. 17a para. 2 EIMP) or, in the event of a refusal to take a decision or if the authority is slow in taking a decision, lodge an appeal against the absence of a decision, which is treated as a negative decision (art. 17a para. 3 EIMP). The FOJ may also decide to take a decision itself on the execution of the request for legal assistance (art. 79a para. 3 let. c EIMP), at the expense of the canton concerned (art. 13 para. 1bis OEIMP).

31 For mutual legal assistance with the USA, the FOJ is always competent and acts in its capacity as Central Office USA (art. 28 para. 1 TEJUS and art. 1 ch. 3 and 5 LTEJUS). The cantonal and federal prosecution authorities assist the FOJ in executing these requests for mutual assistance.

3. Delegation of criminal prosecution

a. To Switzerland

32 Where extradition is ruled out, where the person prosecuted is liable in Switzerland for other, more serious offences, and where the requesting state gives a guarantee that it will not prosecute the person for the same offence once he or she has been acquitted or punished in Switzerland, Switzerland may take over the prosecution of an offence committed abroad (art. 85 EIMP). This option "meets the objectives of the proper administration of justice and better social rehabilitation", and provides an alternative to extradition.

33 Such a request must be addressed to the FOJ, which decides, in matters of cantonal criminal jurisdiction, after consulting the prosecuting authority, to accept the foreign request and forward the file to the competent prosecuting authority (art. 91 para. 1 EIMP). This decision does not oblige the authority to initiate criminal proceedings (art. 91 para. 3 EIMP), nor to convict the person prosecuted. Subsequently, the competent authority is obliged to inform the Federal Office of its decision whether or not to act on the request for delegation, of any sanction imposed and its enforcement, and of any other decision taken, and the Federal Office informs the requesting State accordingly (art. 36 para. 1 letters a to e OEIMP).

34 Where jurisdiction lies with the federal criminal jurisdiction, the FOJ decides in agreement with the Attorney General of the Confederation whether to accept the requests (art. 4 para. 4 OEIMP). These provisions do not apply when the offence is subject to Swiss jurisdiction under another provision.

b. To the foreign state

35 At Switzerland's request, a foreign state may be asked to assume criminal prosecution of an offence under Swiss jurisdiction, if its legislation permits the prosecution and judicial punishment of this offence, in two cases: a) if the person prosecuted resides in this state, extradition to Switzerland being inappropriate or excluded, or b) if the person prosecuted is extradited to this state and the transfer of criminal prosecution makes it possible to expect better social rehabilitation (art. 88 EIMP).

36 The request to delegate criminal prosecution is submitted by the competent Swiss authority, normally the competent public prosecutor's office, to the

FOJ, which then forwards it to the foreign state (art. 30 para. 2 EIMP). This does not apply to requests concerning Germany, Austria and Italy, countries with which Switzerland has concluded bilateral agreements enabling requests for the delegation of criminal prosecution to be sent directly to the competent prosecuting authorities.

During the delegation procedure, the FOJ is responsible for deciding what happens to the escrow, even if the request to delegate criminal prosecution is submitted directly to the foreign authority, without going through the FOJ. 37

4. Enforcement of foreign criminal judgments

The enforcement of foreign criminal judgments involves the execution of a final foreign criminal judgment - i.e. a sentence or a measure - by the requested state. 38

Many states do not extradite their own nationals, so it is possible for the requesting state to delegate enforcement of the penalty (sentence or measure) to the country of origin, in order to prevent persons convicted under a final and enforceable decision from evading punishment. In this case, a request for enforcement of the criminal decision must be submitted to the country of origin. 39

a. By Switzerland

The FOJ is responsible for deciding on the request, after consulting the enforcement authority, and in the event of acceptance, forwards the request to the enforcement authority. The exequatur procedure is then governed by the Code of Criminal Procedure. 40

b. By a foreign state

A criminal judgment handed down in Switzerland may be delegated for enforcement by a foreign state, subject to the conditions set out in articles 100 to 102 EIMP. The FOJ is competent to decide on delegation abroad, at the request of the cantonal or federal authority (art. 30 para. 2 EIMP). 41

The author has written this contribution in a personal capacity. The assessments and opinions presented are her own and are not binding on the Federal Office of Justice.

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COMMENTARY ON

Art. 17 IMAC

A commentary by Lisa Harrison

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Art. 17 Federal authorities

[1] The Federal Department of Justice and Police (the Department) shall decide on cases under Article 1 letter *a*. The decision of the Department may be requested within 30 days of receiving written notification of the final ruling.

[2] The FOJ shall receive the requests from abroad and file Swiss requests. It shall handle extradition requests and arrange for requests for other assistance, transfer of proceedings and execution of criminal judgments to be examined by the appropriate cantonal or federal authorities if their execution is not obviously inadmissible.

[3] It shall decide:

a. whether to require a guarantee of reciprocity (Art. 8 para. 1);

b. on the appropriate procedure (Art. 19);

c. on the admissibility of Swiss requests (Art. 30, para. 1).

[4] It may transfer the conduct of proceedings wholly or partly to the federal authority which would be competent to prosecute the offence if it had been committed in Switzerland.

[5] It may also decide on the admissibility of assistance and allow its execution in accordance with Article 79 letter *a*.

CONTENT

I. General historical overview of the origin of the standard 98
II. Changes to the standard 99
A. First paragraph 99
B. Second paragraph 101
C. Third paragraph 101
D. Fourth paragraph 101
E. Fifth paragraph 101
III. The article in context 102
IV. Commentary on the article 102
A. First paragraph 102
B. Second paragraph 105
1. Receiving requests for mutual assistance from abroad 105
2. Swiss requests for mutual assistance abroad 107
3. Processing extradition requests 107
a. Forwarding Swiss extradition requests 107
b. Receipt of foreign extradition requests 108
4. Forwarding foreign requests for mutual assistance to the competent Swiss authorities 108
5. Criminal prosecution by delegation 108
6. Enforcement of decisions 108
C. Third paragraph 108
1. Request for a reciprocity guarantee 109
2. Choice of appropriate procedure 110
3. Admissibility of a Swiss request 110
D. Fourth paragraph 111
E. Fifth paragraph 111
1. The request requires investigations in several cantons 112
2. Failure to reach a decision within a reasonable time 112
3. Complex or particularly important cases 113
Recommended further reading 113
Bibliography 113

I. GENERAL HISTORICAL OVERVIEW OF THE ORIGIN OF THE STANDARD

1 As can be seen from the commentary on Article 16 of the IMAC, the division of competences prior to the entry into force of the IMAC was unsatisfactory. The aim of the draft IMAC was to introduce simple regulations that would enable the requesting state's request to be processed rapidly, without unacceptable delays. According to this draft, given that the execution of a request for mutual assistance could both raise questions as to "the application of the code of criminal procedure", as the rulings and decisions subject to appeal are "substantially similar in nature to official acts performed by the investigating judge", and fall under administrative law when it comes to applying "the very provisions of the law on mutual assistance", jurisdiction was divided between the FDJP and the Police Division. The Police Division was given responsibility for all matters relating to extradition. For other acts of mutual assistance, competence was assigned, for the most part, to "the authorities responsible for criminal prosecution". As a result, the cantons assume "most of the responsibilities which, in principle, are assigned to the Police Division". The Police Division has nevertheless been granted the right to use, "in its capacity as supervisory authority, the remedies provided for in cantonal legislation". In view of this division of powers, article 17 IMAC, which concerns the powers of the federal authorities, follows article 16 IMAC, which concerns the cantonal authorities.

2 Article 14 al. 1 of the draft, which subsequently became article 17 al. 1 IMAC, conferred exclusive decision-making powers on the DFJP in the cases provided for in article 1 al. 2 of the draft, which has since become article 1a IMAC.

3 Letters a and b of article 14 al. 2 of the draft, subsequently incorporated into article 17 al. 2 IMAC, conferred exclusive decision-making powers on the Police Division to rule on the existence of grounds for inadmissibility and the rejection of an application, depending on the seriousness of the offence.

4 Letters c, e and f of article 14 para. 2 of the draft, subsequently incorporated into article 17 para. 3 IMAC, conferred decision-making powers on the Police Division in the following cases:

- request for reciprocity insurance,

- choice of procedure and
- admissibility of a Swiss application.

It is also clear from the draft IMAC that Article 13 para. 1 and Article 14 para. 2 let. d, subsequently incorporated into Article 17 para. 4 IMAC, governed the transfer of powers from the cantonal to the federal authorities for the execution of mutual assistance proceedings in Switzerland. This transfer of jurisdiction was based on a decision by the Police Division, which could choose to "entrust the partial or total execution of a procedure to a federal authority when the prosecution or punishment of the offence would be the responsibility of that authority if committed in Switzerland". The second paragraph of article 13 para. 2 also empowered the "joint superior authority" to rule on differences between federal authorities. 5

Like Article 16 IMAC, the wording of Article 17 IMAC was largely inspired by Article 3 of the Federal Act on the Treaty with the United States of America on Mutual Assistance in Criminal Matters of October 3, 1975 (hereinafter: LTEJUS). 6

It should be pointed out that in 1979, even before the entry into force of the IMAC in 1981, the Police Division became the Federal Office of Police, commonly referred to as the "Federal Office" in the text of the IMAC. In the early 2000s, the powers of the Federal Office of Police with regard to mutual assistance were reassigned to the Federal Office of Justice (hereinafter "FOJ"), but the legal text of the IMAC remained unchanged. It was only at the beginning of 2024, in the context of the amendment of the Swiss Criminal Procedure Code decided on June 17, 2022, that the terms "Federal Office" used in the various provisions of the IMAC - including art. 17 IMAC - were effectively replaced by "FOJ". 7

II. CHANGES TO THE STANDARD

A. First paragraph

The first paragraph of article 17 IMAC was amended in 1996, following the repeal of the 2nd paragraph of article 1, which had been included in article 1a IMAC. The amendment came into force on February 1, 1997. 8

9 This amendment was in response to the legislator's wish to "better separate the purpose of international cooperation from its limits". According to the Message concerning the revision of the Federal Act on International Mutual Assistance in Criminal Matters and the Federal Act on the Treaty with the United States of America on Mutual Assistance in Criminal Matters, as well as a draft Federal Decree concerning a reservation to the European Convention on Mutual Assistance in Criminal Matters of March 29, 1995, The aim of this revision was to remedy the weaknesses of the IMAC "in terms of the execution of requests for mutual assistance, particularly with regard to the length of the execution procedure, which in some particularly high-profile cases (Pemex, Marcos) has proved excessive". The means employed by the Federal Council and the FDJP to simplify and accelerate the procedure, by way of ordinances or interventions, or by the jurisprudence of the Federal Court, have proved insufficient, necessitating a more complete and extensive revision of the law.

10 In 2001, as part of the total revision of the federal judicial system, article 17 para. 1 IMAC was again amended, with the same aim as the amendment of March 29, 1995, "namely to speed up proceedings". This second amendment, which came into force on January 1, 2007, introduced a second sentence setting a deadline of 30 days following communication of the decision to close the procedure, within which to request a decision from the Department. This time limit was intended to "ensure that the procedure referred to in Article 1a IMAC runs in parallel with the appeal procedure", and thus prevent persons with party status from blocking the final mutual assistance decision by invoking Article 1a IMAC. Indeed, as the Message concerning the total revision of the Federal Judiciary of February 28, 2001 shows, in practice, the instrument of article 1a IMAC was used "with the aim of preventing the authorized delivery of mutual assistance documents", after ordinary legal remedies had been exhausted without success. This result is the consequence of the fact that the procedure under article 1a IMAC allows mutual legal assistance to be refused "admissible in itself" if such cooperation could harm Switzerland's sovereignty, security, public order or other essential interests.

B. Second paragraph

Paragraph 2, which concerns the powers of the FOJ, has not been amended since the IMAC came into force, subject to the replacement of the words "Federal Office" by "FOJ" on January 1, 2024. 11

C. Third paragraph

Paragraph 3 was the subject of a single amendment when the Federal Act on International Mutual Assistance in Criminal Matters and the Federal Act on the Treaty with the United States of America on Mutual Assistance in Criminal Matters were revised, as well as a draft Federal Decree concerning a reservation to the European Convention on Mutual Assistance in Criminal Matters of March 29, 1995. 12

This amendment, which came into force on February 1, 1997, concerned letter b of this paragraph, which confers jurisdiction on the FOJ to choose the appropriate procedure in cases covered by article 19 IMAC. 13

D. Fourth paragraph

Paragraph 4 - which concerns the execution, in whole or in part, of a request for mutual assistance by a federal authority which would be competent if the offence had been committed in Switzerland - has not been amended since the IMAC came into force. 14

E. Fifth paragraph

This last paragraph was introduced when the IMAC was amended on October 4, 1996, and came into force on February 1, 1997. 15

It empowers the FOJ to decide on the admissibility of mutual assistance and its execution in the cases provided for in article 79a IMAC, which was also introduced at the time of this revision and came into force on February 1, 1997. The introduction of this paragraph and of article 79a IMAC was intended to increase the powers of the FOJ in certain situations where its competence would facilitate the granting of mutual assistance or its execution. 16

It should be noted that neither this paragraph nor article 79a IMAC were included in the Message concerning the revision of the Federal Act on International Mutual Assistance in Criminal Matters and the Federal Act on the 17

Treaty with the United States of America on Mutual Assistance in Criminal Matters, as well as a draft Federal Decree concerning a reservation to the European Convention on Mutual Assistance in Criminal Matters of March 29, 1995. These were added during the parliamentary debates.

III. THE ARTICLE IN CONTEXT

18 Article 17 IMAC is located in the first part of the law, which deals with the general provisions of the law.

19 The article is placed in Chapter 3, Section 1, which governs procedure in Switzerland and defines the competent authorities for judicial and international mutual assistance in criminal matters and the powers of these authorities.

20 As noted in Chapter 1, Article 17 IMAC, which concerns the powers of the federal authorities, follows Article 16 IMAC, which concerns the cantonal authorities. It is clear from this system that the ordinary mutual assistance procedure is primarily the responsibility of the cantonal authorities. There are, however, a few exceptions to this principle, notably in the case of extradition proceedings - which fall within the remit of the FOJ - or, in the case of minor mutual assistance, when a treaty concluded by Switzerland establishes the jurisdiction of the FOJ as the central authority, as is the case with the United States of America (art. This is the case with the United States of America (art. 28 of the Treaty between the Swiss Confederation and the United States of America on Mutual Assistance in Criminal Matters, concluded on May 25, 1973) and - for requests for mutual assistance in cases of organized crime, corruption and other serious crimes - Italy (art. XVIII of the Agreement between Switzerland and Italy to supplement the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959, and to facilitate its application, concluded on September 10, 1998). The federal authorities therefore have what is termed residual jurisdiction, and article 17 of the IMAC defines this.

IV. COMMENTARY ON THE ARTICLE

A. First paragraph

21 This first paragraph gives the FDJP the power to take decisions in cases covered by Article 1a IMAC. More specifically, the FDJP is competent to assess

whether the mutual legal assistance granted is likely to prejudice the sovereignty, security, public order or other essential interests of Switzerland, and may, where appropriate, refuse to execute mutual legal assistance on these grounds.

The notion of "other essential interests" refers to other interests decisive for 22
the existence of the country as a whole. Mere harm to individual economic agents is not sufficient to constitute an infringement of essential interests: execution must be likely to cause harm to the Swiss economy as a whole (e.g., risk of a general embargo on Swiss products, or systematic exclusion of Swiss companies from public contracts). Article 1a IMAC therefore limits Switzerland's scope for cooperation when the execution of the request, "otherwise well-founded", is likely to harm Swiss interests.

The scope of this article is extremely limited as far as extradition is con- 23
cerned. Indeed, where a treaty on mutual legal assistance exists with the requesting State, the grounds for refusal set out in Article 1a IMAC only apply if the treaty in question contains a provision equivalent to this Article, which is rarely the case in the field of extradition. In the field of minor mutual assistance, this ground for refusal is provided for in mutual assistance agreements and bilateral treaties.

The FDJP's examination must be limited to "the question of whether 24
sovereignty, security, public order or other essential interests of Switzerland under Article 1a IMAC are affected is of a purely political nature and must be resolved independently of proceedings before the Federal Supreme Court".

The right to request a decision from the FDJP is reserved exclusively for Swiss 25
nationals and foreigners domiciled in Switzerland, as well as for companies with their head office or a permanent establishment in Switzerland.

In order to avoid this means being used to delay the procedure and prevent 26
the execution of a final decision that has entered into force, a period of 30 days following written communication of the closing decision is allowed to the person with standing (art. 21 al. 3 and 80h let. b IMAC) to request a decision from the FDJP. The 30-day time limit begins to run as soon as the closure decision is communicated in writing (and not as soon as it becomes final), and is intended to ensure that the procedure provided for in article 1a IMAC "runs in parallel with the appeal procedure". After the 30-day deadline, the application is inadmissible. It is interesting to note, however, that the Federal Coun-

cil, in its capacity as the appeal authority of the FDJP, "may of its own motion and at any time refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of Switzerland".

27 The submission of a request based on article 1a IMAC filed after an enforceable decision does not suspend the enforcement of that decision (art. 21 para. 4 IMAC); it is then up to the applicant to request provisional measures.

28 The jurisdiction of the FDJP demonstrates the purely political nature of this decision. For the same reason, an administrative appeal has been lodged against this decision with the Federal Council (art. 26 IMAC).

29 Some academics have strongly criticized this dual appeal body, arguing that it is not an appeal body because the FDJP reports directly to the Federal Council. We do not share this criticism, for two reasons. Firstly, we believe that in administrative procedure, a double appeal body is not a general procedural guarantee or a constitutional right of citizens. Secondly, we consider that the double instance is confused, at least in part, with the right to be heard. In this case, the dual appeal body - the FDJP and the Federal Council - enables the applicant to express himself several times, before different authorities, and to put forward his arguments and means of proof. The applicant's right to be heard is therefore respected. The fact that the FDJP reports to the Federal Council does not mean that the arguments put forward by applicants are not examined independently and impartially by each authority.

30 Another section of the doctrine criticizes this paragraph because of the possibility of requesting, in parallel, an appeal against the admissibility of legal assistance, available under article 80e IMAC before the Complaints Court of the TPF (art. 37 al. 2 let. a LOAP). In order to avoid what she describes as "duplication of legal remedies", she proposes that the judge alone should weigh up all interests, including those referred to in art. 1a IMAC. We do not share this view either. It is true that the legal system means that, in parallel, two separate authorities are competent to render decisions concerning the same request for mutual assistance. However, these two authorities, once seized, do not carry out the same analysis: the FDJP and the Federal Council are only competent to determine whether Switzerland's essential interests make it impossible to grant mutual assistance. In contrast, the TPF and TF are not competent to examine this question, but only to determine whether mutual assistance

can be granted on the basis of the other provisions of the IMAC. In other words, and as emphasized on numerous occasions in the decisions handed down by the Federal Council in connection with article 1a IMAC, these two channels "do not examine the same aspects of the problem". The eminently political nature of the issues at stake under art. 1a IMAC makes it essential for the DFJP and the Federal Council to exercise control, as they are in a better position to define any political limits to the granting of mutual assistance than a judicial authority. We would also point out that this distribution of powers is similar to the power of these authorities to authorize the prosecuting authorities to prosecute offences of a political nature (art. 302 CP and 66 LOAP), where the Federal Council can only refuse authorization in order to safeguard the country's overriding interests (art. 66 para. 1 LOAP). Finally, we would like to point out that, although the parallelism of legal remedies can sometimes prove problematic in practice, case law has shown that the two remedies coexist satisfactorily.

B. Second paragraph

The second paragraph reiterates the division of powers between cantonal and federal authorities in matters of international legal assistance (art. 16 para. 1 IMAC), specifying the powers of the FOJ. 31

More specifically, this paragraph stipulates that the FOJ is responsible for receiving requests from abroad and submitting those from Switzerland, processing extradition requests and forwarding requests concerning other acts of mutual assistance, delegated criminal prosecution and the enforcement of decisions to the competent cantonal and federal authorities for examination, unless they are manifestly inadmissible. 32

As our commentary on article 16 IMAC discusses in detail the division of powers between the FOJ and the cantonal and federal authorities, we will only examine below the particulars concerning the FOJ's powers, which can be further elaborated. 33

1. Receiving requests for mutual assistance from abroad

Subject to direct transmission by the requesting authority to the competent federal or cantonal enforcement authority, the FOJ is competent to receive requests for mutual assistance from abroad. 34

35 The direct channel between judicial authorities depends, first and foremost, on "the degree of proximity of legal systems and geographical distance". This channel is established by several instruments: the supplementary agreements to the ECCJ, the ECCJ IIAP, the CISA and the AAF. It is also admissible in cases of urgency. In principle, for European countries, foreign judicial authorities can send their request directly to the requested cantonal or federal judicial authority. It should be noted, however, that the United Kingdom has entered a reservation to article 4 of the PAII CEEJ. Requests from this country must therefore be addressed to the FOJ, and vice versa.

36 Where the direct route is not possible or practical, or where the FOJ has jurisdiction, the FOJ, in its capacity as the Swiss Central Office, receives foreign applications. This route, also known as the ministerial route, is known as the standard route.

37 In the absence of a treaty with Switzerland instituting such a channel, the diplomatic channel must be used. The FOJ then receives the request through diplomatic channels from the foreign authority.

38 On receipt of a foreign application, the FOJ carries out a summary examination of the formal admissibility of the application before delegating it - unless it is manifestly inadmissible - to the competent cantonal or federal authority (art. 78 para. 2 IMAC). The FOJ also has the option of returning the application to the requesting state for amendment or completion (art. 78 al. 3 IMAC). In practice, this option is only used if there is a serious defect in the application. In fact, the competent cantonal or federal authority responsible for executing the application is considered to be in the best position to request the necessary additions.

39 Receipt and transmission are not subject to appeal (art. 78 al. 4 IMAC). Similarly, the FOJ does not issue a prior formal decision on the question of the manifest inadmissibility of the foreign application, nor can such a decision be provoked.

40 In urgent cases, the FOJ is also empowered to order provisional measures itself, if necessary (art. 18 para. 2 IMAC).

2. Swiss requests for mutual assistance abroad

When Swiss requests are submitted abroad, the FOJ checks whether they are admissi- 41
ble (art. 17 para. 2 and 3 let. c in conjunction with art. 30 para. 1 IMAC).

In practice, this examination is limited to checking whether the statement of facts corresponds to the classification of the offence referred to in the application and, in general, whether it is compatible with the IMAC. In particular, the principle of reciprocity (art. 8 IMAC) must be respected, which means that a Swiss authority may not request measures which cannot be ordered by itself in execution of a foreign request. The same applies if the offence referred to in the request would not give rise to mutual assistance on the part of Switzerland under article 3 IMAC. 42

With regard to the channel for transmitting requests from Switzerland to other countries, the explanations given in the previous chapter apply mutatis mutandis. Accordingly, the FOJ will transmit the request either via the ministerial channel or the diplomatic channel, the direct channel being reserved for the judicial authorities. 43

For the rest, reference is made to our considerations on article 16 IMAC, which apply mutatis mutandis. 44

3. Processing extradition requests

a. Forwarding Swiss extradition requests

Before transmitting a formal extradition request, the FOJ is competent, at the request of the cantonal or federal prosecution or enforcement authority, to transmit requests for tracing persons. 45

The search request must be sent in writing by the Swiss authority to the Extradition Unit of the FOJ. In urgent cases, advance electronic transmission is possible. In urgent cases outside office hours, the announcement can be made via Fedpol's Operations Center. The content to be included in such a request is detailed in the Aide-mémoire pour les recherches internationales de personnes en vue d'extradition. 46

Search requests are then forwarded by the FOJ either directly to the person's country of residence, where the place of residence is known or presumed, or 47

via the Schengen Information System (SIS) platform for member countries, or via Interpol.

48 Once the wanted person has been arrested, the FOJ is responsible for submitting the extradition request abroad within the stipulated deadline. To this end, it advises the competent Swiss authority on the preparation of the necessary documents.

b. Receipt of foreign extradition requests

49 With regard to the receipt of foreign extradition requests, reference is made to our considerations under article 16 IMAC, which apply mutatis mutandis.

4. Forwarding foreign requests for mutual assistance to the competent Swiss authorities

50 Except where the direct route is provided for (and followed), the FOJ receives foreign requests for mutual assistance (requests concerning other acts of mutual assistance) and, after a summary examination of admissibility, forwards them for execution to the competent cantonal and federal prosecution authorities.

5. Criminal prosecution by delegation

51 With regard to the delegation of criminal prosecution, reference is made to our considerations under article 16 IMAC, which apply mutatis mutandis.

6. Enforcement of decisions

52 With regard to the enforcement of criminal decisions, reference is made to our considerations under article 16 IMAC, which apply mutatis mutandis.

C. Third paragraph

53 The third paragraph concerns the FOJ's specific powers with regard to :

a. requesting a reciprocity guarantee (art. 8 para. 1),

b. choice of the appropriate procedure (art. 19) and

c. admissibility of a Swiss application (art. 30 para. 1).

Until the revision of June 17, 2005, FOJ decisions within the meaning of this paragraph were subject to administrative appeal to the Federal Department, which gave the final ruling. With effect from January 1, 2007, this legal remedy has been replaced by an appeal to the TPF, which decides in a single instance. 54

1. Request for a reciprocity guarantee

The first letter of paragraph 3 grants the FOJ the power to request a guarantee of reciprocity if circumstances so require. 55

This principle is "essentially a promise by the requesting State to the requested State to provide the same type of assistance in the future, should the requested State so request". 56

Treaties do not generally contain reciprocity guarantees, as their "very purpose is to establish international cooperation on a stable basis which dispenses with such declarations"; "the guarantee of reciprocity results from the treaty". In principle, therefore, a guarantee of reciprocity is only required in the absence of a treaty basis between the foreign state and Switzerland. 57

Article 8 al. 1 IMAC in fine recalls the FOJ's competence in this respect, "if circumstances so require", and specifies that, in principle, a request for mutual assistance will only be granted if the requesting state guarantees reciprocity (art. 8 al. 1 IMAC). Article 8 al. 2 IMAC mentions, in a non-exhaustive manner, the cases where a guarantee of reciprocity is not necessary, i.e. when it concerns a notification or when the execution of the request : 58

a. appears necessary because of the nature of the act committed or the need to combat certain forms of offence,

b. is likely to improve the situation of the accused or his chances of social rehabilitation, or

c. serves to elucidate an act directed against a Swiss citizen.

The FOJ has a wide margin of discretion in deciding whether to require a guarantee of reciprocity. According to jurisprudence, such a guarantee may be waived in particular for the suppression of organized crime and economic crime, as well as money laundering and corruption, in accordance with art. 8 para. 2 (a) IMAC. 59

60 Finally, it should be noted that, in accordance with the principle of trust, the FOJ is not required to verify the competence of the authority issuing the declaration of reciprocity, except in cases of manifest abuse.

2. Choice of appropriate procedure

61 According to the second letter of paragraph 3, the FOJ is also competent when an application is to be sent to a State which offers a choice between several procedures.

62 This letter of article 17 para. 3 refers to article 19 IMAC, according to which, if the person prosecuted is abroad and the law of the State to which the request is to be addressed offers a choice between several procedures, preference will be given to the one that appears to ensure the best social reclassification. This choice is made on the basis of :

a. the relations of the person sought with the requested state and with Switzerland,

b. the likelihood of expulsion from Switzerland,

c. the rational administration of justice, and d. an overall judgment in the case of multiple offences (art. 8 OEIMP).

3. Admissibility of a Swiss request

63 This third letter of paragraph 3 grants the FOJ the power to rule on the admissibility of a Swiss application.

64 The FOJ carries out this examination on the basis of article 30 para. 1 IMAC, and examines in particular whether Switzerland could comply with such a request if it were addressed to it (principle of reciprocity).

65 To enable the FOJ to carry out this examination, the requesting Swiss authority is required to forward the file to the FOJ (art. 7 EIMPO).

66 Any decision by the FOJ not to submit a request for mutual assistance may be appealed by the cantonal criminal authority (art. 25 para. 3 IMAC) to the TPF. According to case law, the federal criminal authority may also appeal against the FOJ's decision not to submit a request.

D. Fourth paragraph

Under the fourth paragraph, the FOJ, after having carried out a summary examination of the request and verified that it is not manifestly inadmissible (art. 17 para. 2 IMAC), may decide, in its capacity as central authority, to entrust the execution of all or part of a mutual assistance procedure to the federal authority that would be competent if the offence had been committed in Switzerland, subject to cases where the FOJ is itself competent to deal with the request for mutual assistance. 67

To this end, the FOJ refers to articles 22 et seq. of the Swiss Criminal Code, which delimit the powers of the Confederation and the Cantons, and in particular articles 23 and 24 of the Swiss Criminal Code, which determine federal jurisdiction for certain offences under the Swiss Criminal Code. As is clear from the word "may" article 17 para. 4 IMAC, as well as article 79 para. 2 IMAC, are potestative by their organizational nature, as they govern only the relationship between the FOJ and the enforcement authorities. Consequently, the FOJ is not bound by the provisions of the PPC when it decides to entrust the execution of a request to a federal or cantonal authority, and therefore has a wide margin of discretion. For this reason too, the FOJ's decision to delegate to
the enforcement authority cannot be challenged separately (art. 14 OEIMP). 68

The FOJ's decision designating the authority in charge of the procedure is final; it cannot be challenged separately or in conjunction with the decision to close the procedure (art. 79 para. 4 IMAC). 69

E. Fifth paragraph

Under this final paragraph, the FOJ is competent to decide on the admissibility
of mutual assistance and its execution in accordance with article 79a IMAC. 70

In accordance with article 79a IMAC, the FOJ "may rule on the admissibility of mutual assistance and delegate execution to a cantonal authority, or itself rule on execution: 71

a. when the request requires investigations in several cantons,

b. when the competent cantonal authority is unable to reach a decision within a reasonable time,

or c. in complex cases or cases of particular importance".

1. The request requires investigations in several cantons

72 Under article 79a let. a IMAC, the FOJ has the option of ruling on the admissibility of mutual assistance and delegating execution to a cantonal authority, or itself ruling on execution when the request requires investigations in several cantons.

73 In practice, this possibility has never been used by the FOJ, and this paragraph therefore remains a dead letter to this day.

2. Failure to reach a decision within a reasonable time

74 The FOJ may also decide to rule itself on the execution of the request if the competent cantonal authority is unable to reach a decision within a reasonable time.

75 In this respect, it should be noted that in matters of mutual legal assistance, the principle of promptness is enshrined in the following article, i.e. article 17a para. 1 IMAC, which requires the authority seized to take a decision "without delay". There is no time limit for making an order.

76 In the field of mutual legal assistance, it is complex to assess compliance with the principle of expedition, as this differs according to the complexity of the request for mutual assistance, for example, the mutual assistance measures required and any exchanges with the requesting authority that may be necessary to execute the request. According to the doctrine, "after a period of six months, however, the Federal Office must be concerned and ask for explanations". The appeal authority, for its part, must ensure that its decision is taken within "a maximum of three months".

77 In extradition cases, where the freedom of individuals is at stake, both the FOJ, as the executing authority, and the appeal authorities must decide within days or even weeks of the request.

78 It should be noted that the costs incurred by the Confederation pursuant to article 79a let. b IMAC are borne by the Canton (art. 13 al. 1bis OEIMP).

3. Complex or particularly important cases

Finally, the FOJ may decide to rule itself in complex or particularly important cases. 79

A case in point is the frigate affair, which was "part of a framework of Franco-Taiwanese public corruption" and in which the FOJ took over the mutual assistance procedure at the request of the Federal Examining Magistrate ("JIF") on the basis of article 79a let. c IMAC. 80

Another example is the Abacha case, a case of mutual assistance based on a criminal investigation by the Nigerian authorities into the misappropriation of public funds under the regime of former head of state Sani Abacha. In this case, the FOJ took over the mutual assistance procedure on the basis of this same provision, insofar as the proceedings concerned a "politically exposed person" or "PEP", in this case a former head of state. 81

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COMMENTARY ON

Art. 17a IMAC

A commentary by Kastriot Lubishtani / Hélène Rodriguez-Vigouroux

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Art. 17*a* Obligation of promptness

[1] The competent authority shall execute requests promptly. It shall decide without delay.

[2] It shall on request provide the FOJ with information on the status of the proceedings, the reasons for any delay and the measures being considered. If the delay is not justified, the FOJ may take the matter up with the appropriate supervisory authority.

[3] When the competent authority, without reason, refuses to or delays in issuing a ruling, its conduct shall be regarded as equivalent to a negative decision subject to appeal.

CONTENT

I. Basis and genesis of art. 17a IMAC 117
II. Obligation to act promptly (para. 1) 117
A. Concept and practical scope 118
B. Competent authority 119
C. Beneficiaries 119
D. Implementation in legislation and case law 120
III. Obligation to provide information and the FOJ's right to intervene (para. 2) 122
IV. Equating a denial of justice with a negative decision (para. 3) 122
Bibliography 122

I. BASIS AND GENESIS OF ART. 17A IMAC

Art. 17a IMAC bears the marginal note "obligation de célérité" ("Gebot der raschen Erledigung"; "obbligo di celerità"). With regard to international mutual assistance in criminal matters, it gives concrete form to the conventional and constitutional guarantee of the right to a fair trial, within the meaning of art. 6 § 1 ECHR, art. 14 ch. 3 UN Covenant II and art. 29 al. 1 of the Swiss Constitution, in its temporal dimension. These guarantees relate precisely to the right of every individual to have his or her case judged "within a reasonable time", and corollary to the prohibition of the denial of justice, according to the adage "Justice delayed is justice denied". In this way, the principle of celerity ("Beschleunigungsgebot"; "imperativo di celerità") is enshrined in the IMAC. Its counterpart in criminal procedure is art. 5 CPP. 1

Art. 17a IMAC was not included in the law as it originally came into force on January 1, 1983. It was only when it was revised on January 1, 1997 that the principle of expedition was included in the IMAC. Since then, no legislative amendments have been made to this provision. 2

From the point of view of the ratio legis, art. 17a IMAC has the dual purpose of emphasizing the urgency and importance of international mutual assistance. The principle of celerity thus plays a cardinal role in reconciling two imperatives of international cooperation: on the one hand, efficiency and rapidity in processing a request for mutual assistance, in order to provide the requesting state with the necessary information; on the other, respect for the rights of the persons concerned, given that mutual assistance constitutes a "considerable slowdown" made necessary by "the obstacle of state borders", which criminals are unaware of. 3

II. OBLIGATION TO ACT PROMPTLY (PARA. 1)

Under art. 17a para. 1 IMAC, the competent authority is required to process requests "expeditiously" and to take a decision "without delay". This provision expressly establishes an obligation to act promptly. 4

A. Concept and practical scope

5 Although art. 17a para. 1 IMAC stipulates that the authority must act "expeditiously" and take a decision "without delay", it does not set out a more precise framework, nor does it establish a "time limit" that cannot be exceeded. In this respect, during the preparatory work on the standard, the Federal Assembly decided not to introduce a time limit of 9 months, by which time the authority should, as a general rule, have taken a decision. The legislator considered that such a time limit could appear both too long for simple cases and too short for complex ones, so that the introduction of a legal time limit could have the opposite effect to that intended.

6 As the legislator deliberately refused to introduce a time limit in principle in art. 17a IMAC, case law holds that compliance with the principle of promptness must therefore be assessed in concreto. According to the Federal Court, an overall assessment of the situation must be made, taking into account all the circumstances of the case, and in particular the degree of complexity of the case, the conduct of the person subject to the procedure, and that of the competent foreign authorities. In the context of this examination, the authority cannot take advantage of a deficient organization or structural overload to justify the slowness of the procedure to be carried out, even if unavoidable "dead times" are admissible and cannot be blamed on it.

7 By way of example, the Federal Court found a serious breach of the principle of expedition in a case in which a period of 7 and a half years had elapsed between the request for mutual assistance (July 5, 2001) and the FOJ's decision (December 31, 2008), it being pointed out that the FOJ had remained inactive for more than 3 years after receiving the requested documents from the requesting authority. In another case, our High Court accepted the existence of a borderline case (Grenzfall) and denied a breach of the principle of expedition, while describing as unusually long the two-year period between the filing of an appeal to the Federal Criminal Court (September 28, 2020) and the latter's decision (November 11, 2022).

8 Generally speaking, in the context of extradition proceedings (art. 32 ff IMAC), the principle of expedition is considered to have been breached if the duration of detention for extradition purposes exceeds the custodial sentence that the extraditable person can expect. In the case of sequestration, the principle of expedition does not apply if the competent authority does not con-

duct the proceedings in accordance with art. 17a IMAC, bearing in mind, moreover, that in such a context the guarantee of property (art. 26 Cst.) also comes into play.

B. Competent authority

The obligation to act promptly is addressed to the "competent authority". This means that, on the one hand, the principle must be respected at all stages of the mutual assistance procedure and, on the other hand, it is binding on all Swiss authorities, whether cantonal or federal, whether in the first instance of enforcement or appeal. It follows that the FOJ is bound by this obligation, particularly in the field of extradition, as is the Federal Supreme Court. 9

On the other hand, art. 17a IMAC does not extend to the requesting authority, since any complaint that the latter has breached the principle of expedition must be lodged with the competent authorities in the foreign state. Switzerland is therefore not responsible for any breach of the principle of expedition by the requesting state in the criminal proceedings it is conducting. That said, such a violation may be raised in the context of Swiss mutual assistance proceedings, but only to a limited extent in relation to art. 2 IMAC if it comes into play. In addition, case law requires that the delay in criminal proceedings in the foreign state be contrary to public policy and thus characterize a serious violation of the right to a fair trial or a denial of justice. 10

C. Beneficiaries

In addressing the competent authority, the obligation to expedite has as its corollary a right on the part of the person affected by the mutual assistance measure addressed to Switzerland to have his or her case dealt with as quickly as possible, inasmuch as art. 17a IMAC is the normative translation of a constitutional and conventional human rights right (N. 1). In this context, it is imperative to remember that mutual legal assistance is part of criminal proceedings carried out abroad, in which the person concerned has the right to have his case tried within a reasonable time (art. 6 § 1 ECHR; art. 14 ch. 3 UN Covenant II). Mutual assistance must therefore be provided promptly. 11

That said, the principle of promptness has another facet, as its primary aim is to ensure that the requesting state's request for mutual assistance is executed swiftly. In its jurisprudence, the Swiss Federal Supreme Court has made it 12

clear that the requesting authority does not have to suffer from a delay attributable solely to the Swiss executing authority. Referring to the case law on administrative assistance, which applies mutatis mutandis in the field of mutual assistance in criminal matters, the Federal Criminal Court also notes that the prompt conduct of proceedings "derives both from the Swiss commitment not to delay the exchange of information - so as not to undermine its effectiveness - and from domestic law, which provides that assistance procedures must be conducted with diligence". In this respect, the swift execution of decisions relating to international mutual assistance is in the public interest. In this context, the principle of celerity is complementary to that of good faith, as Switzerland must fulfill its international obligations to the best of its ability, particularly in terms of meeting deadlines. Thus, a delay in the proceedings, or even a serious breach of the principle of promptness, cannot be penalized by the rejection of the request for mutual assistance, as Switzerland remains obliged to grant the assistance requested, given that the mutual assistance procedure is designed to promote inter-state cooperation in criminal matters. If the proceedings are not terminated, the measures provided for in art. 17a para. 2 and art. 79a IMAC must be taken, as well as, where applicable, those relating to supervision or high-level supervision.

D. Implementation in legislation and case law

13 The principle of promptness is implemented in various ways in legislation and case law.

14 On the normative level first of all, the principle of celerity is essentially concretized through the short deadlines marking the rapidity with which the mutual assistance procedure must be carried out both before the authority of first instance and before the Federal Tribunal: thus, there are no judicial féries in the IMAC (art. 12 al. 2 and 46 al. 2 let. d LTF); moreover, there is no suspensive effect in the event of an appeal in principle (art. 21 al. 4 1st phr. IMAC and art. 103 al. 1 LTF), with the exception of the cases mentioned in art. 21 al. 4 2nd phr. IMAC and 103 al. 2 let. c LTF); in addition, the time limit for lodging an appeal with the Federal Supreme Court is 10 days (art. 102 al. 2 let. b LTF); lastly, the legislator has set a time limit of 15 days for our High Court to issue a ruling of inadmissibility, starting from the end of the exchange of written submissions between the parties. This time limit does not apply, however,

when "the extradition proceedings concern a person whose asylum application has not yet been the subject of a final decision" (art. 107 al. 3 LTF).

Expressions of the principle of celerity in the law go beyond the mere question of deadlines. For example, the enforcement authority must "immediately" take the provisional measures required under art. 18 IMAC. In addition, it can resort to mutual assistance in the strict sense (art. 80c IMAC) and simplified extradition (art. 54 IMAC) if the person concerned consents. Furthermore, the absence of an "incidental" appeal in the context of the transmission of secret information or documents (art. 80e para. 1 IMAC) also contributes to the implementation of the principle of celerity through "the concentration of appeals at the end of the procedure", subject to the exceptions provided for in art. 80e para. 2 IMAC. Finally, Ludwiczak Glassey stresses that the provisions on dynamic mutual assistance (art. 18b and 80dbis ff IMAC) are "part of a general objective of celerity", insofar as these instruments "make it possible to speed up a certain (restricted) use of documents by the requesting authority before the end of the mutual assistance procedure", even if they do not speed up the procedure itself. 15

In case law, the principle of celerity has also been applied to the question of deadlines. For example, a time limit of 10 days applies to the party required to pay an advance on costs. It is also 10 days for the right of reply. However, subject to refusal, this right may be extended by 7 days. 16

What's more, case law holds that a suspension of proceedings by the Swiss authorities may be contrary to the principle of expeditiousness and therefore lead to a refusal of a request to this effect. Such a refusal is particularly justified when the request for suspension is based on an application lodged with the European Court of Human Rights, and is aimed at staying the decision of the enforcement authority until the Strasbourg court's decision, which is not expected in the near future. The same applies to the request for a stay pending the outcome of parallel proceedings in the requesting state. Furthermore, in cases where two parallel extradition requests are submitted to Switzerland by two States, the latter is not obliged to rule simultaneously on both requests, according to case law. Once the FOJ has determined, in the light of the legal criteria, which country should be given priority for extradition, it examines the admissibility of the request submitted by that state. If the request is accepted, it must be processed without delay, in accordance with the principle of expedition. 17

18 The principle of promptness also creates duties for the person affected by the mutual assistance measure. In particular, the latter must take part in the sorting of documents when a request for mutual assistance concerns the handing over of evidence, in the sense that he or she must specify to the executing authority which documents he or she considers should not be handed over, and on what grounds. Failure to comply with this obligation will result in the forfeiture of this right.

III. OBLIGATION TO PROVIDE INFORMATION AND THE FOJ'S RIGHT TO INTERVENE (PARA. 2)

19 One of the FOJ's duties is to ensure that the IMAC is properly applied, in accordance with art. 16 para. 1 sentence 3. IMAC. As part of this function, it must ensure compliance with the principle of promptness. The legislator has therefore stipulated in art. 17a al. 2 1st phr. IMAC that, at the FOJ's request, the executing authority must inform it of the status of the procedure, the reasons for any delay and the measures envisaged. In addition, the FOJ may intervene with the competent supervisory authority in the event of unjustified delay (art. 17a para. 2 sentence 2 IMAC). Where the FOJ is the competent authority, the Federal Council is the supervisory authority (art. 187 al. 1 let. a Cst. cum art. 8 al. 3 LOGA).

IV. EQUATING A DENIAL OF JUSTICE WITH A NEGATIVE DECISION (PARA. 3)

20 According to art. 17a para. 3 IMAC, if "the competent authority, without reason, refuses to rule or delays in ruling, its attitude is then assimilated to a negative decision subject to appeal". In so doing, the legislator assimilates the denial of justice to a negative decision, and opens up an express avenue of appeal against it. The legislator's intention was to enable the FOJ, as supervisory authority and party to the proceedings, to intervene more effectively in the event of a denial of justice.

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COMMENTARY ON

Art. 32 IMAC

A commentary by Andrés Payer

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Part Two: Delivery

Chapter 1: Requirements

Art. 32 Aliens

Foreign nationals may be surrendered to another state for the purpose of prosecution or execution of a sanction restricting their liberty in respect of acts for which it is competent to punish them, if that state requests extradition or, at Switzerland's request, assumes responsibility for prosecution or execution of the criminal decision.

CONTENT

I. History 127
II. Context of the provision. At the same time, on the significance and rationale of extradition 127
III. Specific content of the provision 128
A. Specification of the term “extradition” 129
B. Formulation of initial requirements for extradition 129
1. Foreign nationals 129
2. Transfer to another state 130
3. Offense 131
4. Purpose of the surrender: criminal prosecution or enforcement of a custodial sentence 134
5. Request 135
Bibliography 136
Materials 138

I. HISTORY

Art. 32 IMAC came into force on January 1, 1983, with the Mutual Assistance Act. It has remained unchanged since then. 1

The **extradition** of suspected or convicted offenders from one sovereign (today: state) to another, which is the subject of Art. 32 ff. IMAC, is the original form of mutual assistance in criminal matters and has a long **history**, of which only the modern part will be outlined here. Particularly well known, although not the first of its kind, is the principle of "aut dedere aut punire" (either extradite or punish) postulated by Grotius in the 17th century. From the 18th century onwards, European countries began to conclude extradition treaties among themselves, which served as the legal basis for such extraditions. In the 19th century, the first extradition laws were introduced to prevent states from becoming places of refuge for criminals. Switzerland passed such a law in 1892, which remained in force until the IMAC came into effect. 2

Art. 1 of the Extradition Act of 1892 can be regarded as the **predecessor provision** to Art. 32 IMAC. In its 1976 message, the Federal Council appears to have assumed that Art. 28 E-IMAC (later Art. 32 IMAC) would not bring about any change compared to the previous law. 3

II. CONTEXT OF THE PROVISION. AT THE SAME TIME, ON THE SIGNIFICANCE AND RATIONALE OF EXTRADITION

Art. 32 IMAC marks the beginning of the **second part of the Mutual Assistance Act**, which regulates extradition. As recently as 1976, the Federal Council stated that it was "to be regarded as the most important form of international cooperation." This explains its prominent position among the forms of mutual assistance in the IMAC system. Extradition continues to play an important role in Swiss mutual assistance practice. It is also the most drastic measure in the area of mutual assistance for the person concerned and is unique to mutual assistance in criminal matters: mutual assistance in civil and administrative matters does not involve the compulsory transfer of a person to another state. Only the seriousness of the alleged criminal behavior (above a certain threshold) can justify it. It is therefore no coincidence that extradition is also referred to as "major mutual legal assistance." 4

5 The rationale behind extradition is, on the one hand, the same as for other forms of mutual assistance in criminal matters: to support other states in the fight against crime. Of course, this is not purely altruistic, as reciprocal assistance is also required in return (see Art. 8 IMAC), i.e., corresponding assistance is expected in cases of need (do ut des). Secondly, extradition is specifically in Switzerland's own interest, as it does not want to harbor potentially dangerous individuals who are suspected of having committed crimes abroad, nor does it want to become a popular refuge for foreign criminals. From the perspective of the state to which extradition is to take place, the procedure makes it possible to bring the offender to justice and to trigger its general preventive effects (rationale for extradition).

6 Within the second part of the IMAC, Art. 32 is at the beginning of **Chapter 1**, which regulates the conditions for extradition. Art. 32 IMAC takes up the domestic privilege under extradition law in Art. 7 para. 1 IMAC, in that according to its wording, only "foreigners" can be extradited (see N. 13 ff.), and specifies the ground for extradition of a specific offense (extraditable offense) as specified in Art. 35 IMAC (see N. 22 ff.).

7 Like all other procedures of international legal assistance in criminal matters, extradition is subject to the **general provisions of the Mutual Assistance Act** (Art. 1 ff. IMAC).

8 Note the **relationship** between Art. 32 IMAC **and provisions under international treaties and cantonal law**. According to Art. 1 para. 1 lit. a IMAC, provisions in international agreements (mutual assistance or extradition treaties) take precedence over the second part of the IMAC and thus also over Art. 32. Art. 32 ff. IMAC, in turn, take precedence over cantonal law (Art. 49 para. 1 FC).

III. SPECIFIC CONTENT OF THE PROVISION

9 Art. 32 IMAC can be said to have two **functions**: on the one hand, the provision helps to clarify the concept of extradition in current law (A.), and on the other hand, it sets out the initial requirements for extradition (B.), which are supplemented by the subsequent articles of the Mutual Assistance Act.

10 Art. 32 IMAC is formulated as a **"discretionary provision"**; it does not establish an obligation to extradite (for the reasons for extradition, see N. 5). Art. 32 IMAC thus reflects the principle contained in Art. 1 para. 4 IMAC, accord-

ing to which no right to cooperation can be derived from the Mutual Assistance Act. However, an obligation to extradite may arise from international agreements (see N. 8).

A. Specification of the term "extradition"

Art. 32 IMAC allows conclusions to be drawn about the concept of extradition underlying the Mutual Assistance Act. As the Federal Council explained in its 1976 message on this law, under the 1892 Extradition Act, "extradition" meant "the transfer of the person being prosecuted to the requesting state for prosecution or enforcement of penalties for acts that are subject to the (original) jurisdiction of that state." Under the Mutual Assistance Act, it is still a matter of handing over a person to another state for prosecution or enforcement of penalties for acts that that state can punish. However, in accordance with European conventions, extradition is now also an instrument for the (compulsory) transfer of the person being prosecuted **to the state requested to take over the prosecution or enforcement of penalties**. This is clear from the text of Art. 32 in fine IMAC and the related materials. The initiative for extradition to a foreign country therefore does not have to originate from that country, and its criminal jurisdiction does not have to be original (keyword: substitute criminal justice). 11

B. Formulation of initial requirements for extradition

12 The wording of Art. 32 IMAC sets out the following initial requirements for extradition, which are supplemented by the subsequent provisions of the law:

1. Foreign nationals

Firstly, the person concerned must, in principle, be a *foreign national*. This follows both from the heading and from the wording of Art. 32 IMAC in all three official languages. The fact that, in principle, only foreigners can be extradited – known as **domestic privilege** – also follows from Art. 25 para. 1, second clause, FC and Art. 7 para. 1 IMAC. 13

It can be inferred from the latter two provisions that it is not the possession of foreign citizenship (of the requesting state or another state) that is decisive for the possibility of extradition, but rather the **lack of Swiss citizenship**. A foreigner within the meaning of Art. 32 IMAC is therefore anyone who does not 14

possess Swiss citizenship (within the meaning of the BüG) (purely negative term). Swiss-foreign dual or multiple citizens are therefore not foreigners within the meaning of this provision, but stateless persons and persons with a residence or settlement permit in Switzerland or refugee status are.

15 The decisive factor is the **time** at which the conditions for extradition are assessed or the extradition is carried out (and not, for example, the time of the offense). Anyone who lost their Swiss citizenship before the extradition decision was made can therefore be extradited, but not anyone who acquired it (even immediately) before the decision or the planned extradition. Accordingly, the acquisition or loss of Swiss nationality after the initial decision in the appeal proceedings must also be taken into account.

16 Contrary to what the wording of Art. 32 IMAC might suggest, the extradition of Swiss nationals is not excluded per se, but is possible if they consent to extradition (Art. 25 para. 1 second clause FC; Art. 7 para. 1 IMAC; see also Art. 54 IMAC). In this case, the same conditions apply to extradition.

17 Other cases in which Swiss nationals may be handed over to foreign countries include **transfer to the International Criminal Court** (see Art. 16 para. 3 of the Federal Act on Cooperation with the International Criminal Court [ZISG]), **transit** (Art. 7 para. 2, Art. 20*a* IMAC), **return** (Art. 7 para. 2 IMAC) and – temporarily limited – **transfer** pursuant to Art. 70 IMAC, whereby in the latter case safe conduct must be granted (Art. 70 para. 1 IMAC). Art. 101 IMAC also refers to transfer in the context of the transfer of criminal enforcement to another country, although there is no apparent reason not to refer to extradition in this case. While transit and return are traditionally understood as special types of extradition, legislators and the majority of legal scholars want to clearly distinguish the transfer to the International Criminal Court from extradition in terms of terminology and concept. This is apparently primarily to circumvent the constitutional requirement that Swiss citizens may not be extradited without their consent (Art. 25 para. 1 FC).

2. Transfer to another state

18 Secondly, the transfer must be made to *another state*. According to the wording of the law, no "extradition" within the meaning of the IMAC is possible to Swiss domestic authorities – as the title and context of the IMAC suggest – to communities not constituted as states or to inter- or supranational organiza-

tions (see, however, N. 20 on such organizations). However, in TPF 2008 61, the Federal Criminal Court approved extradition to the United Nations Interim Administration Mission in Kosovo. This was a special case in that the said authority had administrative power over Kosovo (including the judiciary).

According to the three-element doctrine recognized under international law, **constitution as a state** requires a state territory, a state people, and state authority. According to Swiss practice, it is not necessary for the requesting state to be internationally recognized as a state; Switzerland does not even have to recognize it as such, because recognition has only a declaratory effect. 19

The amendment to Art. 1 IMAC, which came into force on June 1, 2021, raises the question of whether Art. 32 IMAC also applies mutatis mutandis to **international courts or other intergovernmental or supranational institutions** (cf. Art. 1 para. 3^{bis} and 3^{ter} IMAC). The message accompanying this amendment supports this view: "The opening up of Article 1 IMAC has [...] the effect of not only making other forms of mutual assistance more flexible, but also cooperation in the area of 'extradition' [...]." With regard to the International Criminal Court, however, the ZISG must be observed as lex specialis. The surrender of a person by Switzerland to the International Criminal Court is governed exclusively by this more specific law and therefore does not constitute extradition, but rather a *transfer* (see N. 17). 20

By referring to *"surrender"*, Art. 32 IMAC implicitly assumes that the **person concerned is in Switzerland**. 21

3. Offense

Thirdly, the surrender must be based on an *act that the other state can punish.* While the Italian wording of the law refers to acts with *"atti"*, as does the German wording, the French wording already includes the breach of law with *"infraction,"* but is more open-ended with regard to the nature of the breach, as it can also include omissions. However, the "acts" or "atti" in Art. 32 IMAC are also to be understood in a broad sense, encompassing both actions and omissions. This interpretation is in line with Art. 35 IMAC, which specifies the characteristics that the predicate offense must have and refers to "offenses" and "acts" ('infractions'/"reati") without limiting them to acts committed. 22

Insofar as Art. 32 IMAC requires that the other state *"can punish"* ("a le droit de connaître de"/"può reprimere") the act in question, this means that it must 23

have *criminal jurisdiction (punitive power)* over it in both senses of the word: First, it must have the right under international law to prosecute the act *(ius puniendi)*, i.e. it must be able to base this on a connecting factor recognized under international law (territoriality principle, flag or registration principle, active or passive personality principle, state protection principle or universality principle) or another basis recognized under international law (in particular the principle of vicarious criminal jurisdiction). This is best expressed in the French wording of Art. 32 IMAC, which expressly refers to entitlement rather than mere ability, and corresponds to the traditional and applicable concept of extradition (see N. 11). In addition, the other state must actually prosecute this act (in accordance with its criminal law).

24 In principle, it is irrelevant on which basis under international law the other state invokes its criminal jurisdiction, e.g. whether on the principle of territoriality or the principle of state protection (see on the principle of universality N. 28 ff.). However, it follows from the principle of reciprocity that it must be one on the basis of which Switzerland could request extradition from it.

25 Fiolka concludes from the requirement of an "act that the other state can punish" that the act must be punishable under the law of the other state, that this law must be applicable to it, and that the foreign authorities must be responsible for "punishing" the act. This appears to require clarification: the former is only clear from Art. 35 para. 1 lit. a IMAC. It may also happen that the other state claims criminal jurisdiction but declares foreign criminal law (e.g. as lex mitior) to be applicable; however, this should not preclude extradition. Finally, the internal jurisdiction of the foreign authority does not need to be examined.

26 Case law applies a cautious **standard of assessment**. According to this, mutual legal assistance or extradition is to be refused (only) if the other state's lack of criminal jurisdiction is *so obvious* that its request appears *abusive* or its affirmation of its own jurisdiction appears *arbitrary*. However, if this restraint is justified on the grounds that it is a question of "interpreting the law of the requesting state," which is "primarily a matter for its authorities," this falls short, as foreign criminal jurisdiction must also be based on applicable international law (see N. 23).

27 The aforementioned standard applied by case law, which is very favorable to mutual legal assistance, has the **consequence** that only in cases where there

is no connection between the requesting state and the offense or no basis in international law for its criminal jurisdiction over the offense is extradition to be refused for lack of a suitable offense within the meaning of Art. 32 IMAC. International agreements may, of course, provide for a different standard.

How should an extradition request be dealt with in which the requesting state invokes the **principle of universality** (world law principle) to justify its criminal jurisdiction? Two scenarios must be distinguished. 28

If the alleged offender was not previously in the territory of the requesting state, this is clearly a case of the so-called **unrestricted principle of universality** (also known as the absolute, pure, or genuine principle of universality), according to which the presence of the offender in the territory of the prosecuting authority is not required. This principle cannot currently be considered recognized under international law. Although it has been adopted by individual legal systems (e.g., Germany, New Zealand), it remains highly controversial, and the threshold for its recognition under customary international law does not appear to have been crossed. 29

What is particularly interesting about the constellation at issue here is that, in the event of extradition, the requesting state would no longer have to invoke the unrestricted principle of universality, but could now prosecute the extradited person on the basis of the restricted principle of universality, which is recognized under international law. However, Art. 32 IMAC does not require that the other state *could* punish the offense, but that it *can* punish it. An obvious interpretation is that the other state must already possess criminal jurisdiction under international law and that it is not sufficient for it to acquire such jurisdiction through extradition (in other words, hypothetical or suspensive criminal jurisdiction is not sufficient). However, it can be argued that the last part of Art. 32 IMAC mentions the assumption of criminal prosecution or enforcement by the other state at the request of Switzerland, thus alluding to the vicarious administration of criminal justice, in which the other state does not initially have criminal jurisdiction under international law. Thus, it seems sufficient for Art. 32 IMAC if the other state can punish the offense *after extradition*. 30

In addition, there is the following point of view: even if – as in the constellation discussed here – the requesting state cannot ultimately base its criminal jurisdiction on existing international law, the more controversial this is (here: 31

the
scope of the principle of universality), the less its request will appear to be *abusive*. Applying the Federal Supreme Court's very favorable standard for mutual legal assistance—which is, admittedly, not convincingly justified (see N. 26)—a request based on the unrestricted principle of universality could therefore still be granted.

32 If the alleged perpetrator was initially on the territory of the requesting state, which initiated an investigation against him, and then left that state's territory, it can be argued that this is a case of the **restricted principle of universality**. Whether this principle actually covers this case in international law or whether criminal jurisdiction expires when the person leaves the territory of the state requires an examination of customary international law, which cannot be carried out here. In any case, the extradition request appears even less abusive in this constellation and will be granted simply because Switzerland itself exercises criminal jurisdiction in the same constellation and submits extradition requests to other countries.

33 Finally, it should be mentioned at this point that the **act** in question must have been committed by **the person concerned** themselves (or be attributable to them). We will return to this point shortly (N. 34).

4. Purpose of the surrender: criminal prosecution or enforcement of a custodial sentence

34 Fourthly, the surrender must be for the purpose of criminal prosecution or the enforcement of a custodial sentence. This refers back to Art. 1 para. 1 lit. a IMAC. Any **other purpose**, such as the conduct of civil or administrative proceedings or the hearing of evidence in other criminal proceedings (against third parties) in the foreign country concerned, is not taken into consideration. The criminal prosecution or penalty to be enforced must therefore be directed at the act committed by the person concerned (or attributable to them).

35 **Extradition for criminal prosecution** serves to arrest and surrender a person accused in foreign criminal proceedings so that the foreign judicial authorities can conduct criminal proceedings against them. The prerequisite is that criminal proceedings against the person are at least being prepared abroad.

It follows from Art. 35 para. 1 lit. a IMAC that, even in the case of criminal prosecution (and not only in the case of the enforcement of sanctions), the offense must be of a **certain severity**. The provision requires an offense that is punishable under the law of both Switzerland and the requesting state with a custodial sentence of at least one year or a more severe penalty. 36

Extradition for the enforcement of a custodial sentence is intended to arrest and transfer to another state a person against whom there is a final and enforceable foreign decision to enforce a custodial sentence. Custodial sentences (see Art. 11 para. 2 IMAC) are understood to mean prison sentences and inpatient measures. "Restrictive of liberty" is therefore synonymous with "depriving of liberty," as is most clearly evident from the French version ("sanction privative de liberté"). 37

The law does not specify a **minimum duration for the penalty to be enforced**. According to the message on the IMAC, it is "self-evident that extradition no longer appears proportionate if the remaining period of deprivation of liberty is less than approximately three months." Such cases are likely to be subsumed under Art. 4 IMAC. Various extradition treaties expressly regulate the minimum duration of penalties to be enforced in order for the contractual obligation to extradite to apply (e.g., Art. 2 no. 1 EEA: four months; Art. 2 no. 1 AVUS: six months). 38

According to the case law of the Federal Supreme Court in the context of the EEA, **extradition for the enforcement of a suspended prison sentence** is only possible if the suspended sentence is revoked (suspensive condition). There is no obligation to apply this case law to the context of the IMAC, especially since, unlike the EEA, there is no obligation to extradite in this case. Rather, a proportionality test is required in each individual case, whereby it is clear that both the remaining sentence and the remaining probationary period must not fall below the minimum applicable to unconditional sentences (see N. 38). 39

5. Request

Fifth, the other state must either **request extradition** (cf. Art. 27 ff. IMAC) **or, at the request of Switzerland**, **take over** the prosecution or enforcement of the criminal judgment (cf. Art. 88 f., 100 ff. IMAC). The latter two op- 40

tions also require the express consent of the other state to the extradition. In practice, they are likely to be rarely used.

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COMMENTARY ON

Art. 35 IMAC

A commentary by Andrés Payer

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Art. 35 Extraditable offences

[1] Extradition is permitted if, according to the documents supporting the request, the offence:

a. is punishable by deprivation of liberty for a maximum period of at least one year or a more severe sentence both under the law of Switzerland and under the law of the requesting State and

b. is not subject to Swiss jurisdiction.

[2] In determining whether an act is an offence under Swiss law, the following are not considered:

a. its specific degrees of guilt and conditions for criminal liability;

b. the conditions relating to the personal and time-related application of the Swiss Criminal Code and the Swiss Military Criminal Code of 13

June 1927 with regard to the criminal provisions on genocide, crimes against humanity and war crimes.

CONTENT

I. History 144
II. Context of the provision 144
III. Specific content of the provision 145
A. Documents accompanying the request as a basis for review (para. 1). At the same time, the domestic nature of the extradition procedure 146
B. Positive requirement: mutual threat of a minimum penalty (para. 1 lit. a) 149
1. Principle of double criminality 149
a. Rationale 149
b. Side effects 151
c. Areas of application and respective differences 152
2. Minimum threshold: custodial sentence of one year 153
3. Content and modalities of the examination 155
a. Relevant sources of law 155
b. Conversion of the facts for examination under Swiss law 157
c. Scope of the examination – positive determination 159
d. Factors not to be examined. Including those expressly excluded by para. 2 161
e. Intensity of the examination 166
C. Negative condition: lack of Swiss jurisdiction (para. 1 lit. b) 166
Bibliography 168
Materials 173
Instructions 174

I. HISTORY

1 Art. 35 IMAC has been **in force** in the wording reproduced above since January 1, 2011. Previously, a similar version (aArt. 35 IMAC) applied, which had come into force with the Mutual Assistance Act on January 1, 1983.

2 The **changes** made in 2011 are straightforward: the factors not to be taken into account listed in para. 2 (see N. 56 ff.) are now divided into two letters (a and b); in addition, the SCC has been inserted in letter b and the relevant criminal provisions have been updated.

3 The **predecessor** to Art. 35 IMAC is Art. 3 of the Extradition Act of January 22, 1892. In contrast to the latter, the former listed all possible offenses for extradition individually in a catalog, in accordance with the "enumeration method" that was widespread at the time. In contrast, Art. 35 IMAC follows the "threshold method" that dominates modern extradition treaties, according to which any offense punishable by a certain minimum penalty can be grounds for extradition (see N. 16).

II. CONTEXT OF THE PROVISION

4 In the **systematic structure of the Mutual Assistance Act**, Art. 35 is found in the second part on extradition, specifically in Chapter 1 on the conditions for extradition. Art. 35 IMAC specifies the extradition requirement of the predicate offense (cf. N. 6), which is already outlined in Art. 32 IMAC. This prerequisite must be examined when deciding on extradition, but may also be relevant in the context of examining *extradition detention*, in particular if the alleged conduct is not punishable under Swiss law (e.g., adultery, cohabitation): In this case, extradition is clearly inadmissible within the meaning of Art. 51 para. 1 IMAC.

5 In **relation to international treaty provisions**, the rule of Art. 1 para. 1 lit. a IMAC applies, according to which provisions in international agreements take precedence over the second part of the Mutual Assistance Act and thus also over Art. 35. Extradition treaties may, in particular, set the threshold for the predicate offense lower, i.e., allow extradition for less serious offenses than would be permissible under Art. 35 IMAC.

III. SPECIFIC CONTENT OF THE PROVISION

As can be seen from its heading in all three official languages and its content, Art. 35 IMAC has the **function of** specifying the extradition requirement of the *offense* (extraditable offense). It requires that, according to the documents in the request (A.), the offense is punishable by a certain minimum penalty in both countries, whereby certain factors are not to be taken into account (B.), and is not subject to Swiss jurisdiction (C.). 6

According to its clear wording in all three official languages, Art. 35 IMAC only sets out **conditions for the admissibility** of extradition; it does not establish any obligation to extradite. It thus reflects the discretionary provision of Art. 32 IMAC and the principle of Art. 1 para. 4 IMAC, according to which no right to cooperation can be derived from the Mutual Assistance Act. However, an obligation to extradite may arise from international agreements (see OK-Payer, Art. 32 IMAC N. 10) . 7

Art. 35 IMAC regulates only the classic scenario in which another state requests Switzerland to extradite a person to it, and not the scenario in which **Switzerland** requests another state **to take over criminal prosecution or enforcement** and, in this context, wishes to extradite the person to it (cf. Art. 32 last clause, Art. 88 lit. b, Art. 100 f. IMAC). Firstly, this is already made clear in para. 1 lit. a, which refers to "the law of both Switzerland and the requesting state" ("du droit suisse et du droit de l'État requérant"/"sia secondo il diritto svizzero sia secondo quello dello Stato richiedente"). Secondly, this is evident from the fact that para. 1 lit. b makes the absence of Swiss jurisdiction a prerequisite for extradition, even though Swiss jurisdiction exists in the case of Swiss requests to foreign countries for transfer (cf. Art. 88, Art. 100 IMAC) and extradition is permissible in this constellation according to other provisions (Art. 32, 88 lit. b and 101 IMAC). Thirdly, this restrictive interpretation of Art. 35 IMAC is supported by the fact that Switzerland can accept foreign requests for the transfer of criminal prosecution/enforcement in connection with surrender even for offenses below the minimum threshold of para. 1 lit. a (Art. 85 and 94 ff. IMAC do not specify such a threshold). Thus, Art. 30 para. 1 IMAC does not preclude Switzerland from requesting another country to take over criminal prosecution/enforcement in connection with extradition for offenses below this threshold; on the contrary, the principle of reciprocity argues in favor of granting Switzerland this right as well. For these reasons, Art. 35 IMAC must be interpreted as not applying to Swiss requests to foreign countries; in 8

this constellation, therefore, neither the condition of lack of Swiss jurisdiction (para. 1 lit. b) nor the minimum threshold of para. 1 lit. a applies. This means that, at least in theory, there is a risk that the minimum threshold of para. 1 lit. a will be circumvented where it should apply – namely when the foreign country requests extradition – by (informal) request from the foreign country. However, this risk is reduced by the fact that a request from Switzerland can only be considered if the transfer to the foreign country is likely to result in better social reintegration (cf. Art. 88 lit. b, Art. 100 lit. b IMAC) . In addition, the FOJ is bound by the principle of legality and the preservation of the legislature's assessment as expressed in Art. 35 IMAC.

A. Documents accompanying the request as a basis for review (para. 1). At the same time, the domestic nature of the extradition procedure

9 **The basis for examining** the further requirements is the documentation accompanying the request (Art. 35 para. 1 IMAC). This requires clarification: the (hypothetical) criminal liability and minimum penalty under Swiss law, as well as the lack of Swiss jurisdiction, must be examined with reference to the relevant domestic legal sources.

10 With regard to the **content** of the request and its annexes, it must be clear in particular what facts the person being prosecuted is accused of and how these are legally classified by the requesting state; the wording of the relevant legal provisions must be included (see Art. 28 para. 2 lit. c and para. 3 IMAC, Art. 10 Ordinance on International Legal Assistance in Criminal Matters [Mutual Assistance Ordinance, IRSV]). In addition, the documents must clarify on what grounds the investigating authority bases its suspicion against the person being prosecuted, so that the request does not appear to be abusive. If an enforceable criminal judgment or arrest warrant exists, it must be enclosed (Art. 41 IMAC). However, the requesting authority does not have to enclose any evidence with its request.

11 Case law does not impose strict **requirements on the presentation of the facts**: completeness and total consistency are not required. This is understandable in the case of extradition for criminal prosecution, especially since this often takes place at an early stage of the foreign proceedings and is intended to enable the requesting state to examine whether and, if so, how the

person being prosecuted has committed a criminal offense. However, the situation is different in the case of extradition for the enforcement of sanctions, where adversarial proceedings have already been conducted and a criminal judgment has been handed down. In this case, higher requirements should be placed on the presentation of the facts (and the legal qualification).

The authority deciding on extradition – the FOJ – is therefore not required to conduct its own investigation of the facts, but must rely on the request and its supporting documents. This can be justified by the **principles of trust and good faith** in international relations. It is in line with these principles that the deciding authority generally adheres to this information (for exceptions, see N. 15). In case of ambiguity or inadequate translation, the requesting state may be asked to provide additional or improved information (Art. 28 para. 6 IMAC). 12

The reliance on the documents in the request (as well as, for example, the fact that the FOJ and not a court decides on extradition, including extradition detention) can also be explained by the fact that, from a Swiss domestic perspective, the extradition procedure is an **administrative procedure** and not a criminal procedure or part of the foreign criminal procedure. The FOJ does not decide on wrongdoing, guilt or punishment, but on an administrative coercive measure. It therefore does not have to deal with the question of whether the person being prosecuted is actually guilty of the alleged offense, but only with the question of whether, according to the request and its documents, the conditions for extradition are met. The extradition proceedings therefore do not serve to establish the material truth, and extradition does not require that an extraditable offense has actually been committed, but only that such an (alleged) offense is being prosecuted or has been punished in the requesting state. The ECtHR has also denied the validity of the guarantees contained in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) for criminal charges (as well as for civil claims) in relation to extradition proceedings. 13

The classification of extradition and, more generally, mutual legal assistance proceedings as administrative proceedings has recently been (once again) **criticized** in some legal literature. This is not the place for a detailed statement, so a brief one will have to suffice: There are indeed some elements that seem to indicate that extradition proceedings have a criminal procedural component (e.g., para. 12(1) sentence 2 of the IMAC, the right of appeal to the 14

Federal Criminal Court, the requirement of double criminality). However, they can also be explained in other ways (see, for example, N. 22 f.), and the criticism seems to be stronger where it is not a question of extradition but of minor legal assistance or coercive measures under the CrimPC. In any case, the concept of extradition as an administrative matter is that of the legislature and also seems understandable, especially since Switzerland typically does not have or exercise any criminal jurisdiction in this area, not even derived jurisdiction. Switzerland cannot conduct its own criminal proceedings, and anyone who believes that the legal assistance it provides is part of foreign criminal proceedings would have to demonstrate that the foreign country has transferred its criminal jurisdiction to Switzerland (through the extradition request). However, this seems far-fetched and does not correspond to the concept of the extradition procedure as it is practiced. Furthermore, it would be detrimental to the purpose of international cooperation in criminal matters to grant all criminal procedural guarantees already in the extradition proceedings, as this would make the proceedings correspondingly more complex and lengthy. Extradition detention would likely be prolonged accordingly, and the capacity and willingness to provide legal assistance could decline. Of course, this does not release Switzerland from its obligation to prevent extradition from enabling (serious) human rights violations abroad (see Art. 2 IMAC). The non-granting of criminal procedural rights in extradition proceedings is based on the premise that they are granted in foreign criminal proceedings.

15 There are three **exceptions** to the principles outlined above (N. 9, N. 12 f.): Firstly, in cases of (liquid) alibi evidence pursuant to Art. 53 IMAC, the FOJ must conduct its own investigations and refuse extradition in cases of clear innocence within the meaning of Art. 53 para. 2 sentence 1 IMAC. Secondly, it may deviate from the statement of facts in the extradition request or its supporting documents to the extent that these are "immediately invalidated by obvious errors, omissions, or contradictions." In our opinion, this should also be done if no correction or addition (cf. N. 12) is made. Thirdly, extradition requests that appear to be an abuse of law – in particular due to a particularly serious and obvious violation of foreign procedural law – must not be complied with.

B. Positive requirement: mutual threat of a minimum penalty (para. 1 lit. a)

Art. 35 IMAC defines the offenses that may give rise to extradition not by means of a list, but by formulating a **minimum threshold** (N. 3): The offense must be punishable in both Switzerland and the requesting state (principle of double criminality), with a custodial sentence of at least one year or a more severe penalty (minimum threshold). This method of definition has the particular advantage over a catalog that it does not require constant updating and supplementation and avoids additional (difficult) questions of interpretation. 16

1. Principle of double criminality

First, the requirement that the act be punishable in both states corresponds to the **principle of double criminality**, also known as the principle of dual criminality. Another, but inappropriate or misleading (see N. 54) term is the principle of identical norms. 17

a. Rationale

Why is double criminality required? The fact that the act must be punishable **in the requesting or prosecuting state** follows from the principle of legality in criminal law and the logic of mutual assistance in criminal matters. But why must it also be punishable *in the requested or assisting state*? It is essential to clarify this point, because only the rationale behind the principle makes it possible to decide various questions concerning its scope on a sound and coherent basis (cf. below N. 30, 47, 49, 51 f., 55, 58, 63). 18

A first approach to justification also seeks to trace this back to the **principle of legality** in criminal law. A state may not apply criminal procedural measures if the alleged offense is not punishable under its laws. However, this argument is not convincing from the outset if mutual legal assistance is classified as administrative law (see N. 13 f.). 19

A second approach refers to the **predictability of mutual legal assistance in criminal matters**: the principle of double criminality serves the requesting state by making the extent of the requested state's cooperation predictable for it. This may be true, but some requesting states would prefer the requested state to abandon this principle, which restricts mutual legal assistance. In addition, it can be said that every standardized requirement for legal assistance 20

promotes the predictability of the scope of cooperation, but this does not provide an intrinsic reason for its existence (in other words: why this particular requirement?).

21 According to a third, widespread approach, the principle of double criminality reflects that of **reciprocity** (mutuality of rights and obligations). The idea is as follows: if behavior X is not punishable in state A, but is punishable in state B, and A were to request B to extradite a person for X (which would of course be absurd), B would refuse extradition because A could not prosecute X at all. A can now conclude that it should not grant extradition to B for X – or, more generally, for conduct that is not punishable under its (A's) law. However, this is based on a simplistic way of thinking or a superficial understanding of reciprocity. The line of reasoning outlined above ignores the reason why B would refuse extradition to A for X: because A cannot prosecute the conduct X due to its lack of criminalization in A. A precise application of the principle of reciprocity must take this reason into account, so that A can only refuse extradition to B on the basis of this principle for acts that B cannot prosecute due to their lack of criminalization in B. This does not apply to X. If A does not want to extradite because of X, then this is not supported by the principle of reciprocity. In short, if the other state would be willing to provide legal assistance even in the absence of criminal liability under its law, it is not clear how the principle of reciprocity could support the principle of double criminality. In any case, the appeal to this idea seems to be stuck at a formal level and thus misses the reason why a state should require double criminality (in the first place) (which would then result in reciprocity consequences for other states).

22 The three inadequate explanations presented (N. 19–21) are countered by a fourth, more convincing justification that refers to **value pluralism**. According to this, the principle of double criminality protects states in their different value convictions by ensuring that no state has to assist another in its prosecution or enforcement if it does not itself consider the conduct to be punishable. Criminal law is, in fact, more than any other area of law an expression of the social value system.

23 A fifth, utilitarian interpretation is similar and also cannot be completely dismissed: if the requested state does not consider the alleged conduct to be punishable, it simply has no **interest** in helping the foreign country. If it waives criminal liability under its own law, it could demand a corresponding waiver from the foreign country in its own requests. However, mutual legal as-

sistance in criminal matters is not only provided in order to acquire reciprocal rights, but above all to enable effective crime fighting that is not hindered by national borders. However, this idea of intergovernmental solidarity or shared responsibility for security reaches its limits if the requested state does not consider the behavior being prosecuted to be criminal (even if the facts of the case are changed).

More recently, the literature has developed several proposals as to how the principle of double criminality, which is sometimes perceived as too restrictive, could be replaced by a **new regulation** that takes into account the legitimate concern underlying it (cf. N. 22) but avoids unnecessary restrictions on mutual legal assistance. According to this, the requested state should be able to refuse legal assistance if the conduct is not punishable under its law *and* (cumulatively) in the opinion of the deciding authority, it does not appear to be punishable or criminally punishable under that legal system. Such an approach would indeed have the advantage of allowing mutual legal assistance in cases where it is not a fundamentally different assessment but, for example, resource-related reasons that have led to more limited criminalization in the requested state. However, it would require the authorities to make a more complex and, in some cases, sensitive assessment. Incidentally, during the deliberations on the Mutual Assistance Act, Parliament rejected an exemption clause proposed by the Federal Council that would have allowed extradition for acts that are not punishable in Switzerland but are punishable abroad due to special circumstances and appear punishable under the general principles of Swiss law (Art. 32 para. 3 IMAC). 24

b. Side effects

A distinction must be made between the rationale behind the principle of double criminality and its (potential) **side effects**. These include, for example, the fact that the examination of double criminality requires an examination of existing differences between criminal law systems and can thus promote harmonization. It may also happen that, in the context of the examination of double criminality, a specific question of interpretation of a Swiss criminal offense has to be decided for the first time; in this way, double criminality contributes to the interpretation of local criminal law. However, the context of the request for legal assistance or the willingness to cooperate may lead to an overly broad interpretation of the elements of the offense, which is problem- 25

atic and should be avoided. Some offenses were even enacted specifically to enable legal assistance or with regard to the requirement of double criminality.

c. Areas of application and respective differences

26 The principle of double criminality is also inherent in the enumeration method used in older extradition treaties. According to a landmark decision by the Federal Supreme Court in 1979, the requirement of double criminality is **universally applicable** and, as a result, should be considered implicit in extradition treaties that do not expressly stipulate it. According to the threshold method, it is enshrined, for example, in Art. 2 no. 1 sentence 2 of the European Convention on Extradition of December 13, 1957 (SR 0.353.1; hereinafter: ECA) and Art. 2 no. 1 sentence 1 of the Extradition Treaty of November 14, 1990, between the Swiss Confederation and the United States of America (SR 0.353.933.6; hereinafter: AVUS). In contrast, the requirement has been partially abolished within the EU with the European Arrest Warrant. The tendency to relativize the principle at the European level raises the question of whether the aforementioned Federal Supreme Court practice can still be upheld; in our opinion, it should be affirmed in any case for extradition.

27 The principle of double criminality also applies to the **transfer of criminal prosecution or** the **enforcement of sentences** by Switzerland (see Art. 86, 94 para. 1 lit. b IMAC). If the offense is not punishable in this country, it cannot be prosecuted here or result in criminal sanctions.

28 The principle of double criminality also applies in principle to **minor mutual assistance**, insofar as procedural coercion is to be applied (Art. 64 para. 1 IMAC), but in a different way: in this case, it is sufficient if the facts described in the request for mutual assistance can be subsumed under a single criminal offense under Swiss law. If this is the case, there is no need to examine whether the facts could fall under other offenses. Furthermore, in the case of minor mutual assistance, it is not necessary for the person affected by the assistance measure to be charged in the foreign criminal proceedings.

29 In **contrast** to this, in extradition law, double criminality (as well as the minimum threshold, N. 48) must be examined in relation to each offense or set of facts for which extradition has been requested. Consequently, the requesting state may only prosecute the extradited person for those circumstances (com-

mitted prior to extradition) for which Switzerland has affirmed dual criminality and approved extradition (principle of speciality, Art. 38 para. 1 lit. a IMAC). If it wishes to prosecute further offenses, it must submit a subsequent extradition request. Only the person being prosecuted may be extradited.

The principle of double criminality also governs **accessory extradition** pursuant to Art. 36 para. 2 IMAC, whereby extradition is granted not only for extraditable offenses but also for offenses that do not constitute such offenses. As case law has clarified, these other offenses must also be punishable under Swiss law; the aforementioned provision only makes it unnecessary for them to reach the minimum threshold of Art. 35 para. 1 lit. a IMAC. This view corresponds to the rationale behind the principle (N. 22 f.). The same applies to an *extension* of criminal prosecution after extradition has taken place: a corresponding supplementary request must be rejected if there is no criminal liability under Swiss law; however, it is not necessary for the new offenses to be prosecuted to reach the minimum threshold of Art. 35 para. 1 lit. a IMAC. 30

In addition, various provisions of **criminal law** standardize the principle of double criminality (e.g., Art. 6 para. 1 lit. a, Art. 7 para. 1 lit. a SCC). However, this principle fulfills a different function there: it requires the domestic criminal authorities to examine whether the act is punishable under foreign law (of the state where it was committed). This serves primarily to prevent inadmissible interference in foreign affairs and to protect individuals, who can thus, in principle, rely solely on the laws of their place of residence. 31

In **contrast** to this, the principle of double criminality in mutual legal assistance law requires the competent authority of the requested state to examine whether the act is also punishable under its own criminal law. This requirement serves domestic interests (N. 22 f.). Due to these different tasks, the principle does not necessarily have to be interpreted in the same way in both areas of law; instead of adopting interpretations tel quel, a separate interpretation must be made in each case, taking into account the specific features of the respective area. 32

2. Minimum threshold: custodial sentence of one year

Art. 35 para. 1 lit. a IMAC does not stop at the requirement of double criminality, but also requires that the offense be punishable in both states with a custodial sentence of at least one year or a more severe penalty. The **func-** 33

tion of this minimum threshold or "minimum maximum penalty" is to set a lower limit: Switzerland is only prepared to undertake the effort of extradition if the offense is of a certain severity, and only then does the considerable interference with the rights of the person concerned appear justified. In this respect, Art. 35 para. 1 lit. a IMAC fulfills the same filtering function – specifically for major mutual legal assistance – as Art. 1 para. 3 and Art. 4 IMAC, which exclude mutual legal assistance in minor cases or proceedings in the requesting state in which no judge can be called upon; In both cases, the aim is to ensure proportionality. Various extradition treaties provide for the same minimum threshold as Art. 35 para. 1 lit. a IMAC, such as the EEA (Art. 2 no. 1 sentence 2) and the extradition treaty of July 29, 1988, between Switzerland and Australia (SR 0.353.915.8; hereinafter: AVAUS) in its Art. 2 no. 1. However, the range of offenses that reach this threshold is broad.

34 It should be noted here that the minimum threshold of Art. 35 para. 1 lit. a IMAC does not apply to extraditions in connection with requests from Switzerland for the transfer of criminal prosecution or enforcement (N. 8). This **exception** serves the interests of the person being prosecuted, as such a request can only be considered if the transfer to another country is likely to result in better social reintegration (cf. Art. 88 lit. b, Art. 100 lit. b IMAC).

35 With regard to the terms "**sanction"**, which also includes measures involving deprivation of liberty, and "**restrictive of liberty**," which is equivalent to "deprivation of liberty," reference is made to OK-Payer, Art. 32 IMAC N. 37.

36 "**More severe sanctions**" than a restriction of liberty (imprisonment or measure involving deprivation of liberty) with a maximum term of at least one year are the death penalty and corporal punishment. If such penalties are threatened, extradition is excluded on grounds of human rights protection or public policy (Art. 2, 37 para. 3 IMAC, Art. 2 f. ECHR, Art. 1 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty of April 18, 1983 [SR 0.101.06]). Extradition may only be considered (Art. 80p para. 1 IMAC) if the requesting state gives assurances that it will refrain from applying for, discussing, or enforcing such a penalty.

37 The minimum threshold of Art. 35 para. 1 lit. a IMAC is based on the (abstract) threat of punishment, not on the expected severity of the punishment. But what if a criminal judgment has already been handed down, i.e., extradition is

intended to enable the **enforcement of the sanction**, and the judgment has imposed a sanction below this threshold or only a deprivation of liberty below this threshold remains to be enforced? What if the offender has been sentenced to a **suspended prison sentence**? Comments on these questions can be found in OK-Payer, Art. 32 IMAC N. 38 f. However, in addition to the minimum durations of imprisonment to be served referred to there, the abstract threat of punishment must always reach the minimum threshold of Art. 35 para. 1 lit. a IMAC (cumulative requirements).

38 In the course of the legislative work, the Federal Council expressly decided against restricting extradition to **official offenses** or making the prosecution of the offense ex officio a characteristic of extraditable offenses. This is because although offenses subject to complaint are often minor offenses for which ex officio prosecution does not appear proportionate in view of the effort involved, the requirement to file a criminal complaint can also serve other purposes (e.g., protecting the relationship between the offender and the victim, facilitating an amicable solution) and is therefore not a reliable criterion for the seriousness of an offense.

3. Content and modalities of the examination

39 The authority deciding on extradition must first determine which foreign and domestic legal sources and which versions of those sources should be used to examine double criminality and the minimum and maximum penalties (a.). Furthermore, it must transpose the facts of the case for examination under Swiss law (b.) and be clear about the scope (c.) and intensity (d.) of the examination. At this point, it should be noted once again that the IMAC is subsidiary to international agreements (see N. 5); the latter must be applied first if they are relevant and may require a modified examination. The following remarks concern the examination of the minimum penalty in both countries pursuant to Art. 35 IMAC.

a. Relevant sources of law

40 The **source of law** from which the criminal liability or threat of punishment under the law **of the requesting state** arises is irrelevant. It may be a criminal code, a special decree, or even – as in common law jurisdictions – case law. The principle of "nullum crimen sine lege *scripta*" does not apply here.

41 However, the **criminal provision** under foreign law must have already existed at the **time** the offense was committed. This follows from the prohibition of retroactivity guaranteed by human rights (see Art. 7 no. 1 ECHR; Art. 15 no. 1 International Covenant on Civil and Political Rights of December 16, 1966 [SR 0.103.2; hereinafter: ICCPR]), which Switzerland is not permitted to assist in violating abroad (cf. Art. 2 IMAC). In addition, the offense must still be punishable at the time of assessing the conditions for extradition, as otherwise the lex mitior principle (Art. 15 no. 1 ICCPR), which is also guaranteed under human rights law, would be violated or assistance would be provided in such a violation. Therefore, the authority deciding on extradition must consult both the foreign law applicable at the time of the offense and the current foreign law (for the scope of this consultation, see N. 49).

42 With regard to the **time** at which the **minimum maximum penalty** was threatened under foreign law, its existence must also be required both at the time of the offense and at the time of assessment or surrender. If a criminal provision existed at the time of the offense but did not threaten a maximum penalty reaching the threshold of Art. 35 para. 1 lit. a IMAC, extradition is not permissible even if the penalty has since been increased and this threshold has been reached. This is because either there is a risk of violating the prohibition of retroactivity (if the foreign country intends to apply the stricter, new penalty) or the offense cannot be prosecuted with the severity envisaged in Art. 35 para. 1 lit. a IMAC (if the foreign country intends to apply the old penalty). Conversely, if the penalty provided for in the criminal law at the time of the offense reached the minimum threshold but has since been reduced below it, extradition is also inadmissible. This is because there is either a risk of violating the lex mitior principle (if the foreign country wishes to apply the more severe, old penalty) or the offense cannot be prosecuted with the severity provided for in Art. 35 para. 1 lit. a IMAC (if the foreign country wishes to apply the new penalty).

43 For criminal liability or the threat of sanctions under **Swiss law**, any law is sufficient as a **source of law**; it does not have to be regulated in the SCC, but can also exist under ancillary criminal law. This is due to a conscious and explicit decision by the legislature. An independent emergency ordinance of the Federal Council (cf. Art. 185 para. 3 of the Swiss Federal Constitution [FC]) may also be considered, provided that it threatens a corresponding sanction, which is permissible according to (not entirely uncontroversial) case law in

deviation from the reservation of law (Art. 31 para. 1, Art. 36 para. 1 sentence 2 FC). On the other hand, criminal liability under *cantonal* law (unlike perhaps for minor legal assistance) cannot suffice because it is limited to contraventions (Art. 335 para. 1 SCC), which, however, can never be grounds for extradition.

The decisive **point in time** at which criminal liability and the minimum maximum penalty under Swiss law must exist is solely that at which the conditions for extradition are assessed, i.e., the decision on extradition is made. It is therefore not the date on which the offense was committed or the date on which the extradition request was made that is decisive, nor, in the case of extradition based on an extradition treaty, is it the date on which the treaty was concluded or entered into force (unless otherwise provided). If Swiss law changes during the proceedings, the new law shall apply. The prohibition of retroactive criminal law does not apply here. International treaties may provide for a different rule, in which case the Federal Supreme Court's principle of favorability must be observed. 44

b. Conversion of the facts for examination under Swiss law

The **facts** described in the extradition request must be **converted** for examination. This process is often described as imagining that the act took place in Switzerland. This is appropriate if the requesting state is the state where the crime was committed. However, if it does not invoke the principle of territoriality to justify its criminal jurisdiction, but rather, for example, the principle of state protection, the act must be imagined as if it had taken place abroad but was directed against Switzerland (rather than against the requesting state). The Federal Supreme Court's more open wording takes this into account: "For the assessment of criminal liability under Swiss law, the facts set out in the extradition request must be assessed as if Switzerland had initiated criminal proceedings on the basis of the corresponding facts." But what does "corresponding" mean, and how exactly should the facts be transposed? The following concrete guidance is suggested here: In the facts of the case, *the requesting state must be replaced by Switzerland*. If a public official of that state acted, he must be regarded as a public official of Switzerland; if the act was committed in the territory of the requesting state, it must be regarded as having been committed in Switzerland; if the act was directed against a national of the requesting state, the victim must be regarded as a Swiss national, etc. 45

46 Sometimes, however, this is not enough, and an **additional modification or abstraction** of the facts is required. This is the case, for example, if the person being prosecuted is accused of driving on the right-hand side of the road in a country where traffic drives on the left (e.g., the United Kingdom): Here, it is necessary to abstract by limiting the facts to the fact that the person being prosecuted drove on the wrong side of the road, or to modify the facts so that one imagines that he or she drove on the left side of the road in this country. However, such an approach is only possible if the behavior is *equivalent*, and not if the law of the requesting state sets the threshold for criminal liability (e.g., age of consent [see Art. 187 SCC], minimum content of certain substances for classification as a prohibited narcotic) lower than the local law.

47 Under the old law (Extradition Act of 1892), Schultz wrote that there should be no change in **factual elements** that are **directly related to Swiss law**, such as the Swiss nationality of the persecuted or injured party, the commission of the offense on Swiss territory, or the prosecution of the offense in Switzerland. This also appears to be correct for current law, but calls for justification and some clarification. If there is a real connection to Swiss criminal jurisdiction, the act may be punishable under Swiss law not only hypothetically, but in reality; there is therefore no need for the change in tense and use of the subjunctive ("would be punishable"), or the latter appears to be imprecise. However, in such a case, the lack of change in tense may obscure the fact that the requesting state may (1.) not have a connecting factor for its criminal jurisdiction that is recognized under international law (e.g., if it (N. 49), it may obscure the fact that the requesting state may (1.) not have a point of connection for its criminal jurisdiction that is recognized under international law (e.g., if it prosecutes a theft committed in another state by a Swiss citizen against a citizen of another state) or (2.) may have such a point of connection, Swiss law does not itself use this point of connection (e.g., domestic residence of the perpetrator), or (3.) has defined the scope of protection of its criminal offenses more broadly than Swiss law (e.g., by also criminalizing aiding and abetting [cf. Art. 305 SCC] to the detriment of foreign, in this case Swiss, jurisdiction). In the first case, extradition must be refused simply because Art. 32 IMAC requires the requesting state to have jurisdiction under international law; even independently of this, criminal proceedings that violate international law – especially those without a connecting factor – must not be encouraged. In the second case, the principle of reciprocity argues against extradition (which, of course, does not establish double criminality, cf. N. 21). And in the third case,

too, it may seem strange that the act would not be punishable in Switzerland if the facts were applied mutatis mutandis. Nevertheless, in these latter two cases, double criminality should be affirmed and extradition should be possible, because the act, as it actually occurred, *is* also punishable under Swiss law and therefore punishable according to Swiss standards, and there is therefore a (even special) interest on the part of Switzerland in supporting the foreign criminal proceedings (cf. on the rationale for double criminality N. 22 f.). However, depending on the relevance of the facts to Switzerland, there may be an overriding interest on the part of Switzerland in prosecuting the case domestically, in which case extradition must be refused (cf. N. 65, 67).

c. Scope of the examination – positive determination

As we have seen, dual criminality must be examined in relation to **every fact** for which extradition has been requested (N. 29). This also applies to the minimum maximum penalty, which can only be dispensed with on the basis of Art. 36 para. 2 IMAC (cf. N. 30). 48

In practice, the accuracy of the subsumption under foreign law presented in the request is not examined in detail, even though Switzerland, as the requested state, is entitled to do so. This can be explained by the principle of trust (N. 12), but also by the function of double criminality, which is intended to protect the domestic value system and domestic interests (N. 22 f.); the **focus of** the review should therefore be on **criminal liability under Swiss law**. Domestic legal practitioners are also more familiar with domestic law; for this reason, too, a certain degree of restraint seems appropriate when assessing the foreign legal situation. However, a cursory examination should still be carried out, consisting of a comparison of the foreign legal provisions attached to the request (N. 10) with the facts of the case and the question of whether the subsumption in the request appears *at least reasonable*. As Garré points out, a "certain critical dialectic [...] is necessary, otherwise the mutual legal assistance procedure would be degraded to an automatic approval procedure." If the lack of criminal liability under foreign law is obvious, the request appears to be an abuse of law. For foreign *criminal jurisdiction* over the offense as a prerequisite for extradition in particular, see OK-Payer, Art. 32 IMAC N. 23 ff. 49

Specifically, with regard to Swiss law, it must be examined whether the converted (N. 45 ff.) facts of the case would fulfill the **objective and subjective** 50

elements of the offense (or, in the case of negligent offenses: the elements of the offense; for specific subjective elements, see N. 58) of a local criminal provision that threatens a custodial sentence of at least one year (N. 33 ff.). This presupposes that Switzerland has **criminal jurisdiction** over the offense, which must also be examined accordingly.

51 If the hypothetical fulfillment of the elements of the offense is affirmed, it must then be examined whether a **justification** would apply under Swiss law. Previous case law takes a different view and seeks to limit itself to examining the fulfillment of the elements of the offense (known as the abstract method). The Federal Council also appears to have assumed a correspondingly limited double criminality. This position could perhaps be supported by the German wording of Art. 35 para. 1 lit. a IMAC, which only refers to "is liable to ... a penalty ...". However, the French and Italian versions of the law ("est frappée d'une sanction ...", "è passibile di una sanzione ...") already appear to be broader in scope, and para. 2 refers to "punishability" ('punissable', "punibilità") in all three official languages. The decisive factor must be the teleological element of interpretation: mutual criminal liability is intended to protect domestic values and interests (see N. 22 f.); However, it would be difficult to reconcile this with, for example, extraditing someone acting in justifiable self-defense. It is true that case law must be agreed with in that the authority deciding on mutual legal assistance does not, in principle, have to assess the evidence or reconstruct the facts of the case independently (see N. 9 ff.). However, if the foreign description of the facts already reveals a justification according to the standards of Swiss law (which is likely to be rare), this must be taken into account. Incidentally, it should be noted that the abstract method also raises the problem of having to decide the controversy as to whether consent has the effect of excluding the elements of the offense (and thus also excluding double criminality) or "merely" justifying it.

52 **Grounds for exclusion of guilt** must then be examined (on the basis of the description of the facts in the request) due to the rationale of mutual criminal liability (N. 22 f.) and, if applicable, preclude extradition if they also stand in the way of both a penalty and a measure involving deprivation of liberty. This applies in particular to the lack of criminal responsibility (cf. Art. 3 Federal Act on Juvenile Criminal Law [JStG] e contrario), unavoidable error of law (Art. 21 sentence 1 SCC) or excuses under Art. 16 para. 2 and Art. 18 para. 2 SCC, but not to a serious mental disorder which, although it may exclude guilt (capacity

for guilt) and thus punishment (Art. 19 para. 1 SCC), allows for a measure involving deprivation of liberty under Art. 59 or Art. 64 para. 1 lit. b SCC.

In terms of a **definition**, it can therefore be stated that **criminal liability under Swiss law** within the meaning of Art. 35 para. 1 lit. a IMAC exists if the converted facts are to be assessed as an offense that is unlawful and culpable or non-culpable but may give rise to a measure involving deprivation of liberty. 53

d. Factors not to be examined. Including those expressly excluded by para. 2

It is not necessary to examine whether the relevant criminal provisions of the two legal systems are **identical** or similar or protect the same **legal interest**. Art. 35 IMAC does not require such similarities, but rather considers it sufficient that the act described in the request is punishable under the laws of both states (so-called *identity of the offense*). Accordingly, the examination of double criminality does not require a comparison of foreign and domestic criminal law provisions. 54

Some authors have **criticized** this view and have advocated the stricter requirement of so-called *norm identity*. This does not, as the term might suggest, require identical wording and formulation of the provisions, but merely that the respective criminal offenses have the same or similar protective purpose. On the one hand, it is argued that foreign proceedings only deserve support if they pursue the same objectives as domestic criminal law, and not simply when there is accidental double criminality. On the other hand, without norm identity, there is a fear of excessive punishment abroad if, for example, insulting the head of state is a simple offense against honor under Swiss law, but a crime under foreign law. The former appears understandable in some cases: it is certainly possible to imagine cases in which the foreign *motives* for criminalization and punishment contradict the domestic value system. For example, when the injury and killing of people is criminalized not to protect the life and limb of those affected, but to protect the "property" of an absolutist ruler. However, the *punishment* (in itself) of such acts remains legitimate according to the values and interests reflected in Swiss criminal law (N. 22 f.). In such cases, it is not uncommon to question whether the person being prosecuted will receive a trial in accordance with human rights in the foreign country (if not, this is an independent ground for exclusion from extradition). How- 55

ever, cases in which the different designation of the protected interest does not conflict with local values and is based, for example, on historically developed peculiarities of the respective legal system or even simply on a different balance of power in doctrine are likely to be more common than blatant cases of the type described. It would also present the extradition or mutual legal assistance decision-maker with a difficult task to determine the scope of protection of the relevant criminal law provisions of both states for each request; even determining the legal interest protected by a Swiss criminal offense can be controversial. It would also be generally inappropriate for the Swiss authorities to pass judgment on the criminal policy of the requesting state. As for the second argument put forward in favor of norm identity—the risk of excessive penalties abroad if norm identity is waived—it should be noted that the requirement of norm identity is not a suitable means of countering such differences in penalties anyway, even if the aim of protection is the same, much harsher penalties may be imposed abroad (e.g., in the US). A more appropriate means would be a requirement (Art. 80p para. 1 IMAC) in individual cases whereby the requesting state must give assurances that it will not request, impose or enforce any penalty above a specified upper limit that is still acceptable under Swiss law or the ECHR. In light of the above, it seems preferable to determine the scope of double criminality based on the identity of the offense.

56 Furthermore, according to Art. 35 para. 2 lit. a IMAC, **special forms of guilt and conditions of criminal liability** are not to be taken into account when assessing criminal liability under Swiss law. This means that, for criminal liability under Swiss law to be affirmed, it is not necessary for special forms of guilt and conditions of criminal liability required by Swiss criminal offenses to be present. This restricts the criterion of double criminality and broadens the range of circumstances in which extradition is permissible.

57 The **special conditions of criminal liability** are to be understood as the objective conditions of criminal liability. In the literature, a *differentiation* is proposed depending on whether the condition results from procedural peculiarities (such as the opening of bankruptcy proceedings in the case of bankruptcy offenses [Art. 163 ff. SCC]) or from criminal policy and legal dogmatic reasons (such as in the case of brawling or assault [Art. 133 f. SCC], where criminal liability only begins with the injury or killing of a person, or in the case of breach of the peace [Art. 260 SCC], which presupposes acts of vio-

lence). Art. 35 para. 2 lit. a IMAC should only apply to objective conditions of criminal liability of the former type, while those of the latter type concern "the very definition of punishable wrongdoing" and must therefore be taken into account when assessing criminal liability. However, this is contrary to the classic concept of objective conditions for criminal liability, according to which these conditions only concern the need for punishment (penal economy) and, for example, a fight or assault is still a culpable wrongdoing or punishable even if there is no injury or death. This classic understanding avoids the conflict with the principle of guilt that would arise if one assumed that the perpetrator is being punished for something that is not covered by his guilt (in the old sense). Instead, according to the classical conception, the perpetrator is punished only for his culpable act, and the circumstance that absolves him of guilt—i.e., the objective condition of punishability—only has the effect of limiting punishability or favoring the perpetrator. The offender has therefore already deserved the punishment through his act; he is only "lucky" if the condition does not occur and the state therefore refrains from intervening. Since the objective conditions for criminal liability do not (co-)define the punishable wrongdoing, their exclusion by Art. 35 para. 2 lit. a IMAC appears justifiable and does not require restriction. However, it is still possible to discuss – although not at this point – whether the traditional attribution of individual characteristics to the objective conditions for criminal liability is justified or whether another interpretation is more appropriate.

58 The concept of **special forms of guilt** refers to the special intentions, motives, or characteristics of attitude required in individual cases; it is therefore based on the outdated, so-called psychological concept of guilt in causal action theory. Often, such special subjective elements do not constitute criminal liability in themselves, but merely qualify, privilege, or replace one offense with another (see, for example, Art. 111 and 112 SCC [special ruthlessness]; Art. 142 para. 1 and 2, Art. 158 no. 1 para. 1 and 3 SCC [intention to enrich oneself]; Art. 141 and Art. 137 SCC [intention to appropriate]). In these cases, the basic or residual offense usually already reaches the minimum threshold of Art. 35 para. 1 lit. a IMAC (cf. N. 33), so that extradition would be permissible even without the provision of Art. 35 para. 2 lit. a IMAC. However, the situation is different with regard to those specific subjective elements that constitute the basis for criminal liability (e.g. Art. 115 SCC [selfish motives]; Art. 260^{quinquies} [intention to finance terrorism]; Art. 261 para. 2 and 3, Art. 262 no. 1 para. 2 SCC [malice]). If these are counted among the special forms of guilt within the

meaning of Art. 35 para. 2 IMAC, this means that when examining double criminality, criminal liability under Swiss law must also be affirmed if these elements are absent in the specific case. However, this contradicts domestic assessments and interests, i.e., the rationale behind the requirement of double criminality (see N. 22 f.). If, for example, Art. 115 SCC only criminalizes incitement and assistance to suicide when the act is motivated by selfish motives, then these motives justify the punishment; according to local assessments, anyone who helps a suffering person to take their own life out of compassion does not deserve punishment. Extraditing them to another country that has criminalized any assistance in suicide regardless of the perpetrator's motivation would contradict this assessment, and Switzerland would have no interest in supporting these foreign proceedings. In order to prevent this conflict, Art. 35 para. 2 lit. a IMAC must be interpreted teleologically and restrictively: the "special forms of guilt" within the meaning of this provision are to be understood only as those intentions, motives, and characteristics of attitude that do not constitute grounds for criminal liability at all. This means that the restriction in Art. 35 para. 2 lit. a IMAC is now of very little practical significance: it only allows extradition in addition where the act would solely fulfill a basic or catch-all offense below the threshold of Art. 35 para. 1 lit. a IMAC, but where there is still a qualifying or alternative offense that reaches the threshold and is characterized by a special subjective element. Art. 35 para. 2 lit. a IMAC then allows criminal liability to be affirmed under this stricter offense, even though the special subjective element it requires is missing. The interpretation proposed here also appears permissible in view of the fact that the Federal Council's statement on Art. 35 para. 2 lit. a IMAC was made a long time ago and did not discuss the issue under consideration here, but may have overlooked it.

59 According to Art. 35 para. 2 lit. b IMAC, when assessing criminal liability under Swiss law, the conditions of the personal and temporal scope of the SCC and the Military Criminal Code (MStG) with regard to the criminal provisions on genocide, crimes against humanity, and war crimes are not to be taken into account. For these most serious crimes (all three core crimes under international law), special rules that are as conducive as possible to prosecution and mutual legal assistance should apply, which is also reflected in the exclusion of the defense of political offense under Art. 3 para. 2 IMAC. On the basis of Art. 35 para. 2 lit. b IMAC, in particular, there is no need to examine the personal applicability of the MStG, the scope of which varies depending on

whether it is peacetime, active service or wartime. The exclusion of the rules on temporal applicability (Art. 2 SCC, Art. 2 MStG) implies that the prohibition of retroactivity does not apply, which is not the case anyway in the context of the examination of criminal liability under Swiss law (as the law of the requested state) (see N. 44).

No attention should then be paid to **concurring offenses**: if a set of facts fulfills several criminal offenses under the law of the requesting state, but only one or several under Swiss law, one of which would supersede the others, then double criminality exists and extradition can be granted for all criminal offenses provided that the relevant or remaining Swiss offense reaches the minimum threshold of Art. 35 para. 1 lit. a IMAC. If, under Swiss law, only a privileged offense were applicable, the penalty for which, in contrast to the basic offense, does not reach this threshold, the required minimum maximum penalty is not met and extradition is inadmissible, unless the privileged offense is characterized solely by special subjective elements that are irrelevant under Art. 35 para. 2 lit. a IMAC (see N. 58). 60

Furthermore, any **grounds for mitigation of punishment** are irrelevant. This is because grounds for mitigation of punishment merely allow the minimum penalty to be reduced and another offense to be recognized (Art. 48a SCC); However, it does not force a shift in the penalty range below this threshold in the case of an offense that reaches the threshold of Art. 35 para. 1 lit. a IMAC. The only exception to this is if the offense carries a maximum prison sentence of exactly one year; in the case of mandatory mitigation of punishment, this can no longer be imposed. However, in such a (rare) case, with regard to Art. 35 para. 2 lit. a IMAC a maiore ad minus, it may be appropriate to exclude the reduction of the sentence when examining criminal liability under Swiss law. 61

Finally, the existence of **procedural requirements**, such as a criminal complaint or authorization, does not need to be examined. The *statute of limitations*, the nature of which is admittedly controversial, is also not examined from the perspective of criminal liability; it is the subject of a separate provision (Art. 5 para. 1 lit. c IMAC). 62

e. Intensity of the examination

63 According to case law, double criminality or the examination of criminal liability under Swiss law is only subject to a **prima facie examination**. This means that a meticulous, detailed examination is not necessary and difficult legal questions may be excluded. In our opinion, however, the rationale behind double criminality (N. 22 f.), which is aimed at protecting domestic values and interests, as well as the expertise of the domestic authorities in domestic law (cf. N. 49) argue in favor of subjecting the examination of criminal liability under Swiss law to stricter requirements than the assessment of criminal liability under foreign law, where a reasonableness test is sufficient (cf. N. 49). Accordingly, it should be required that the conduct *would probably be punishable* under Swiss law (within the meaning of the above clarifications [N. 50 ff.]). A degree of uncertainty can be accepted in view of the many unresolved controversies regarding the correct interpretation of criminal provisions and the sometimes lacking or fluctuating case law of the Federal Supreme Court.

C. Negative condition: lack of Swiss jurisdiction (para. 1 lit. b)

64 As a negative condition for extradition, Art. 35 para. 1 lit. b IMAC stipulates that the offense must not be subject to Swiss jurisdiction. Art. 36 para. 1 IMAC makes an important **exception** to this rule in cases where special circumstances, namely the possibility of special social reintegration, justify extradition (despite Swiss jurisdiction). Case law recognizes further "special circumstances," so that, for example, for reasons of procedural economy and to enable the joint assessment of several perpetrators abroad if Swiss jurisdiction exists.

65 Swiss jurisdiction is determined in particular by Art. 3 ff. SCC; further grounds for jurisdiction can be found in the Special Part of the SCC and in ancillary criminal law. The wording of Art. 35 para. 1 lit. b IMAC seems to exclude extradition in the case of any Swiss jurisdiction, i.e., regardless of whether it is based on the principle of territoriality, the principle of protection, or the active principle of personality, etc. However, the Federal Council's message makes it clear that "jurisdiction" refers only to jurisdiction based on the principle of territoriality. Accordingly, Art. 35 para. 1 lit. b IMAC is to be interpreted as being limited to **territorially based Swiss jurisdiction** (Art. 3 para. 1 in conjunction with Art. 8 SCC). In addition to the *historical* element of inter-

pretation, there is also the *teleological* element: Swiss criminal jurisdiction based on the principle of territoriality is generally the most important for the country; it would be contrary to the principle of mutual legal assistance if Switzerland were not allowed to extradite to the country where the crime was committed, for example, in cases of domestic criminal jurisdiction based on the passive principle of personal jurisdiction (Art. 7 para. 1 SCC). The *systematic* element of interpretation also supports the aforementioned restrictive interpretation of Art. 35 para. 1 lit. b IMAC. This is because various provisions of criminal law relating to acts committed abroad require – usually as a prerequisite for prosecution – that the offender not be extradited (e.g., Art. 7 para. 1 lit. c SCC). However, if Art. 35 para. 1 lit. b IMAC also excluded extradition in cases of extraterritorial Swiss criminal jurisdiction, the interaction of these provisions would mean that Switzerland would always have to prosecute itself and only extradite on a subsidiary basis. This would neither be the intention of the legislature nor compatible with the practice of the Federal Supreme Court of offering extradition first. And insofar as the relevant provisions of criminal law even stipulate non-extradition as a prerequisite for domestic criminal jurisdiction (and thus for jurisdiction) and not merely as a prerequisite for prosecution – namely in the case of substitute criminal jurisdiction (Art. 7 para. 2 lit. a SCC) – these provisions would become circular if Art. 35 para. 1 lit. b IMAC also referred to extraterritorial jurisdiction. This is because, in order to establish criminal jurisdiction under Art. 7 para. 2 lit. a SCC, the offender would not have to be extradited, which, according to Art. 35 para. 1 lit. b IMAC, is not the case under criminal jurisdiction under Art. 7 para. 2 lit. a SCC.

66 Various international treaties expressly stipulate that the requested state may refuse extradition if it has criminal jurisdiction over the matter itself based on the principle of territoriality (known as the **prosecution privilege of the requested state**), for example in Art. 7 no. 1 of the EAÜ. This is an optional ground for refusal.

67 In the case of Swiss jurisdiction based on the **principle of national security** (Art. 4 para. 1 SCC; provided that the perpetrator is foolish enough to enter the country after committing the offense) or on the **flag or registration principle**, which is similar to the principle of territoriality, refusal of extradition in favor of domestic prosecution may also appear appropriate. However, this does not require these cases to be subsumed under Art. 35 para. 1 lit. b IMAC,

because extradition under IMAC is optional anyway (N. 7) and can already be refused in such a case with reference to Switzerland's own criminal interest.

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Section 3 Detention awaiting Extradition and Seizure

Art. 47 Arrest warrant and other rulings

[1] The FOJ shall issue an arrest warrant with a view to extradition. It may decline to do so, especially if the defendant:

a. will probably not elude extradition and will not endanger the criminal investigation; or

b. can prove without delay that he was not at the place of the offence when it was committed.

[2] If the defendant is unfit to remain in detention or if there are other valid reasons, the FOJ may order measures other than detention to ensure his presence.

[3] At the same time the FOJ shall rule on which objects and assets will remain seized or must be seized.

CONTENT

I. General 178
II. Conditions 179
A. Extradition request not manifestly inadmissible 179
B. Risk of absconding or obstructing the investigation (Art. 47 para. 1 a IMAC) 180
C. Lack of alibi (Art. 47 para. 1 b IMAC) 181
D. Fitness to be imprisoned (Art. 47(2)) 182
E. Ineffectiveness of alternative measures (Art. 47 para. 2 in fine IMAC) 183
III. Seizures (Art. 47 para. 3) 184
Bibliography 185

I. GENERAL

1 **Detention pending extradition** is a coercive measure under administrative law. Its main purpose is to ensure that the objectives of the extradition procedure are achieved and, indirectly, to support mutual legal assistance in foreign criminal proceedings.

2 The **arrest warrant** is issued by the FOJ. It follows the provisional arrest carried out by the police. The decision must be made within three working days of the arrest, failing which the provisional coercive measure must be lifted. The arrest warrant may be issued in advance by fax, email or telephone, but must be confirmed in writing within the aforementioned time limit. The decision must be notified to the person being prosecuted, whereupon the authority informs them of their rights and gives them the opportunity to state their reasons for opposing the arrest warrant and/or extradition.

3 According to case law, which has been adopted by legal doctrine, the imposition of a measure involving deprivation of liberty against the person who is the subject of an extradition request is "**the rule**" and this applies in principle throughout the proceedings. The freedom of the person concerned during the proceedings is the exception. The Federal Court justifies this interpretation by Switzerland's international obligations to ensure the surrender of the person to the requesting State. The conditions for ordering detention pending extradition are thus more flexible than those laid down by the legislature for ordering provisional detention in criminal proceedings. In the latter case, the legislature has expressly provided that the principle is that the accused "remains at liberty" and that detention is the exception.

4 However, the interpretation of the conditions for issuing an arrest warrant for extradition must respect the **right to personal liberty** guaranteed by the Federal Constitution and international law. Any interference with a person's liberty must be justified by a public interest and be proportionate to the aim pursued, which is also the case for the issuance of an arrest warrant in extradition proceedings. As the European Court of Human Rights has reiterated in a case concerning Switzerland, "pre-trial detention must appear to be the last resort, justified only when all other available options prove insufficient." We are of the opinion that this principle also applies to extradition detention. The

"more flexible" interpretation proposed by the Federal Court does not therefore exempt the authority from conducting a strict review of proportionality.

II. CONDITIONS

The FOJ may only issue an arrest warrant for extradition if the following **cumulative conditions** are met: 5

- The authority has received an extradition request that is not manifestly inadmissible (2.1);
- There is a risk of flight and/or obstruction of the investigation (2.2);
- The person cannot provide an alibi without delay (2.3);
- The person is fit to be detained (2.4) and
- No alternative measures can significantly reduce the risk of flight and/or collusion (2.5).

A. Extradition request not manifestly inadmissible

An arrest warrant may be issued when the requesting State has submitted an extradition request including **sufficient information** on the identity of the person sought, as well as the facts and offenses alleged against them. 6

Even in the **absence of a formal warrant**, coercive measures may be ordered on a provisional basis if the requested State expressly requests this and indicates that it intends to submit an extradition request. Measures may also be taken ex officio by the FOJ if there is a risk of danger. 7

The information provided must show that the request is not **manifestly inadmissible or inappropriate**. In particular, the extradition request must not: 8

- relate to a Swiss national;
- originate from a State that clearly does not have jurisdiction to prosecute the acts;
- lead to prosecution by a special court or to the enforcement of a sentence imposed by such a court;
- relate to an offense that is manifestly political, military, or fiscal in nature;
- relate to penalties or acts that are clearly time-barred;

- relate to acts that are manifestly not punishable under Swiss law;
- relate to acts that are trivial and/or punishable by a sentence of less than one year.

B. Risk of absconding or obstructing the investigation (Art. 47 para. 1 a IMAC)

9 An arrest warrant may only be issued if there is a **risk** that the person will "abscond" or "obstruct (...) the investigation." These terms correspond to the "risk of flight" and "risk of collusion" that may justify deprivation of liberty in criminal proceedings, although case law requires that these risks be accepted more broadly in order to issue an extradition detention order. The legislature has rightly not provided for the possibility of issuing an arrest warrant on the grounds of a risk of repetition.

10 In practice, it is the **risk of absconding** that is invoked to justify the issuance of an arrest warrant. The concept of "obstruction of the investigation" has not been developed in particular in doctrine and case law. In particular, it is unclear whether the legislature intended to justify the measure on the basis of the risk of obstruction of the administrative extradition proceedings or on the basis of the risk of collusion in any criminal proceedings that may be brought in the requesting State. In the latter case, the risk of obstruction could not be taken into account in relation to an extradition request for the enforcement of a sentence.

11 The risk of absconding must be **admitted restrictively** where the person has developed close and long-standing family and professional ties with Switzerland, in particular the length of residence and any close family ties with persons residing in the country. The FOJ must also take into account the type of offense alleged, the penalty threatened and the existence of a final conviction. Health problems that would prevent flight abroad must also be taken into account. Advanced age may be a factor reducing the likelihood of flight.

12 The legal text states that, in the **absence of a risk of flight or collusion**, the authority *may* refrain from issuing an arrest warrant. We are of the opinion that deprivation of liberty imposed on a person who does not intend to evade or obstruct proceedings would be a disproportionate measure and would therefore violate the right to personal freedom. In the absence of such risks, deprivation of liberty should be ruled out.

C. Lack of alibi (Art. 47 para. 1 b IMAC)

Extradition detention cannot be ordered if the person concerned can provide an **alibi**, which constitutes a ground for refusal of extradition. This is an exception to the principle that it is for the foreign courts of first instance to rule on the facts of the case and the guilt of the person prosecuted. This rule is a general principle of extradition law. The aim is to spare a manifestly innocent person the rigors of criminal proceedings. 13

According to federal case law, the term "alibi" must be understood in its traditional **restrictive sense**, i.e., in its literal meaning. The person must prove that they were not at the place where the offense was committed at the time of the events, contrary to what is stated in the extradition request, even if their presence is a condition for the commission of the alleged offense and/or for the jurisdiction of the requesting State to prosecute. 14

However, an overly restrictive interpretation of the evidence of the unfounded nature of the alleged acts would be **incompatible** with the case law of the ECtHR, which considers that "the persistence of plausible reasons for suspecting the arrested person of having committed an offense is a *sine qua non* condition for the lawfulness of detention." 15

Case law provides that, in order to prevent the issuance of a (future) arrest warrant, the alibi evidence must exclude participation in all of the offenses alleged in the (future) extradition request. This position should be qualified. A **partial alibi** may still have an impact on the seriousness of the alleged offenses and the possibility of ordering alternative measures. 16

It is up to the person concerned to **provide the evidence**, which is not, in principle, administered by the FOJ. The administration of essential evidence by the criminal authority is not excluded by the legislature and should be allowed in special circumstances. This is the case if the person subject to the arrest warrant claims that there is a risk of mistaken identity: the FOJ should then be able to request additional information from the requesting authority. The same applies if information proving that the charge in the extradition request is unfounded is already in the possession of a federal or cantonal authority. 17

The evidence must be **immediate and unequivocal**, for example by demonstrating that there has been a case of mistaken identity. Case law requires a 18

high standard of proof for an alibi to be accepted, particularly with regard to the credibility of witnesses acting on behalf of the person sought.

19 The law and case law provide that evidence must be provided **without delay**, i.e. "on the spot" or immediately. An allegation accompanied by an announcement of future evidence is not sufficient to prevent the issuance of an arrest warrant. We consider that this position, based on long-standing case law (1983) and on the short time available to confirm provisional arrest, is ill-suited to the reality of proceedings in which the person subject to the measure needs time to organize their defense and gather relevant evidence, which often has to be obtained from abroad and may relate to past events. Alibi evidence may in any event be submitted subsequently, in the context of an application for release that may be made later in the proceedings.

D. Fitness to be imprisoned (Art. 47(2))

20 Deprivation of liberty in the context of extradition may only be ordered if the person is **capable of serving a prison sentence**. This means taking into account both the person's state of health and the impact of detention on them. According to federal case law, advanced age alone is not sufficient to rule out detention. A person is considered incapable of serving a prison sentence if it is highly probable that detention would endanger their life or health. If the person claims that detention exposes them to a risk of suicide, the Federal Criminal Court considers that this risk should be accepted "with great restraint." This means taking into account physical health problems as well as any mental disorders requiring medical treatment.

21 Depending on the circumstances, deprivation of liberty may be enforced in a specialized hospital unit or detention may be accompanied by outpatient treatment. In this context, the authorities must be able to ensure **appropriate care** and a comprehensive treatment strategy aimed at remedying the person's health problems or preventing their worsening, rather than treating their symptoms.

22 Where detention is **incompatible with the state of health** and the therapeutic care needs, an arrest warrant may not be issued.

E. Ineffectiveness of alternative measures (Art. 47 para. 2 in fine IMAC)

An arrest warrant may not be issued if the imposition of **alternative measures** less severe than detention is sufficient to ensure that the person will not abscond or unlawfully obstruct the proceedings. Alternative measures must not offer an "absolute guarantee" that the risk or risks will not materialize, but must be capable of "significantly reducing" the risk identified. In such a case, in accordance with the principle of proportionality, these measures must be ordered, otherwise the personal freedom of the person concerned will be violated. 23

With regard to **security**, the amount depends on the seriousness of the acts alleged and the personal circumstances of the person whose extradition is sought. The amount of the guarantee must be assessed in light of the person's resources, their ties to persons who could act as guarantors, and the confidence that can be placed in the prospect of losing the amount committed as a sufficiently powerful deterrent to prevent any attempt to flee. 24

This implies an **increased obligation to cooperate** on the part of the person whose extradition is sought in order to establish their financial and relational situation, the financial situation of any relatives who may be called upon to pay the bail, and the origin of the funds offered as security. The lack of concrete information on the financial situation of the person or their relatives is a reason invoked by the Federal Court for declaring itself unable to determine an appropriate amount for a possible financial guarantee. 25

It is also recommended that an **amount** be specified by the person offering to pay the security. 26

The **security** may take the form of a cash deposit or a guarantee provided by a bank or insurance company established in Switzerland. For this reason, the Federal Criminal Court has refused to accept a guarantee in the form of the registration of a lien on real estate in the land register or the surrender of shares. The question of whether a guarantee can take the form of the surrender of an object of value does not appear to have been decided by case law. However, this assumption seems to be contrary to the intention of the legislature, which deleted this reference from the legal text when the rules of procedure were revised. 27

28 With regard to **electronic surveillance**, two distinct systems should be considered. On the one hand, the fitting of an electronic tag that only makes it possible to know whether a person is within a given perimeter. Such a device only makes it possible to detect *a posteriori* that the person has absconded. It has little preventive effect on the risk that the person will abscond and should therefore be accompanied by other measures, such as the payment of a deposit. On the other hand, a system could be considered that would allow the person to be tracked and monitored in real time, with immediate intervention by the police. The introduction of an "electronic monitoring" system has been expressly recommended by federal case law for several years. This measure significantly reduces the risk of flight and therefore makes it possible to dispense with the issuance of numerous arrest warrants.

29 Federal case law takes a very restrictive approach to allowing the imposition of alternative measures to detention that are capable of countering the risk of flight and/or collusion. As noted *above*, the position adopted by the Swiss courts could be **incompatible with the case law of the European Court of Human Rights,** which states that "pre-trial detention must appear to be the ultimate solution, justified only when all other available options prove insufficient." We are of the opinion that an arrest warrant in extradition proceedings can only be issued if the authority demonstrates that one or more alternative measures would not mitigate the risks invoked.

III. SEIZURES (ART. 47 PARA. 3)

30 At the same time as issuing the extradition arrest warrant or ordering alternative measures, the FOJ shall take a decision on the objects and valuables seized by the police when the person being prosecuted was arrested. It may order that the seizures be maintained, lifted or new seizures be made. This decision may also be taken at a later stage in the proceedings.

31 The measure is intended to enable a response to any **request for the surrender of objects or valuables**, the surrender of evidence, or the enforcement of a foreign judgment, in particular in the context of confiscation. Federal court case law also provides for the possibility of ordering seizure to cover costs.

If extradition is granted, the FOJ will in principle also order the **surrender of any objects or valuables** found on the person being prosecuted that may serve as evidence or are the proceeds of the alleged offense. 32

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COMMENTARY ON

Art. 48 IMAC

A commentary by Olivier Peter

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Art. 48 Content

[1] Rulings under Article 47 shall contain:

a. information, provided by the foreign authority, concerning the identity of the defendant and the offence alleged against this person;

b. the name of the office which made the request;

c. the confirmation that extradition will be requested;

d. the notice regarding the right of appeal under paragraph 2 and the right to appoint a legal adviser.

[2] An appeal against these rulings may be filed with the Appeals Chamber of the Federal Criminal Court within ten days of the serving of

the written arrest warrant with a view to extradition. Articles 379–397 CrimPC apply by analogy to the appeal procedure.

CONTENT

I. Content of the Arrest Warrant (Art. 48, para. 1, IMAC) 190
A. Details of the Facts (Art. 48(1)(a) IMAC) 190
B. Identification of the authority submitting the request (Art. 48, para. 1, subpar. b, IMAC) 191
C. Statement that extradition is requested (Art. 48(1)(c) IMAC) 191
D. Information on the Right to Appeal and Related Rights (Art. 48(1)(d) IMAC) 191
II. Remedies (Art. 48(2) IMAC) 192
A. Appeal to the Federal Criminal Court 192
B. Appeal to the Federal Supreme Court 194
C. Referral to an International Body 195
Bibliography 195

I. CONTENT OF THE ARREST WARRANT (ART. 48, PARA. 1, IMAC)

1 Art. 48 IMAC specifies the content of an arrest warrant for the purpose of extradition. This provision gives concrete effect, in the context of extradition detention, to the guarantee set forth in Art. 5, para. 2, of the ECHR, according to which any person who is arrested must be informed **why** they have been deprived of their liberty.

2 The arrest warrant must **contain** at least the following elements:

- information regarding the identity of the person sought;
- information regarding the alleged offenses and/or the decision to be enforced;
- the name of the authority that submitted the request;
- a statement that extradition is being requested;
- a statement regarding available remedies;
- a statement regarding related rights.

A. Details of the Facts (Art. 48(1)(a) IMAC)

3 Art. 48(1)(a) IMAC provides that the arrest warrant must contain details "regarding the **facts** with which the person subject to extradition is charged."

4 This requirement is clarified in Art. 10(2) of the EIMP Implementing Ordinance, according to which the description of the facts must specify, at a minimum, the place, date, and manner in which the offense was committed.

5 These provisions are intended to ensure that all necessary information is provided to enable the person concerned to exercise their right to an **effective defense** at this stage.

6 Above all, this entails the obligation **to briefly set forth** the charges on which the foreign authority bases its request for international cooperation. Federal case law holds that an incomplete description of the offenses in the arrest warrant would not affect the legality of the detention, a position consistent with that adopted by the European Court of Human Rights (ECHR). This is explained in particular by the fact that the person concerned and their coun-

sel have the right to access the case file, which contains documents setting forth the missing information.

We are of the opinion that the text of Art. 48(1)(a) of the IMAC contains a **gap**, since its wording refers only to extradition for the purpose of prosecuting "acts of which the person is accused" and not to extradition for the enforcement of a sentence (Art. 2(1) of the Extradition Convention). In this second scenario, in order to ensure the right to an effective defense, we are of the opinion that the arrest warrant must specify the decision whose enforcement is sought. 7

B. Identification of the authority submitting the request (Art. 48, para. 1, subpar. b, IMAC)

Decisions based on Art. 47 IMAC must identify **the foreign authority** that initiated the request for cooperation. 8

C. Statement that extradition is requested (Art. 48(1)(c) IMAC)

According to Art. 5(1)(f) of the ECHR, deprivation of liberty for the purpose of extradition can be justified only by the fact that **proceedings are pending**. 9

An arrest warrant may therefore be issued only if there is a formal extradition request from the requesting State or, at the very least, a request for search or arrest within the meaning of Art. 42 of the IMAC, in which the foreign authority has expressed its intention to subsequently file an extradition request. This point must be specified in the arrest warrant. 10

D. Information on the Right to Appeal and Related Rights (Art. 48(1)(d) IMAC)

The legislature has stipulated that the arrest warrant must mention the existence of a **right to appeal**—specifically, the appeal procedure, the appellate authority, and the deadline for filing an appeal— and the right to be assisted by a legal representative. 11

The use of the term "legal representative" (*Rechtsbeistand*) confirms that there is **no monopoly on representation** for attorneys in the field of extradition, just as there is none in the field of asylum. The person subject to an ar- 12

rest warrant may therefore be represented in the extradition proceedings by a person of their choice.

13 Art. 48(1) of the IMAC contains a gap due to the failure to mention in the decision the **right of the person concerned to be assisted by an interpreter**, as well as the right to have **the decision communicated in a language they understand**. These safeguards stem from international law. They are essential elements for the effective exercise of procedural rights, just like the right to legal representation, and should therefore be mentioned in the arrest warrant. It should be noted that the supplementary provisions of Swiss law provide for the appointment of an interpreter, but only during the initial hearing, at which time "the person subject to extradition proceedings is provided with an explanation of the extradition procedure in a language they understand."

14 The right to have one's consular post notified and to communicate with it (Art. 16 OEIMP) constitutes another essential guarantee of information that is missing from the list in Art. 48(1) IMAC but must be guaranteed.

15 We are of the opinion that these rights should be **expressly mentioned** in the extradition warrant and guaranteed throughout the entire proceedings, so that the person may review the documents and the extradition proceedings prior to any hearing, by applying Article 68 of the Code of Criminal Procedure by analogy.

II. REMEDIES (ART. 48(2) IMAC)

16 Art. 5(4) of the ECHR provides for the right of any person deprived of liberty to have **their detention reviewed** promptly by a court. This right also applies to extradition detention and is reiterated in Art. 48(2) IMAC.

17 The corollary to this challenge is a request for immediate release: if the arrest warrant is annulled due to lack of legal basis or insufficient grounds, **the release** of the person must be ordered without delay.

18 If the Federal Office of Justice (FOJ) denies a request for release (Art. 50(3) of the IMAC), the person has a right of appeal under Art. 48(2) of the IMAC.

A. Appeal to the Federal Criminal Court

19 The issuance of an arrest warrant or the denial of a request for release may be appealed to the **Complaints Chamber of the Federal Criminal Court**.

The appeal has no suspensive effect. 20

The deadline for filing an appeal is **10 days** from written notification of the arrest warrant, which generally occurs at the time the person is interviewed by the FOJ. This period begins to run even if notification occurs while the person is already in pretrial detention or serving a sentence, provided that the person is effectively notified of the decision. The 10-day deadline applies equally in the case of a seizure order, even if it is issued after the arrest warrant. If the deadline has expired, a seizure order may be challenged only in conjunction with the decision on extradition. 21

A person deprived of liberty has the right to obtain "promptly" a decision regarding the legality of extradition detention. The procedure to review the legality of detention must be conducted with **particular speed**, especially since the arrest warrant was issued by an administrative authority (OFJ) rather than by a court. The Complaints Chamber of the Federal Criminal Court must rule promptly, rejecting any requests for an extension from the authority, except under exceptional circumstances. 22

In the context of an appeal, the case law of the European Court of Human Rights (ECHR) requires the authorities to grant **access to the case file**. While the file need not necessarily be complete, it must contain sufficient information to enable an effective appeal. 23

According to the statutory text, only the person being prosecuted would have standing to appeal the arrest warrant. The **standing to appeal of family members** is not mentioned. On this point, a literal interpretation of Art. 48(2) of the IMAC does not appear to be consistent with the right to an effective remedy (Art. 13 of the ECHR). Indeed, the decision to deprive a person of liberty may directly infringe upon the right to family life (Art. 8 of the ECHR) of their family members, in particular that of any minor children, a cohabiting partner, and dependents. The European Court of Human Rights (ECHR) has notably recognized that "for a parent and their child, being together is a fundamental aspect of family life (...) . [D]omestic measures that prevent them from doing so constitute an interference with the right protected by Article 8 of the Convention." Family members directly affected by a warrant must therefore have access to an effective remedy to challenge the measure and obtain its annulment or modification (Art. 13 ECHR). This implies recognizing 24

that they have a protected legal interest in challenging the decision, as well as standing to appeal.

25 The appeal procedure is generally conducted in writing, although the law does not preclude the holding of a hearing. In the event of an appeal, if the Complaints Court must rule on matters concerning the character of the person concerned, that person should be able to be **heard in person**. There is no absolute right to a public hearing, but a public hearing may be required under specific circumstances.

26 The appellate authority is not required to rule on the merits of the extradition, but only on the legality and appropriateness of ordering a measure depriving the person of liberty. Consequently, the grounds for appeal that may be raised before this court are limited. In this regard, raising **arguments regarding the merits** of the extradition request (e.g., violation of the principle of dual criminality or the statute of limitations) does not oblige the Court to examine them prematurely at this stage, unless there are particularly serious circumstances that would render the detention unlawful. This is the case if the person can demonstrate that extradition is manifestly inadmissible (Art. 51(1) IMAC), insofar as one of the circumstances provided for in Articles 2 through 5 IMAC is undoubtedly met.

27 According to federal case law, **formal defects** that could vitiate the arrest warrant—such as a violation of the right to be heard during the proceedings—do not constitute grounds for release. This strict interpretation should be aligned with the position adopted by the European Court of Human Rights (ECHR), according to which lawful detention implies the absence of arbitrariness. Thus, a particularly serious procedural defect should lead to the annulment of the decision and the release of the person.

B. Appeal to the Federal Supreme Court

28 The decision of the Complaints Chamber of the Federal Criminal Court concerning pretrial detention for extradition may be appealed to the **Federal Supreme Court**, despite its incidental nature, when the case is of particular importance.

29 This is the case when the person can credibly allege that the proceedings violate their fundamental rights or when the case raises a **legal question of**

principle. In this second scenario only, an appeal to the Federal Supreme Court may also be filed by the FOJ.

The Federal Supreme Court must also rule in accordance with the require- 30
ment of **expedition**; however, this requirement is less strict insofar as the appeal is against a decision rendered by a judicial body in proceedings offering adequate guarantees of a fair trial.

C. Referral to an International Body

An appeal against the decision of the Federal Supreme Court may be brought 31
before an **international body**.

In particular, a case may be brought before the European Court of Human 32
Rights (ECHR) for a violation of the prohibition against inhuman and degrading treatment (Art. 3 of the ECHR) —in connection with conditions of detention—violation of the right to liberty and security (Art. 5 of the ECHR), the right to respect for family life (Art. 8 of the ECHR), or the right to an effective remedy (Art. 13 of the ECHR).

A case may also be brought before the Committee Against Torture, for exam- 33
ple, when pre-extradition detention is ordered on the basis of evidence submitted by the requesting State that was allegedly obtained through torture (Art. 15 CAT).

It is also possible to submit the case to the Committee on the Rights of the 34
Child when the deprivation of liberty of a parent is ordered without giving "primary consideration" to "the best interests of the child" (Art. 3 CRC).

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COMMENTARY ON

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A commentary by Giacomo Respini

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Art. 54 Simplified extradition

[1] If the defendant places on the record before a judicial authority that he waives the requirement of extradition proceedings, the FOJ shall order his surrender unless there are special considerations prohibiting it.

[2] This waiver may be revoked provided the FOJ has not ordered the surrender.

[3] Simplified extradition shall have the effect of extradition and is subject to the same conditions. The requesting State shall be given notice thereof.

CONTENT

I. Introduction 199
A. General Provisions 199
B. Purpose and Origin of the Provision 199
II. Commentary on the Article 200
A. Waiver of the Ordinary Extradition Procedure (para. 1) 200
1. Consent to simplified extradition 200
2. Authorization for surrender 201
3. Grounds for refusing simplified extradition 201
B. Revocation of the waiver of the ordinary extradition procedure (para. 2) 202
C. Effects and Conditions of Simplified Extradition (para. 3) 203
1. Principle of Speciality 203
2. Appeal against the authorization for surrender 204
3. Subsequent Extradition Request 204
4. Costs of the proceedings 204
Bibliography 205
Materials 205

I. INTRODUCTION

A. General Provisions

Article 54 of the AIMP governs simplified extradition (also referred to as "**surrender without formalities**"), that is, the surrender of the person sought to the requesting State with their consent. In such cases, the person sought is surrendered without initiating a formal extradition procedure. 1

The option to choose simplified extradition is a **right** granted to the wanted individual. However, if extradition is requested simultaneously by multiple States for different offenses (concurrent requests), the simplified procedure does not grant the person to be extradited the right to choose the State to which they wish to be surrendered. 2

Since Swiss nationals cannot be extradited to a foreign authority without their consent (Art. 25 para. 1 in fine of the Constitution and Art. 7 para. 1 of the AIMP; see also Switzerland's reservation to Art. 6 of the European Convention on Extradition), simplified extradition is the only means by which a **Swiss citizen** may be surrendered to a foreign state. In such cases, however, the FOJ merely informs the Swiss citizen in writing of the existence of an extradition request filed against them and asks for their consent to extradition (Art. 7(1) AIMP). 3

From the perspective of **treaty law**, simplified extradition is provided for in particular by the Third Additional Protocol to the European Convention on Extradition of November 10, 2010, and by Art. 18 of the Extradition Treaty between the Swiss Confederation and the United States of America of November 14, 1990. 4

B. Purpose and Origin of the Provision

The purpose of Art. 54 AIMP is to **significantly expedite the extradition** of the wanted individual. As a rule, in fact, under a simplified procedure, the surrender of the person sought takes place within a few days. This is because the simplified procedure allows for the extradition of the person concerned without waiting for the requesting State to submit a formal extradition request. Consequently, given that the detention of the person sought is the rule throughout the entire extradition procedure, while their release remains the 5

exception, opting for simplified extradition allows the person concerned to avoid a long period of detention for extradition purposes.

6 The expedited procedure was already provided for in the Federal Act on Extradition to Foreign States of January 22, 1892. It was incorporated into the AIMP to address a **practical need**, since it is not uncommon for the person sought to clearly express, as early as the initial interrogation, a desire to be surrendered without delay to the requesting State and consequently to waive the formal procedure. At the time of the AIMP's entry into force on January 1, 1983, Art. 54 was titled "*surrender without formalities*." The new title of the provision ("*simplified extradition*"), as well as certain terminological clarifications in paragraphs 1 and 2, were introduced with the revision of March 29, 1995, which entered into force on February 1, 1997. Since then, the provision has not been further amended.

II. COMMENTARY ON THE ARTICLE

A. Waiver of the Ordinary Extradition Procedure (para. 1)

7 Art. 54(1) AIMP provides that if, according to the record drawn up by a judicial authority, the person sought **explicitly waives** the application of the extradition procedure, the FOJ shall authorize the surrender, unless special considerations preclude it.

1. Consent to simplified extradition

8 The judicial authority, acting on behalf of the Extradition Section of the FOJ, **interrogates the person sought** first upon their arrest (hearing pursuant to Art. 54 AIMP) and then once the requesting State has submitted the formal extradition request (hearing pursuant to Arts. 52 et seq. AIMP). During both hearings, the judicial authority informs the person sought of the possibility of waiving the ordinary extradition procedure and invites them to state their consent to simplified extradition.

9 Consent to simplified extradition must be **free and informed**, meaning that the person sought must make the decision without being subjected to pressure and must be informed, in a language they understand, of the effects and scope of their consent. Implied consent is excluded. The consent of a Swiss

citizen to extradition must in any case be provided in writing (Art. 7 para. 1 AIMP).

If the person sought consents to simplified extradition, they must be informed of the **possibility of revoking** their consent and of the time limit granted for that purpose (Art. 6, para. 1, first sentence, OAIMP). This notification is recorded in the minutes (Art. 6, para. 2, second sentence, OAIMP). 10

2. Authorization for surrender

If, during the interrogation, the person concerned expresses consent to simplified extradition, the FOJ must **immediately** authorize the extradition, in accordance with the requirement of promptness set forth in Art. 17a(1) AIMP, pursuant to which the competent authority shall process requests promptly and decide without delay. Authorization for surrender is granted within a few days or even on the same day. 11

The FOJ authorizes the surrender of the person sought by means of a **written notice addressed to the Ministry of Justice of the requesting State**, without issuing any decision subject to appeal. A copy of the authorization shall subsequently be provided to the extradited person and/or their legal counsel. 12

3. Grounds for refusing simplified extradition

Art. 54(1) *in fine* of the AIMP provides that special considerations may, in exceptional cases, preclude the FOJ from granting authorization for the surrender of the person sought. Since extradition with the consent of the person sought
also constitutes an act of Swiss sovereignty, it is possible only if it is not **contrary to Swiss public policy**. 13

For this reason, before authorizing extradition based on the consent of the person concerned, the FOJ is nevertheless required to verify that the additional **formal and substantive conditions** for extradition are met, notably the requirement of double criminality—according to which the offense attributed to the person sought must also be punishable under Swiss law—and the statute of limitations. The FOJ is therefore not limited to verifying the existence of a valid declaration waiving the ordinary extradition procedure, but is also required to conduct a summary substantive review. The surrender of the 14

person sought to the requesting State is authorized only if there are no specific grounds preventing extradition.

15 The legislature has refrained from providing an illustrative list of the **special considerations** that may preclude the granting of authorization for surrender. Legal doctrine identifies among the possible grounds for refusal, for example, absolute grounds for refusing mutual legal assistance under Articles 2 and 3 of the AIMP, the fact that the offense is not punishable in Switzerland, or, under certain circumstances, political considerations. Procedural defects or the risk of ill-treatment in the requesting State may also be taken into account. Finally, the existence of well-founded doubts regarding the free will of the person sought, or their waiver of the formal extradition procedure, may preclude authorization of surrender, provided that in such a case a legally valid waiver could not be deemed to exist.

16 With regard to the **grounds for the inadmissibility of an extradition request** pursuant to Articles 2 and 3 of the AIMP, these include, in particular, cases where the proceedings abroad do not comply with the principles of the European Convention on Human Rights or are aimed at prosecuting or punishing a person for their political opinions or for their membership in a particular social group, ethnic group, religion, or nationality (Art. 2 AIMP). Extradition is also excluded when the foreign criminal proceedings are motivated by political persecution of the person sought (Art. 3(1) AIMP); however, this protection does not apply in cases of genocide, crimes against humanity, war crimes, or other particularly reprehensible acts, notably in cases of terrorism (Art. 3(2) AIMP).

B. Revocation of the waiver of the ordinary extradition procedure (para. 2)

17 Pursuant to Art. 54(2) AIMP, the waiver of the ordinary extradition procedure may be **revoked as long as the FOJ has not authorized the surrender**. The decisive moment is when the authorization for extradition is sent to the Ministry of Justice of the requesting State.

18 Since authorization for extradition is issued without delay, the person sought generally has little time to revoke their consent to simplified extradition. For this reason, the person sought may request, during their hearing before the judicial authority, that they be granted a **period of reflection** to confirm their

waiver of the formal extradition procedure. If, within that period, the person concerned has not revoked their consent to simplified extradition, the FOJ may authorize their surrender to the requesting State.

The revocation of the waiver of the formal procedure is **final**. If the person sought withdraws their consent to simplified extradition, the ordinary procedure resumes. In such a case, as a rule, the FO issues an arrest warrant for extradition, which is subject to appeal, and simultaneously invites the requesting State to submit a formal extradition request. 19

C. Effects and Conditions of Simplified Extradition (para. 3)

Pursuant to Art. 54 para. 3 AIMP, simplified extradition has the **same effects** as extradition and is subject to the **same conditions**. The requesting State must be made aware of this. 20

1. Principle of Speciality

The authorization for simplified extradition addressed to the Ministry of Justice of the requesting State must contain a **reference to the conditions listed in Art. 38 AIMP**, which establishes the reservation of speciality (Art. 21 OAIMP), according to which the extradited person may not be prosecuted, detained, or re-extradited to a third State for an act committed prior to their surrender and for which extradition was not authorized. 21

However, during their hearing before the judicial authority, the person being prosecuted is asked **whether they waive the benefit of the principle of speciality** (see Art. 38(2)(a) AIMP). Such a waiver is not an unusual scenario in practice, as the person sought who consents to simplified extradition often wishes to settle the criminal proceedings against them in the requesting State "once and for all" and quickly. 22

A particular aspect regarding the principle of speciality arises in **extradition relations with the United States**: Article 18 *in fine* of the relevant Treaty provides that, if simplified extradition is granted by Switzerland, the principle of speciality applies. The clarification contained in the last sentence of Article 18 of the Treaty implies, *a contrario*, that when simplified extradition is granted by the United States, the rule of specialty does not apply. However, since Article 16(4)(b) of the Treaty allows the U.S. authority to waive the principle of 23

speciality in any case, the consent of the person sought to their simplified extradition does not result in a worsening of their situation.

2. Appeal against the authorization for surrender

24 As a rule, the granting of simplified extradition cannot be challenged, as the person to be extradited has no legally protected interest or standing to appeal, having himself consented to his surrender to the requesting State. Exceptionally, an appeal against the surrender authorization issued by the FOJ is possible when the person to be extradited claims *a posteriori* the **absence of their consent**, particularly in the event of an error. In such a case, the appellate authority must determine whether the FOJ acted in violation of the principle of good faith.

3. Subsequent Extradition Request

25 When the execution of the simplified extradition decision—i.e., the surrender of the person sought— is suspended pursuant to Art. 58(1) AIMP because the person concerned is the subject of criminal proceedings in Switzerland for other offenses, nothing prevents the FOJ, upon subsequently receiving a concurrent extradition request, from **granting priority** to extradition to the other requesting State.

4. Costs of the proceedings

26 The ordinary extradition procedure is subject to costs, and the private property of the person sought may be used to cover the costs provided it is not to be surrendered to the requesting State (Art. 62(2) AIMP). However, if the person sought consents to simplified extradition immediately after their arrest, **the UGF may waive**, for reasons of proportionality, the collection of costs incurred by the extradition proceedings.

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A commentary by Giacomo Respini

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Section 6 Execution

Art. 56 Executability

[1] Extradition may be executed if the defendant:

a. expressly requests his own immediate extradition; or

b. does not give notice within five days of the issue of the ruling that he will file an appeal.

[2] If extradition is refused, the FOJ shall release the person concerned from detention with a view to extradition.

CONTENT

I. Introduction 209
A. General 209
B. Substantive Requirements for the Execution of Extradition 209
II. Commentary on the Article 210
A. Request for Immediate Execution (para. 1(a)) 210
B. Intent to Appeal the Extradition Decision (para. 1(b)) 210
1. Form and Deadline for the Notice of Appeal 211
2. Consequences of Failure to File an Appeal 211
3. Compliance with the Appeal Deadline 211
4. Legal Scholarship Criticism of Art. 56(1)(b) IMAC 212
C. Consequences in the Event of Refusal of Extradition (para. 2) 213
Bibliography 214
Materials 214

I. INTRODUCTION

A. General

Article 56 of the IMAC establishes the point in time from which extradition may be carried out (para. 1) and governs the consequences in the event that the extradition request is rejected (para. 2). 1

From a legal standpoint, except in cases of simplified extradition, the execution of an extradition requires a decision ordering the surrender of the person sought to the requesting State. Compared to other codes of procedure, Article 56 of the IMAC imposes less stringent requirements regarding enforceability, **allowing for the execution of decisions that have not yet become final**. 2

The provision was designed to address the need for an **accelerated extradition procedure**. For this reason, Article 56(1) of the IMAC provides that the extradition decision becomes enforceable—without having to wait for the appeal period to expire—if the person sought explicitly requests it (subparagraph (a)) or does not declare, within five days of the decision's service, their intention to appeal (subparagraph (b)). 3

The provisions of Article 56(1)(b) of the IMAC mean that, in practice, the person subject to extradition often announces their intention to appeal the extradition decision issued by the Federal Office of Justice (FOJ) in order to temporarily suspend its enforcement and thus have more time to **assess the chances of success of a potential appeal** before the Criminal Appeals Chamber of the Federal Criminal Court (FCC). 4

B. Substantive Requirements for the Execution of Extradition

According to settled case law, the detention of the person sought is the rule throughout the entire extradition proceeding, while their release remains the exception. The Federal Office for Justice (UFG) may refrain from issuing an arrest warrant for the purpose of extradition, in particular if the person sought is unlikely to evade extradition or compromise the criminal investigation (Art. 47(1)(a) of the IMAC). In the absence of a flight risk or a risk of collusion, the OFJ may, instead of detention, order other precautionary measures, in particular the alternative measures provided for in Art. 237 of the Swiss Criminal Procedure Code (Art. 47(2) of the IMAC). If an alternative measure to deten- 5

tion has been ordered for extradition purposes, the person sought must, as a rule, be **arrested in preparation for the execution of the extradition**.

6 If the person to be extradited cannot be located because they have fled—in particular despite the adoption of alternative measures—the extradition decision cannot be enforced due to **lack of subject matter of the proceedings**; if the person subject to prosecution fled before the extradition decision was rendered, the extradition proceedings are generally dismissed due to lack of subject matter.

7 The execution of extradition must be **postponed** if the person to be extradited is temporarily unable to be transported due to their state of health.

II. COMMENTARY ON THE ARTICLE

A. Request for Immediate Execution (para. 1(a))

8 Pursuant to Art. 56, para. 1(a) of the IMAC, extradition may be executed if the person sought **explicitly requests immediate execution**.

9 As a general rule, the request for immediate execution is accompanied by a **waiver of the right to appeal**. In such a case—that is, if the person entitled to appeal waives the right to appeal as an ordinary remedy (see Art. 437, para. 1, subpar. b of the Swiss Criminal Procedure Code)—the extradition decision must be deemed final and may be executed without further formalities.

10 From a formal standpoint, it would be advisable for both the declaration regarding immediate enforcement and the waiver of appeal to be made expressly **in writing**.

11 For the purposes of immediate enforcement, the extradition decision must contain neither **conditions** subject to acceptance under Art. 80p of IMAC nor obligations that the requesting State is required to fulfill beforehand.

B. Intent to Appeal the Extradition Decision (para. 1(b))

12 Pursuant to Art. 56, para. 1(b) of the IMAC, extradition may be carried out if the person sought does not **declare** within five days of notification of the decision **that they intend to file an appeal**.

1. Form and Deadline for the Notice of Appeal

The notice of intent to appeal the extradition decision must be addressed **to the UFG**, i.e., the authority that issued the decision the person subject to extradition intends to challenge. 13

This is a **unilateral declaration of intent**, which need not be substantiated nor is it subject to any specific requirements. 14

The notice of appeal must be filed within **5 days** of service of the extradition decision. 15

The requirement set forth in Art. 56(1)(b) of the IMAC **does not constitute an excessive formality**, but rather a requirement expressly provided for by the legislature to take into account the specific nature of the extradition procedure. Moreover, this requirement is evident from a simple reading of the statutory text and is also expressly mentioned by the Federal Office of Justice (FOJ) in its guidance on the remedies available against an extradition decision. 16

2. Consequences of Failure to File an Appeal

If a notice of intent to appeal is not filed within five days of service of the extradition decision, the decision becomes enforceable, and the UFG**may proceed with the surrender of the person sought** to the requesting State without waiting for the appeal period to expire. 17

Any appeal against the extradition decision filed within 30 days of its notification has an **automatic suspensive effect** (see Art. 21(4) IMAC), meaning that if the extradition has not yet taken place at the time the appeal is filed, its execution is suspended. 18

Once the person sought has been surrendered to the requesting State, an appeal against the extradition decision **is no longer admissible**. 19

3. Compliance with the Appeal Deadline

Extradition becomes enforceable if **the appeal deadline has expired without having been utilized**. This means that extradition may be carried out, despite a declaration of intent to file an appeal, if the person subject to prosecution does not challenge the extradition decision before the Criminal Appeals Chamber of the Federal Criminal Court (TPF) within 30 days of its notification (Art. 50(1) of the Administrative Procedure Act). The same conclusion 20

applies if the person concerned does not file an appeal against the TPF's judgment with the Federal Supreme Court within 10 days of being served with the full text of the decision (Art. 100, paras. 1 and 2(b) of the Federal Supreme Court Act). Similarly, extradition becomes enforceable if **any appeal has been definitively dismissed**. In all these cases, in addition to being enforceable, the extradition decision becomes final.

4. Legal Scholarship Criticism of Art. 56(1)(b) IMAC

21 **A school of legal scholarship criticizes the provisions set forth in Art. 56(1)(b) IMAC**. *First and foremost*, because the person subject to prosecution could promptly file an appeal with the Federal Criminal Court (TPF) as early as the sixth day following notification of the extradition decision; for this reason, the failure to declare an intention to appeal cannot be construed as a definitive waiver of the right to file an appeal within the 30-day deadline. According to the author, the IMAC therefore lacks a provision that, analogous to the provisions of Article 399(1) of the Swiss Criminal Procedure Code (CPP) regarding the notice and declaration of appeal, would establish a 5-day deadline as a condition for the validity of an appeal against the extradition decision. According to the author, before proceeding with the surrender of the person sought, one should wait for the appeal period to expire without action, unless the person subject to extradition has submitted a declaration waiving the right to appeal. To accommodate the need for an expedited extradition procedure, the author suggests shortening the appeal period.

22 The Federal Supreme Court does not share these criticisms. First of all, **according to the High Court, an analogy with Art. 399(1) of the Criminal Procedure Code (CPP) is not justified**. Unlike the OFJ's reasoned extradition decision, the first-instance criminal judgment is initially served only in its operative part (see Art. 84(2) CPP) . The 10-day deadline for filing an appeal with the trial court, as provided for in Art. 399(1) of the Criminal Procedure Code, begins to run upon service of the written operative part of the judgment (Art. 384(a) of the Criminal Procedure Code). The party that has filed an appeal must then submit a written notice of appeal to the appellate court within 20 days of service of the judgment with reasons (Art. 399(3) of the Criminal Procedure Code). However, if—contrary to the system provided for in the CPP—the trial court does not communicate the operative part to the parties either orally or in writing, but instead serves the reasoned judgment

directly on them, the obligation to file a notice of appeal is waived. As for the requirement to wait in all cases for the 30-day appeal period to expire, according to the Federal Supreme Court, this **would render the clear and justified meaning and purposes of Art. 56(1)(b) of the IMAC meaningless**, thereby disregarding the clear intent of the federal legislature.

The solution adopted by the Federal Supreme Court appears reasonable. 23
First, it does not constitute a particularly onerous burden for the person subject to extradition to promptly communicate their intention to appeal—by means of a simple, unsubstantiated declaration—once they have taken note of the decision and, at least in summary form, of the grounds on which the Federal Office of Justice (FOJ) based its decision to grant extradition. Furthermore, this case law is consistent with the guarantee of judicial review enshrined in Art. 29a of the Constitution (as well as Art. 13 of the ECHR), insofar as the requirement established by the legislature in Art. 56(1)(b) of the IMAC does not constitute a procedural obstacle to the judicial protection guaranteed by Art. 29a of the Constitution, but rather a simple formality justified by the need for speed that characterizes the extradition procedure. Moreover, the Federal Supreme Court has observed that the disputed provision has rarely been the subject of litigation, since compliance with it by persons subject to extradition—who are often represented by counsel—poses no problem provided they act with due diligence.

C. Consequences in the Event of Refusal of Extradition (para. 2)

Art. 56, para. 2 of the IMAC provides that, if extradition is denied, the UFG 24
shall terminate detention pending extradition.

Extradition is refused if the OFJ denies the surrender of the person sought to 25
the requesting State or if an appeal against the decision granting extradition is upheld by the Criminal Appeals Chamber of the Federal Criminal Court (TPF) or by the Federal Supreme Court.

In the event that extradition is refused, the UFG **orders the release** of the 26
person subject to prosecution **or terminates the alternative measures** imposed on that person.

If extradition to the requesting State is denied, the person subject to prosecu- 27
tion may assert a right to **compensation** for wrongful imprisonment pursuant

to Art. 15 IMAC; Articles 429 and 431 of the Criminal Procedure Code (CPP) apply by analogy.

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COMMENTARY ON

Art. 55a IMAC

A commentary by Giuseppe Aufiero

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Art. 55*a* Coordination with asylum proceedings

If the defendant has applied for asylum under the Asylum Act of 26 June 1998, the FOJ and the appellate authority shall consult the files from the asylum proceedings when deciding on extradition.

CONTENT

I. Background 217
II. Context 219
III. Commentary 219
A. General 219
B. Coordination procedures 221
IV. Criticism 226
Bibliography 227
Materials 227

I. BACKGROUND

Article 55a of the IMAC is a new provision that has been in force since April 1, 2011. It was introduced into the IMAC when the Federal Act on the Coordination of Asylum and Extradition Procedures was adopted on October 1, 2010. 1

The adoption of this Act followed a series of high-profile cases involving extradition requests for asylum seekers. Following the recognition of refugee status or the granting of asylum, the extradition of alleged dangerous criminals had to be refused after the fact. 2

Faced with problems arising from the existence of simultaneous extradition and asylum proceedings, which had led to **contradictory decisions**, the former Head of the Federal Department of Justice and Police, Federal Councilor Eveline Widmer-Schlumpf, set up a working group on August 25, 2008, to study solutions to improve coordination between these two procedures and avoid contradictory decisions with regard to the **principle of non-refoulement**. This working group, made up of representatives of the Federal Criminal Court (FPC), the Federal Administrative Court (FAC), the Directorate of International Law of the Federal Department of Foreign Affairs (FDFA), and the Federal Department of Justice and Police (State Secretariat for Migration [SEM] and Federal Office of Justice [FOJ]), and was placed under the direction of the FOJ. On February 18, 2009, it submitted its final report with recommendations. 3

With a view to remedying the lack of coordination between asylum and extradition procedures (when they run in parallel) and contradictory decisions, the working group proposed **opening up access to the Federal Supreme Court (FSC) in asylum** matters. It also suggested that asylum procedures should be subject to the **principle of expediency** and that the authority concerned by a procedure should be **required to take into account the file processed by the competent authority in the second procedure** in order to ensure **better coordination** both at first instance (between the SEM and the FOJ) and at the appeal stage (between the FAC and the FPC) . 4

On June 29, 2009, Federal Councilor Eveline Widmer-Schlumpf opened the consultation on the preliminary draft law in the form of a hearing, which was scheduled to end on August 28, 2009. This consultation did not result in any changes to the preliminary draft law. On February 24, 2010, the Federal 5

Council (FC) submitted the draft bill to Parliament, which adopted it without amendment. The strategy proposed by the working group thus led to the adoption on October 1, 2010, of the Federal Act on the Coordination of Asylum and Extradition Proceedings, which entered into force on April 1, 2011.

6 The purpose of this Act is to speed up asylum and extradition proceedings when extradition and asylum requests are pending simultaneously, to optimize the exchange of information between the FOJ and the SEM, and to avoid contradictory decisions by allowing the proceedings to be consolidated at the level of the Federal Supreme Court. The amendment led to the introduction of the new Article 55a into the IMAC and to the amendment of the Asylum Act of June 26, 1998 (AsylA) with the introduction of the new Articles 41a and 108a, which are the counterparts in the AsylA to Article 55a IMAC, as well as new paragraphs 4 of Article 37 and 5 of Article 109, which require the "rapid" processing of asylum decisions in cases of detention pending the extradition of the applicant. The amendment also led to the modification of the Federal Court Act (LTF) of June 17, 2005: Article 83(d)(1), which opens the way for public law appeals against asylum decisions made by the Federal Administrative Court (FAC) when they concern persons who are the subject of an extradition request filed by the State from which those persons are seeking protection; Article 93(2), first sentence, which stipulates that in matters of international mutual assistance in criminal matters and asylum, preliminary and incidental decisions cannot be appealed; Finally, Article 107(3), which releases the Federal Court from the obligation to issue a decision not to proceed within 15 days of the end of any exchange of written submissions when the extradition proceedings concern a person whose asylum application has not yet been the subject of a final decision that has entered into force.

7 For the sake of completeness, we should mention **other relevant provisions concerning the coordination of asylum and extradition**, such as Articles 11a(3) of the IMAC and 9(c)(1) of the Ordinance on the Central Migration Information System (CIS Ordinance) of April 12, 2006, which guarantee SEM access to personal data stored in the FDJP's data management system for the area of mutual legal assistance and grant the FDJP access to relevant data in the SEM's SYMIC database. Another special regulation concerning asylum seekers applies to spontaneous transmission within the meaning of Article 67a of the IMAC, which cannot be carried out in the case of criminal offenses committed by this group of persons.

II. CONTEXT

In the systematics of the IMAC, Article 55a is found in the second part devoted to extradition, more specifically in the 5th section of Chapter 2 devoted to the decision on extradition in the context of extradition proceedings. Thus, if we stick solely to the structure of the law, it would only be at the stage of the extradition decision that the FOJ would have to apply Article 55a IMAC and therefore take the asylum file into account. However, Article 43 IMAC requires the FOJ to examine ex officio the foreign search and arrest request. This examination covers the formal and material conditions as well as the grounds for inadmissibility of the request. Thus, under the **ex officio principle**, the FOJ must examine ex officio whether there are grounds for **manifest inadmissibility** of extradition that would prevent arrest and extradition (Articles 2 to 5 of the IMAC), regardless of the complaints raised by the person subject to extradition. Article 55a IMAC thus gives concrete expression to the principle of ex officio and must also be applied when the FOJ receives a request for arrest and not only at the stage of the decision on extradition (see also below N. 11 and N. 19). 8

III. COMMENTARY

A. General

Under the **principle of non-refoulement** enshrined in Article 33 of the Convention of July 28, 1951, relating to the Status of Refugees (CR), Switzerland may not expel, return or extradite a person to the borders of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. In other words, both the SEM and the FOJ must ensure that the person concerned is not a victim of **persecution** or that they do not risk aggravation of their punishment in the event of a conviction (**polit malus**) for one of the above-mentioned reasons in their country of origin. Thus, when asylum and extradition proceedings are pending simultaneously or in parallel and extradition is requested by the person's country of origin, the **principle of non-refoulement**, derived from Article 33 of the CR, requires the FOJ and SEM, as the authorities of first instance, and then the Federal Criminal Court and the Federal Administrative Court, as the appeal authorities, to examine the same issues when they have to rule on refoulement in the broad sense. If the issues 9

are identical, the authorities concerned will nevertheless examine them from **perspectives and with means of investigation that differ on certain points**. Thus, in matters of extradition, the requesting State will benefit from the **principles of good faith and trust**, with the result that the FOJ will only question the assertions of the requesting State in exceptional cases and that the the FOJ may grant extradition subject to **guarantees**, particularly in cases where there is a **risk of torture**. Furthermore, in extradition cases, questions of fact and guilt will not be examined, except in the presence of obvious errors, omissions, or contradictions. Finally, the **extradition procedure is written and not oral**, in the sense that the person concerned will not be heard on the facts by the FOJ or the FPC, not to mention that the FOJ has neither the specific knowledge nor the direct investigative resources of the SEM. There is therefore a risk that, at the end of the proceedings, the SEM and the FOJ will reach diametrically opposed conclusions and issue **contradictory decisions**. However, this risk of contradictory decisions also exists at the level of the appeal authorities. On several occasions, the FOJ and SEM have concluded that there is no risk of persecution, but the asylum appeal authority has ruled that the person concerned should be granted **refugee status**. "Coordination between the two procedures is therefore necessary, since the same factors, namely the **risks incurred** by the person in the event of extradition or refoulement, are analyzed by [the said] authorities [...]". Article 55a IMAC was drafted with a view to avoiding the risk of contradictory decisions and thus better coordinating the two procedures. **The principle of non-refoulement or non-discrimination clause within the meaning of Article 33 CR is also enshrined in extradition law in Article 2(b) and Article 37(3) IMAC**.

10 However, the principle of non-refoulement is not limited to the risk of persecution within the meaning of Article 33 of the CRC. The prohibition of refoulement is also guaranteed in cases of **risk of torture or ill-treatment**, regardless of **any situation of persecution and with regard to any State**. This is the case in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (ECHR), Article 7 of the International Covenant on Civil and Political Rights of December 16, 1966 (UN Covenant II) and Article 25(3) of the Federal Constitution of the Swiss Confederation of April 18, 1999 (Cst.). In such cases, while the SEM will reject the asylum appli-

cation in the absence of persecution, the FOJ may refuse extradition. Furthermore, while in asylum matters the principle of non-refoulement under Article 33 of the CR protects the person only in relation to their country of origin, in extradition matters this principle will protect the person concerned in relation to any country. Finally, the IMAC provides for other cases in which the FOJ will refuse extradition, in particular if the person concerned risks being sentenced to the **death penalty** (Art. 37 para. 3 IMAC) or if they risk being tried by a **special court** in the requesting State (Art. 38 para. 1 let. c IMAC) . The FOJ's examination from the perspective of the principle of non-refoulement therefore goes beyond that carried out by the SEM when the latter concludes that there is no **persecution** but that there is a **risk of torture or ill-treatment**, or that extradition is not requested by the person's country of origin.

Article 55a IMAC provides for coordination with the asylum procedure when the person being prosecuted has filed an **application for asylum** within the meaning of the Asylum Act. As we shall see below, this provision imposes an obligation to coordinate when the two procedures are conducted in parallel and extradition is requested by the State from which the person seeking protection is fleeing. This obligation stems from the principle of ex officio or inquisitorial procedure. This provision not only aims to ensure **coordination** in order to avoid contradictory decisions, but also to **speed up procedures** and reconcile Switzerland's obligations under extradition law and the CR. However, the principle of coordination also aims to ensure compliance with the principle of non-refoulement guaranteed by other norms of international law. Thus, when extradition is refused on grounds that may have an impact on the asylum application, the question of the risks incurred in the requesting State must be examined in a coordinated manner by the administrative and then judicial authorities that are successively seized of the matter. The SEM and the competent appeal authority must therefore also take the extradition file into account in the event of a refusal of extradition, in order to examine the right of the person concerned to **provisional admission** or to be granted a residence permit, or even possibly to be deported to another State. 11

B. Coordination procedures

Article 55a IMAC aims, as its title indicates, at coordination with the asylum procedure when the person being prosecuted has filed an asylum application 12

within the meaning of the Asylum Act. The FOJ and the appeal authorities then take the asylum case file into consideration when deciding on the extradition request.

13 Although the provision does not explicitly state this, it imposes an **obligation** "on the authorities competent in extradition matters to take into account the asylum case file when deciding on the extradition request" and, by the same token, Article 55a IMAC imposes an obligation on them to coordinate with the authorities competent in asylum matters. This **obligation to coordinate** arises when the two procedures are conducted in parallel and extradition is requested by the State from which the person seeking extradition is seeking protection. It stems from Switzerland's international commitments on extradition and asylum (see Art. 33 CR). These obligations imposed on the authorities must be reconciled. For Ludwiczak Glassey, **this coordination would also be necessary when extradition is requested by another state**, because when the FOJ refuses extradition, the authorities responsible for immigration law will also have to examine whether the person can remain in Switzerland. In our opinion, it is nevertheless necessary to check whether this obligation is provided for in the standards to be applied by the authorities responsible for immigration law, as Article 55a IMAC only applies to the authorities responsible for extradition.

14 Article 55a IMAC expressly states that the **exchange of files** between the SEM and the FOJ is a form of coordination. This exchange is intended to prevent contradictory decisions. Thus, Article 55a only allows us to infer, on the basis of its wording, that the mutual assistance authorities (administrative and judicial) must obtain the files of any parallel proceedings from the SEM or the FAC.

15 For some legal scholars, the desired "coordination" between extradition and asylum proceedings is not optimal when it is limited to a simple "exchange of files." This is partly because communication at the first instance judicial level (TPF/TAF) is limited to consulting files and decision-making cannot be coordinated either in terms of timing or substance. As a general rule, the decision on extradition (despite Art. 37, para. 4, LAsi, which requires the rapid settlement of asylum decisions in the case of parallel proceedings) is taken as a matter of priority, but it cannot prejudge the decision on the merits of the asylum case. This also applies vice versa, of course. In certain circumstances, the lack of procedural unity may, despite the provision of Article 55a, lead to

materially incompatible final judgments, even though the proceedings should be combined and decided uniformly at the level of the Federal Supreme Court on the basis of Article 83(d)(1) LTF. Pursuant to Article 84(1) LTF, extradition cases are only subject to appeal in public law in particularly important cases, so that the Federal Supreme Court "can" only examine the substance of asylum cases in certain circumstances and therefore there can be no question of coordination. However, the documents and marginal notes allow the following practical maxim to be drawn: the mutual assistance authorities and courts dealing with such cases, as well as the relevant parallel authorities, namely the [SEM] and the [TAF], must, as far as possible, coordinate the proceedings in progress. It would therefore be necessary to establish an exchange of information between the federal offices responsible for the case (FOJ and SEM) or the courts (FPC and TAF) . Article 55a IMAC thus implies a duty of communication in the sense that the authorities and courts responsible for extradition proceedings (TPF/TF) must communicate extradition decisions made in related asylum proceedings to the SEM or the TAF. Indeed, "if asylum has been previously refused by a final decision, the extradition authority hearing an objection relating to a political offense cannot disregard this decision, since the conditions for recognizing refugee status (Art. 3 AsylA) depend on the same criteria. This applies even if it is a decision not to enter into the merits of the case, which terminates the asylum procedure without ruling on refugee status." This consideration should also be taken into account if the extradition authority has to rule on allegations of ill-treatment, torture, or risk of torture. The FOJ will consult the asylum file and decide freely on the existence of grounds for refusing extradition based on the principle of non-refoulement, then communicate its decision (to the SEM). In certain circumstances, this decision may lead to a review of the asylum decision. In addition, if there are indications to suggest this, the FOJ or the FPC must check the relevant SEM database or contact the SEM to find out whether asylum proceedings are in progress.

Case law and legal doctrine have also deduced the **principle of expediency** 16
from Article 55a of the IMAC Act: coordination would also aim to speed up proceedings. For Ludwiczak Glassey, this coordination would even imply the **suspension of the extradition proceedings** until the outcome of the asylum proceedings is known. Although suspension has been ordered in some cases, the Federal Supreme Court has not always considered such suspension to be justified and has even considered that it could conflict with the principle

of expediency. Thus, in one case, the Federal Supreme Court inquired about the progress of the extradition proceedings. At the time of the ruling, these proceedings were at the investigation stage with the Federal Office of Justice. Bound by the principle of expeditiousness, the Federal Supreme Court did not wait for the extradition proceedings to be completed before ruling on the asylum appeal. The investigation of the case had been completed and the questions relating to the granting of asylum and refugee status, as well as those relating to removal under the Asylum Act, were ready to be decided, so there was no justification for a suspension.

17 A suspension of one of the procedures is all the more unjustified given that "when an asylum procedure is ongoing, extradition can only be granted subject to the outcome of that procedure." In practice, the [FOJ] will grant extradition **subject to the recognition of refugee status or the granting of asylum**. Furthermore, in cases where the Federal Criminal Court has jurisdiction under Article 55(2) of the IMAC, the FOJ must also **reserve the decision of that court on the political offense** complaint. Finally, "if refugee status is granted to the person sought, the [final] decision is binding on the extradition authorities. Extradition cannot then be ordered unless the person is only granted **temporary protection**." In other words, extradition may be ordered, but its execution may be suspended until a final decision on asylum has been made. In any event, even if the FOJ and the SEM are required to exchange their files, there is nothing to prevent one of these authorities from having a different opinion on the case in question, given that their perspectives and means of investigation differ.

18 Even if coordination in time does not seem possible, it is necessary to ensure, when deciding on extradition, that any pending asylum or appeal proceedings are not compromised. If asylum proceedings are pending in respect of the person being prosecuted, extradition is only authorized if the asylum application or the related appeal has been definitively rejected by the Federal Administrative Court (FAC). The same applies if the person being prosecuted submits an asylum application during the extradition proceedings. However, this does not exempt the FOJ or the FPC from also examining whether there is an obstacle to extradition in the form of **political persecution**.

19 The above applies mutatis mutandis when the FOJ is required to examine a **request for arrest**. Even though, according to the structure of the IMAC, Article 55a is found in the second part devoted to extradition, more specifically

in Section 5 of Chapter 2 devoted to the decision on extradition, the FOJ must automatically inquire into the existence of any grounds for manifest inadmissibility of extradition and, in particular, consult the **SYMIC** to verify whether the person concerned has not filed an asylum application or does not have refugee status in Switzerland.

Finally, **in order to ensure uniform case law and avoid contradictory** de- 20
cisions, a **right of appeal to the Federal Supreme Court** has been introduced, which is **exceptional in asylum law.** The Federal Council emphasized that the introduction of this new right of appeal will make it possible to combine, at the level of the supreme court, the asylum and extradition procedures when they are conducted in parallel and to take due account of the principle of non-refoulement. Article 83(d)(1) of the Federal Supreme Court Act allows for the elimination of any contradictions that may still exist at the stage of appeal to the Federal Supreme Court and thus ensures this coordination. "Thus, although public law appeals are generally excluded against asylum decisions rendered by the FAC, this legal remedy is available when the case concerns a person who is the subject of an extradition request filed by the State from which the person is seeking protection." The purpose of the appeal to the Federal Supreme Court is to ensure that case law is free of any contradictions concerning the **principle of non-refoulement**. The Federal Supreme Court rules on appeals concerning extradition and asylum in a single decision. For all these reasons, a **suspension** of one of the proceedings is therefore not justified.

For the sake of completeness, it should also be mentioned that, unlike in asy- 21
lum matters, there are no **holidays** in extradition matters (Art. 46 para. 1 let. b LTF). Coordination on this point would also be welcome, particularly from the point of view of the principle of speed.

Other provisions also provide for a form of coordination between the authori- 22
ties to avoid contradictory decisions. For example, Article 32 of Ordinance I on Asylum of August 11, 1999 (OA I) provides that there shall be **no examination or decision on removal from Switzerland if a decision to return the asylum seeker to the border has already been made**. The Federal Administrative Court has thus ruled, with reference in particular to Article 32 OA I and taking into account the court's assessment of a possible removal or possible obstacles to the enforcement of the removal, that in the interests of ef-

fective coordination, the appeal proceedings should be temporarily suspended until the FOJ has ruled in the first instance on the request for removal.

23 **When extradition is requested by a third country, refugee status does not prevent extradition to that country, provided that there is no risk of refoulement to the country of origin**. Article 15 CEExtr provides a valid guarantee that the person being prosecuted will not be extradited to their country of origin without Switzerland's consent. At the latest when the extradition is carried out, the foreign authorities must be informed of the asylum procedure underway in Switzerland. Indeed, extradition must be refused, in accordance with Article 3(2) CEExtr, when the person sought fulfills the conditions for recognition of refugee status. Nevertheless, the principle enshrined in Article 33 of the CR does not prevent the requested State from extraditing a person to whom it has granted refugee status to the requesting State of which that person is not a national and in which he or she has no reason to fear discrimination, bearing in mind that the requesting State to which the person is extradited is not authorized to re-extradite him or her to a third State **without the consent of the requested State**. Thus, the latter may ensure, in accordance with the **principle of non-refoulement**, that the person whose extradition is requested will not be returned to their country of origin, which they left to seek refuge in the requested State.

IV. CRITICISM

24 While Article 55a of the IMAC provides a legal basis for the exchange of files, this exchange must above all enable the authorities concerned to base their examination of the same issues on a standardized set of facts. However, this is not always sufficient to avoid contradictory decisions, given the different perspectives and resources available to the various authorities. Furthermore, while the consolidation of proceedings at the Federal Supreme Court level is to be welcomed, the latter rarely or only exceptionally examines appeals in asylum matters and therefore does not benefit from all the expertise of the Federal Administrative Court. Finally, in cases where asylum is granted and extradition authorized, i.e., a scenario in which contradictory decisions are rendered, the Federal Supreme Court will not be able to resolve this contradiction if no appeal is lodged against the granting of asylum.

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COMMENTARY ON

Art. 63 IMAC

A commentary by Marta Stelzer-Wieckowska

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Part Three Other Mutual Assistance

Chapter 1 Requirements

Section 1 General

Art. 63 Principle

[1] Mutual assistance within the meaning of Part Three of this Act shall comprise the transmission of information, as well as procedural acts and other official acts permitted under Swiss law provided these acts appear to be necessary for proceedings carried out abroad in criminal matters or serve to retrieve the proceeds of the offence.

[2] Mutual assistance measures shall include in particular:

a. the service of documents;

b. obtaining evidence, and in particular searching persons and rooms, seizure, orders to produce, expert opinions, conducting hearings and confrontations of persons;

c. production of documents and papers;

d. handing over of objects or assets with a view to forfeiture or for restitution to the entitled person.

[3] The following shall, in particular, be considered proceedings carried out in criminal matters:

a. prosecution of criminal offences as provided for in Article 1 paragraph 3;

b. administrative measures against an offender;

c. execution of criminal judgments and pardons;

d. compensation for unjustified detention.

[4] Assistance may also be granted to the European Court of Human Rights and to the European Commission on Human Rights in proceedings regarding the safeguarding of human rights and fundamental freedoms.

[5] Assistance which will exonerate a defendant is permitted even if the request is inadmissible under Articles 3–5.

CONTENT

I. General 232
A. History of the provision 232
B. Significance of the provision and relationship to other provisions 232
II. Concept of minor mutual assistance and requirement of necessity, Art. 63 para. 1 IMAC 233
A. Content 233
1. Information 234
2. Procedural acts and other official acts 234
B. Necessity for the foreign proceedings 235
1. Connection to the offense 235
2. Obligations to cooperate in the assessment of proportionality 236
3. Prohibition of excessive measures 237
III. Minor measures of mutual assistance, Art. 63 para. 2 IMAC 237
A. General 237
B. Service of documents (Art. 63 para. 2 lit. a IMAC) 238
C. Taking of evidence (Art. 63 para. 2 lit. b IMAC) 239
1. General 239
2. Hearings 239
3. Searches 241
4. Seizure of objects and assets 242
5. Secret surveillance measures 243
D. Surrender of files and documents (Art. 63 para. 2 lit. c IMAC) 244
E. Surrender of objects or assets for confiscation or return to the entitled party (Art. 63 para. 2 lit. d IMAC) 245
IV. "Proceedings in criminal matters," Art. 63 para. 3 IMAC 245
V. Recipients of minor mutual assistance, Art. 63 para. 4 IMAC 245
VI. Mutual assistance to exonerate the person being prosecuted, Art. 63 para. 5 IMAC 246
Bibliography 247
Materials 249

I. GENERAL

A. History of the provision

1 Art. 63 IMAC has **not been significantly amended** since the Act entered into force. As part of the revision of the IMAC in 1995, the examples of mutual assistance measures in para. 2 were reorganized and supplemented to better reflect the activities of the executing authorities. Selected forms of taking evidence were expressly mentioned (para. 2 lit. b). The surrender of objects or assets for confiscation or restitution, which is now regulated in Art. 74*a* IMAC, was included in Art. 63 para. 2 lit. d IMAC. For systematic reasons, transit was moved to another section of the IMAC (Art. 20*a* IMAC).

2 The draft IMAC also contained a provision intended to regulate more precisely the **protection of confidential information**, in particular from third parties (Art. 61 E-IMAC). This is probably why the message did not go into detail on the requirement that the mutual assistance measure be necessary (Art. 63 para. 1 IMAC), even though the interpretation of this term is important for protecting the privacy of persons affected by mutual assistance. The version of the law that entered into force does not contain Art. 61 E-IMAC or a corresponding provision is not to be found in the version of the law that has entered into force. The interpretation of the concept of the necessity of the mutual assistance measure was thus left to the courts (see principle of proportionality below n. 17 ff.).

B. Significance of the provision and relationship to other provisions

3 Art. 63 IMAC explains the concept of **minor** mutual assistance (also referred to as **accessory** mutual assistance). Para. 1 also contains an important provision establishing the principle of **proportionality** of mutual assistance measures/mutual assistance (see n. 17 ff. below).

4 Art. 63 IMAC and the entire third part of the IMAC contain only a few details on specific mutual assistance measures. According to Art. 12 para. 1 IMAC, procedural acts must be carried out in accordance with the applicable **criminal procedure law**. The more detailed provisions concerning the implementation of specific measures (e.g., hearings, searches) are therefore generally to

be found in the CrimPC (enforcing authority: public prosecutor's office) or in the VStrR (enforcing authority: federal administrative authority).

Certain measures are regulated in more detail in other provisions of the IMAC and the IMACV (e.g., service of documents, Art. 68 f. IMAC, Art. 29 f. IMACV; surrender of evidence, Art. 74 IMAC; seizure and surrender for confiscation or return, Art. 74*a* IMAC, Art. 33*a* IMACV).. 5

Art. 75 IMAC specifies who may submit a request for minor mutual assistance under Art. 63 IMAC ("the authorities responsible for prosecuting offences or for deciding on other proceedings to which this Act applies"). 6

The highest police authorities of the Confederation and the cantons may also submit requests for minor mutual assistance in their own name under **Art. 75a IMAC** if the measures do not involve the use of procedural coercion (Art. 75*a* para. 2 lit. a IMAC, see also Art. 35 IMAC) and do not involve the surrender of criminal judgments or criminal files (Art. 75*a* para. 2 lit. c IMAC). Such cases systematically fall within the scope of police cooperation. If Swiss police authorities are requested to provide assistance, this is done without issuing a final decision (see Art. 35 IRSV). The person who may be affected by the measure has no legal remedy and the requirement of double criminality does not apply. 7

According to Art. 63 para. 3 lit. a IMAC, minor mutual assistance is provided in the prosecution of criminal offenses under **Art. 1 para. 3 IMAC**, i.e., in criminal matters in which, under the law of the requesting state, the judge may be called upon. Art. 63 para. 3 lit. b-d IMAC specifies what is meant by this and lists examples of proceedings related to criminal proceedings in which minor mutual assistance may be provided (administrative measures against an offender, the enforcement of criminal judgments, and pardon and compensation for unjustified detention). 8

II. CONCEPT OF MINOR MUTUAL ASSISTANCE AND REQUIREMENT OF NECESSITY, ART. 63 PARA. 1 IMAC

A. Content

Art. 63 para. 1 IMAC comments on the **scope and purpose** of minor mutual assistance. 9

1. Information

10 Minor mutual assistance may consist, among other things, in the transmission of **information** which is already available to the authorities or which can be obtained without the use of coercion. This includes, for example, information from the criminal register or information on the identity or whereabouts of a person (see also Art. 77 para. 2 IMAC). The transmission of such information does not generally involve any or only a minor infringement of fundamental rights. The provision of information on criminal law or criminal procedure law does not fall under minor mutual assistance.

11 The transmission of certain documents and information may also take place within the framework of the **police cooperation** referred to in Art. 75*a* IMAC (see N. 7 above).

2. Procedural acts and other official acts

12 According to Art. 63 para. 1 IMAC, minor mutual assistance consists of **procedural acts** that are permissible under Swiss law. Various measures that are not individually mentioned in the IMAC and to which criminal procedure law applies are possible (see also Art. 12 para. 1 IMAC). These may be coercive measures (e.g., searches, see Art. 196 ff. and Art. 241 ff. CrimPC) or acts without coercion (service of documents, see Art. 68 and Art. 69 para. 2 IMAC; Editions).

13 Despite these elements of criminal procedure, it is assumed that mutual assistance proceedings in general, and minor mutual assistance proceedings in particular, are proceedings of an **administrative law** nature, in which the rules of criminal procedure apply only when criminal procedural measures are carried out.

14 The performance of acts that are permissible under the law of the requesting state or under an international agreement and are not provided for in Swiss criminal procedure law is **not permissible**.

15 The term "**other official acts**" was not defined in the IMAC. According to Art. 25 IRSV, the surveillance of persons given a suspended sentence or released from prison on parole is also considered an official act. Art. 271 SCC is relevant for determining the meaning of the term "official act." This article penalizes the performance of acts for a foreign state on Swiss territory without

authorization if they are intended for an authority or a public official. This indirectly determines which sovereign acts are to be performed by way of mutual legal assistance as a result of the principles of sovereignty and territoriality.

B. Necessity for the foreign proceedings

According to Art. 63 para. 1 IMAC, the measures must appear **necessary for** the proceedings abroad or serve to return the proceeds of crime. 16

The necessity of minor mutual assistance for the foreign proceedings or for the recovery of the proceeds determines the scope of the mutual assistance to be provided and is regarded as an expression of the **principle of proportionality**. First, the requested measure must be appropriate, necessary, and proportionate in the strict sense. Secondly, there must be a sufficient connection between the measure and the foreign criminal proceedings (prohibition of unlawful gathering of evidence/fishing expeditions). 17

It is not a prerequisite that the requesting authority has exhausted its own possibilities for obtaining evidence (**no subsidiarity** of minor mutual legal assistance as such). 18

1. Connection to the offense

The request for legal assistance, in particular the attached facts (see Art. 28 para. 3 lit. a IMAC), must show that there is a **connection between the requested measures and the foreign criminal proceedings**. 19

The requesting authority should be assisted in clarifying the facts of the case through the provision of mutual legal assistance. For this reason, it is **not required** that it present the facts of the case completely and without contradiction in the request for mutual legal assistance. 20

The Swiss authority to which the request is addressed is in principle bound by the statement of facts in the request, unless the facts are "immediately invalidated by obvious errors, omissions, or contradictions." Overall, great **trust** is placed in the content of the request for legal assistance and the statements made by the requesting state. 21

On the basis of the information contained in the request for legal assistance, the requested authority should be in a position to verify the condition of double criminality if coercive measures within the meaning of Art. 64 para. 1 22

IMAC have been requested and to verify whether the offense is one for which legal assistance is permissible (see in particular Art. 3 IMAC).

23 There is no connection with the offense if the measures requested “are not related to the offense being prosecuted and are clearly unsuitable for advancing the investigation” and are “certainly not relevant” to the proceedings abroad. The **potential** relevance of the measures for the proceedings abroad is sufficient in principle.

24 The **assessment** of evidence, the determination of facts and the decision on the guilt of the person being prosecuted are the responsibility of the foreign court with jurisdiction and not of the requested authority. The requested state may not “replace the assessment of the authority conducting the investigation with its own (...)” because it "(...) does not have the means that would allow it to rule on the appropriateness of certain evidence in foreign proceedings." The decision as to whether the evidence requested is necessary for the criminal proceedings is therefore generally left to the requesting state and is only questioned in exceptional cases.

2. Obligations to cooperate in the assessment of proportionality

25 It is generally the responsibility of the requested state to verify whether there is a connection between the requested mutual assistance measures and the proceedings abroad. The person affected by the mutual assistance measure is also obliged to **cooperate**, particularly in complex investigations and where there is extensive evidence, because the requested authority has only limited possibilities to determine which items of evidence are irrelevant to the proceedings in the requesting state. According to the Federal Supreme Court, the obligation to cooperate arises from Art. 5 para. 3 FC (state organs and private individuals must act in good faith).

26 The person concerned must formulate any **objections** to the transfer of evidence in good time (already at the stage of execution of the request) and provide sufficient reasons. They are obliged to “clearly and precisely indicate to what extent the documents and information to be transferred exceed the scope of the request or are of no interest to the foreign proceedings.”. Objections that are not sufficiently substantiated may be classified as an inadmissible counterstatement of the facts and will not be taken into account.

According to the Federal Supreme Court, a lack of knowledge of the official language does not exempt the person concerned from their **duty to cooperate**. If the person concerned did not raise any objections in the first instance proceedings, even though they had the opportunity to do so, they may not do so in the appeal proceedings. If it was not possible to raise objections in the first instance proceedings, the person concerned is obliged to do so in the appeal proceedings. 27

However, the obligation of the person concerned to cooperate does not release the executing authority from its obligation to carry out a **triage** of the seized documents. 28

3. Prohibition of excessive measures

The requested state may only provide the requesting state with mutual legal assistance to the extent that it has been requested (**prohibition of excessive measures**). 29

However, according to case law, the request for legal assistance must be interpreted generously in favor of the requesting state in order to avoid supplementary requests and unnecessary delays. In accordance with the **principle of expeditiousness and mutual legal assistance**, evidence may also be transmitted which is not directly related to the facts described in the request for legal assistance. 30

The prohibition of excessive measures is also mitigated by the fact that information which is not directly relevant may, under certain circumstances, be transmitted as potentially **exculpatory**. 31

III. MINOR MEASURES OF MUTUAL ASSISTANCE, ART. 63 PARA. 2 IMAC

A. General

Art. 63 para. 2 IMAC contains a **non-exhaustive** list of mutual assistance measures. The measures expressly mentioned therein, namely service of documents, searches, seizures, hearings, and the surrender of files, documents, objects, and assets, are among the most common measures of ancillary mutual assistance and are also provided for in national criminal procedure. 32

33 More modern measures of evidence gathering or measures that only come into question in cross-border cases were not mentioned in Art. 63 IMAC. Certain **newer measures** of evidence gathering were partially regulated elsewhere in the IMAC (surveillance of postal and telecommunications traffic, Art. 18*a* IMAC; real-time monitoring and transmission of electronic traffic data, Art. 18*b* IMAC).

34 **Other measures** can be found in international agreements (e.g. hearing by videoconference, Art. 9 ZP II to EÜR; immediate securing of computer data, Art. 29 CCC; the collection of traffic data and content data in real time, Art. 33 f. CCC; controlled delivery, Art. 18 ZP II EÜR; covert investigation, Art. 19 ZP II EÜR).

35 Minor mutual legal assistance also includes **cross-border surveillance** (Art. 17 ZP II EÜR) and **joint investigation teams** (Art. 80*d*^{ter} ff. IRSG and Art. 20 ZP II EÜR).

36 According to Art. 63 para. 1 IMAC, other measures provided for in the CrimPC are also permissible, even if they are not regulated in the IMAC (e.g. surveillance of bank accounts, Art. 284 f. CrimPC, DNA analysis, Art. 255 ff. CrimPC, identification records, handwriting and voice samples, Art. 260 ff. CrimPC). Due to the **principle of favor** in mutual legal assistance law, the measures provided for in the IMAC and the CrimPC are also permissible in contractual mutual legal assistance even if they were not provided for in the specific agreement.

B. Service of documents (Art. 63 para. 2 lit. a IMAC)

37 In the case of service of documents, the requirement of double criminality does not have to be met because the measure is taken **without the use of coercion** (see Art. 64 para. 1 IMAC).

38 Further rules concerning service, in particular summonses, are contained in **Art. 68 and Art. 69 IMAC**. The person who receives a summons is not obliged to comply with it (Art. 69 para. 1 IMAC).

39 Summonses containing **threats of coercion** are not served (Art. 63 para. 2 IMAC). Decisions and penalty orders are criminal judgments which must in principle be served through the channels of mutual assistance.

With the exception of summonses, documents may be served **directly by** post on persons who are not themselves being prosecuted in the foreign proceedings (Art. 30 para. 1 IRSV). Documents within the meaning of Art. 30 para. 1 IRSV include court files and other documents relating to foreign proceedings. Direct service of documents in criminal matters by post is permissible in the case of traffic offences (Art. 30 para. 2 IRSV). Direct service is also permissible if this has been agreed between Switzerland and the foreign state under international law (multilateral or bilateral). Within Europe, certain court documents can be served directly on the basis of Art. 52 para. 1 SDÜ. 40

C. Taking of evidence (Art. 63 para. 2 lit. b IMAC)

1. General

Art. 63 para. 2 lit. b IMAC contains a non-exhaustive list of measures of assistance in obtaining evidence. As indicated above (n. 32 ff.), measures of evidence gathering are permissible if they are provided for in Swiss criminal procedure law or in multilateral or bilateral mutual assistance treaties. They are usually ordered in an **interim decision**. 41

Certain measures for the taking of evidence, in particular the securing of endangered evidence, may be ordered as **provisional measures** under Art. 18 IMAC. 42

2. Hearings

Under Art. 12 para. 1 IMAC, Art. 142 ff. CrimPC (the general rules) apply to hearings, as well as the provisions governing the hearing of the accused (Art. 157 ff. CrimPC), witnesses (Art. 162 ff. CrimPC) and persons providing information (Art. 178 ff. CrimPC). 43

The **role** in which the person is to be heard should generally be specified in the request for legal assistance (see Art. 28 IMAC). If there are doubts in this regard or if contradictions are apparent in the request for mutual assistance, it is appropriate for the requesting state to amend/supplement the request within the meaning of Art. 78 para. 3 or Art. 80*o* IMAC. 44

The person being heard is entitled to the **rights to refuse to testify** provided for in Swiss law (Art. 9 IMAC). In addition, the rights to refuse to testify of the requesting state also apply (Art. 65 para. 3 IMAC). 45

46 Under **Art. 65 para. 3 IMAC**, the person being questioned may also refuse to testify if, under the law of the requesting state or the state in which the person making the statement resides, criminal or disciplinary consequences.

47 At the express request of the foreign state, special **forms of confirmation** provided for in the law of the requesting state may be observed when hearing witnesses and experts (Art. 65 para. 1 lit. a IMAC). This is subject to the condition that they are compatible with Swiss law and do not cause any significant disadvantages for the person concerned (Art. 65 para. 2 IMAC).

48 One measure of minor mutual assistance is the **classic** hearing of a person on site, but also in the form of a videoconference (Art. 144 CrimPC in conjunction with Art. 12 para. 1 IMAC, see also Art. 9 ZP II EÜR).

49 The hearing by **video conference** is conducted by the authority of the requesting state in accordance with its law, pursuant to Art. 9 para. 5 lit. c ZP II to EÜR. In this respect, it differs from the classic hearing on site. The requested authority shall draw up a report and intervene if the hearing violates the fundamental principles of the legal system of the requested state (Art. 9 para. 5 lit. c and para. 6 ZP II EÜR).

50 Since the requesting authority asks the questions directly and obtains the information immediately before the conclusion of the mutual assistance proceedings, the requirements of Art. 65a IRSG must be met for the presence of the foreign parties to the proceedings.M., the conditions for the presence of the foreign parties to the proceedings under **Art. 65*a* IMAC** must be met. The same **precautionary measures** must be taken as would be necessary if the foreign authority were present on site (e.g. the obligation of the requested authority not to use the information before the mutual assistance proceedings have been legally concluded).

51 Under prevailing opinion, **telephone tapping** as a form of mutual legal assistance is considered inadmissible in Switzerland because it is not regulated in Swiss criminal procedure law. This is despite the fact that it is provided for in Art. 10 ZP II EÜR.

3. Searches

Searches under mutual legal assistance serve to locate objects, documents or assets that are to be **handed over** to the requesting state either as evidence or for confiscation or restitution under Art. 74 or 74*a* IMAC. 52

The IMAC does not contain any special provisions concerning the conduct of searches. Pursuant to Art. 12 para. 1 IMAC, the general provisions on searches and investigations (Art. 241 ff. CrimPC), on the search of houses, apartments and rooms not accessible to the public (Art. 244 f. CrimPC) and on the search of records (Art. 246 ff. CrimPC) apply. The general requirements for coercive measures (Art. 197 ff. CrimPC) must also be observed, in particular the requirements for the **proportionality** of the measure (Art. 197 CrimPC). 53

Art. 9 sentence 2 IMAC emphasizes that the relevant provisions of the CrimPC (Art. 246–248 CrimPC) apply mutatis mutandis to the **search of records**. The requested authority often has to deal with extensive documentation. Under certain circumstances, it may therefore be necessary to first carry out a rough triage and then the actual triage of the documents or data. 54

The requested authority sorts out the items of evidence that are not relevant to the foreign proceedings (see above N. 25 ff. and N. 29 ff.). The **sorting** may be carried out according to specific "keywords." Persons may also be called in to assist the requested authority with the actual sorting (see Art. 65a IMAC). However, the person who has the right to participate under Art. 80*b* IMAC is not entitled to be present during the sorting. 55

Art. 9*a* lit. b IRSV specifies that in the case of **house searches**, the owner or tenant is considered to be personally and directly affected within the meaning of Art. 21 para. 3 and Art. 80h IMAC. Therefore, only the person who has actual control over the searched premises is entitled to lodge a complaint. 56

Of practical importance in mutual legal assistance proceedings is the possibility of **sealing** records and objects under Art. 248 CrimPC. Sealing is intended to prevent the executing authority from gaining knowledge of information that is irrelevant to the proceedings in the requesting state. 57

It is partly disputed whether only the actual **owner** of records is entitled to seal them or whether other persons who have a legally protected interest in the records are also entitled to do so. However, it is postulated that the right to seal may also be granted to other interested persons, even if they are not 58

considered to have standing to appeal within the meaning of Art. 80*h* lit. b IMAC. The Federal Supreme Court has left open the question of the extent to which sealing not only protects the right to refuse to give evidence in order to protect the privacy sphere, but also, for example, obstacles to mutual legal assistance.

59 The competent cantonal **coercive measures court** (if the executing authority is a cantonal authority or the Office of the Attorney General of Switzerland) or the Appeals Chamber of the Federal Criminal Court (if the mutual legal assistance measure is carried out by a federal administrative authority) shall decide on the unsealing.

60 The decision on unsealing is treated as an interim order of the court responsible for coercive measures in mutual legal assistance proceedings and **no criminal procedural** remedies may be lodged.

61 Under Art. 80*e* para. 2 IMAC, a decision on the unsealing of documents is in principle **not independently** appealable, as the executing authority's knowledge of the contents of the records does not entail any "irreparable disadvantage"; any disadvantage only arises when the records are handed over to the requesting authority, and this is only decided in the final decision. The decision on the unsealing can therefore generally only be challenged together with the final decision (see Art. 80*e* para. 1 IMAC).

62 According to Art. 76 lit. c IMAC, the state requesting the search must enclose with its request a **confirmation of the admissibility** of the measure. The search or seizure warrant attached to the request is considered sufficient confirmation (Art. 31 para. 2 IMAC).

4. Seizure of objects and assets

63 According to Art. 12 para. 1 IMAC, the provisions of criminal procedure concerning seizure apply (Art. 263 ff. CrimPC). The seizure of **objects and assets** used as evidence (Art. 263 para. 1 lit. a CrimPC; see also Art. 74 IMAC), preventive seizure and seizure of assets (Art. 263 para. 1 lit. d CrimPC) and seizure for the purpose of return to the injured party (Art. 263 para. 1 lit. c CrimPC).

64 According to the Federal Supreme Court, surrender for the purpose of settling **sub-**

stitute claims (and also the seizure of assets for this purpose) is not possible within the framework of minor mutual assistance. In such cases, however, mutual assistance in enforcement under Art. 94 ff. IMAC may be considered.

Art. 33*a* IRSV mentions the permissible **duration of** seizure of objects or assets that are to be surrendered on the basis of a final and enforceable decision of the requesting state (see Art. 74*a* para. 3 IMAC). These remain seized until the decision is available or the requesting state informs the requesting authority that such a decision can no longer be made (in particular due to the statute of limitations). 65

Frequent mutual assistance measures include the **secret freezing of accounts**, which is not regulated by law. The legal basis for this measure is Art. 80*n* IMAC and Art. 8 para. 2 BG-RVUS. 66

Seizure may take longer in the case of minor mutual assistance under Art. 74a IMAC, as a final decision by the requesting state must generally be available (see Art. 74 para. 3 IMAC) or the conditions for so-called **early release** must be met. 67

Whether the duration of the seizure is still proportionate depends on the circumstances of the specific case. Seizure lasting up to **two years** is generally considered proportionate. In the case of longer measures, the complexity of the proceedings and the actions or inaction of the requesting and requested authorities are taken into account. However, it is not possible to set a fixed limit beyond which longer seizure would be disproportionate. 68

5. Secret surveillance measures

In the case of surveillance measures, it is often necessary for tactical reasons to transfer the evidence gathered for the purposes of foreign proceedings before the mutual assistance proceedings have been concluded (see also Art. 80*d*^{bis} IMAC, known as **dynamic mutual assistance**). 69

One measure of minor mutual assistance is the **surveillance of postal and telecommunications traffic** (Art. 18*a* para. 2 ff. IMAC). It is generally undisputed that these measures are permissible within the framework of mutual assistance. In addition to the requirements of mutual legal assistance law, however, the requirements of Art. 269 ff. CrimPC must also be cumulatively fulfilled (see Art. 18*a* para. 4 IMAC). 70

71 Art. 18*b* IMAC provides for the transmission of electronic **traffic data**. This does not refer to content data, but to other data collected in connection with the surveillance. The possibility of early transmission of content data is therefore governed by Art. 80*d*[bis] IMAC.

72 **Surveillance using technical surveillance devices** (Art. 280 f. CrimPC) is mentioned in Art. 18*b* para. 1 lit. b IMAC. Surveillance devices within the meaning of Art. 280 CrimPC include, for example, bugs, cameras, GPS trackers, and methods of monitoring electronic devices (e.g., keyloggers). It is partly disputed whether Art. 18*b* para. 1 lit. b IMAC provides a sufficient legal basis for ordering these measures in mutual assistance proceedings.

73 **Covert investigations** and **cross-border surveillance** in the context of minor mutual assistance were not provided for in the IMAC and are therefore only permissible if permitted by an international treaty. Covert investigation is therefore possible on the basis of Art. 19 ZP II EÜR, and cross-border surveillance is regulated in Art. 17 ZP II EÜR, as well as in the context of police cooperation in Art. 40 SDÜ and in agreements with certain European countries.

D. Surrender of files and documents (Art. 63 para. 2 lit. c IMAC)

74 Art. 63 para. 2 lit. c IMAC refers to surrender for the purposes of evidence (Art. 74 para. 1 IMAC). **Art. 74 para. 1 IMAC** regulates additional aspects of the surrender of evidence (including the rights of bona fide third parties, Art. 71 para. 2 IMAC, and the postponement of surrender, Art. 74 para. 3 IMAC).

75 Art. 63 para. 2 lit. c IMAC only mentions files and documents. However, **other evidence** (objects, assets) may also be surrendered (see Art. 74 para. 1 IMAC).

76 This may be evidence that is already in the possession of the requested authority or that can be obtained without the use of coercion (e.g., files, interrogation records from other proceedings). However, evidence that the executing authority must first obtain (see Art. 63 para. 2 lit. b IMAC above) may also be considered.

E. Surrender of objects or assets for confiscation or return to the entitled party (Art. 63 para. 2 lit. d IMAC)

The surrender of objects or assets for confiscation or return is regulated in **Art. 74*a* IMAC**. 77

It also specifies which objects or assets may be surrendered (Art. 74*a* para. 2 lit. a-c IMAC) and when and under what conditions surrender may take place (Art. 74*a* paras. 3-7 IMAC). 78

IV. "PROCEEDINGS IN CRIMINAL MATTERS," ART. 63 PARA. 3 IMAC

Art. 63 para. 3 IMAC lists **examples** of proceedings in "criminal matters" within the meaning of Art. 1 para. 3 IMAC in which minor mutual assistance may be provided. These include the prosecution of criminal offenses within the meaning of Art. 1 para. 3 IMAC (Art. 63 para. 3 lit. a IMAC), administrative measures against an offender (Art. 63 para. 3 lit. b IMAC), the enforcement of criminal judgments, pardons (Art. 63 para. 3 lit. c IMAC) and compensation for unjustified detention (Art. 63 para. 3 lit. d IMAC). 79

This is not an exhaustive list ("in particular"). 80

The term "proceedings in criminal matters" must be interpreted **broadly**. It may also include proceedings that are closely related to criminal proceedings. When determining whether proceedings are criminal in nature, the principle of mutual legal assistance must be taken into account, as the procedures and powers of the authorities in the requesting state may differ from those in Switzerland. 81

V. RECIPIENTS OF MINOR MUTUAL ASSISTANCE, ART. 63 PARA. 4 IMAC

Minor mutual assistance in criminal matters, like international mutual assistance in criminal matters in general, is provided to foreign **states**. 82

Art. 63 para. 4 IMAC contains an exception to this rule. Minor mutual assistance may also be provided to the **European Court of Human Rights**. Further exceptions can be found in Art. 1 para. 3bis (mutual assistance to interna- 83

tional courts or other inter- or supranational institutions with criminal jurisdiction) and para. 3ter IMAC (currently, on the basis of this provision: mutual assistance to the European Public Prosecutor's Office). The rules governing cooperation with the International Criminal Court are contained in a separate law.

VI. MUTUAL ASSISTANCE TO EXONERATE THE PERSON BEING PROSECUTED, ART. 63 PARA. 5 IMAC

84 According to Art. 63 para. 5 IMAC, minor mutual assistance may**, exceptionally**, also be provided even if the grounds for exclusion under Art. 3-5 IMAC apply, if it is intended to exonerate the person being prosecuted.

85 In more complex cases or where there is extensive evidence, it may be difficult or impossible for the requested authority to assess whether the legal assistance to be provided is actually **exculpatory** for the person being prosecuted. An additional problem is that the mutual legal assistance to be provided may potentially incriminate other persons and that the grounds for exclusion under Articles 3-5 IMAC may be circumvented by the transmission of evidence.

86 Both case law and literature point out that the provision must be applied restrictively; a **potentially** exonerating effect is not sufficient. The provision of mutual assistance under Art. 63 para. 5 IMAC should only be possible if the person being prosecuted consents. The exonerating effect of mutual assistance must be denied if the person being prosecuted expressly opposes the provision of mutual assistance.

87 Under IMAC, the provision of minor mutual assistance to exonerate the person being prosecuted is also permissible in certain other situations by way of exception. According to **Art. 64 para. 2 lit a IMAC**, the requirement of double criminality does not apply to such measures, and according to **Art. 66 para. 2 IMAC**, mutual assistance may be provided in such cases even if proceedings against the person being prosecuted are pending in Switzerland for the same offense.

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COMMENTARY ON

Art. 65 IMAC

A commentary by Yasmine Dellagana-Sabry

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Art. 65 Application of foreign law

[1] At the express request of the foreign State:

a. the statements of witnesses or experts shall be affirmed in the form prescribed by the laws of the requesting State, even if the applicable Swiss law does not provide such a form;

b. forms necessary to obtain other evidence that is admissible in court may be taken into consideration.

[2] Forms for obtaining and affirming evidence according to paragraph 1 must be compatible with Swiss law, and no essential prejudice may result therefrom to the persons involved.

[3] A person may also refuse to testify provided the law of the requesting State so provides or if the fact of testifying may cause criminal or

disciplinary sanctions to be imposed under the laws of that State or of the State where the examined person lives.

CONTENT

I. General Provisions 254
II. Content of the Provision 255
A. Request by the Requesting State 255
B. Evidence (para. 1) 255
1. Confirmation of Statements (subpar. a) 255
2. Other Evidence (Letter b) 256
a. Hearings by Videoconference 258
b. Hearing by Conference Call 261
c. Concluding Remarks 263
C. Compatibility with Swiss law and absence of serious harm to persons participating in the proceedings (para. 2) 263
D. Right to Refuse to Testify (para. 3) 264
III. Cases Covered by Art. 65 of the Mutual Legal Assistance Act (EIMP) as Grounds for Appeal 265
Bibliography 266
Materials 267

I. GENERAL PROVISIONS

1 The execution of mutual legal assistance measures requested in the context of international cooperation in criminal matters is, in principle, carried out in accordance with the forms and procedures of the requested State (*locus regit actum*; see, in particular, Art. 3 CEEJ, Art. 22 CEExtr, and Art. 80*a*, para. 2, EIMP). Consequently, in the context of passive mutual legal assistance, acts requested by the requesting State and performed by Swiss authorities for the purposes of foreign criminal proceedings are governed by Swiss law and not by the law of the requesting State. In the absence of an international treaty, the Mutual Legal Assistance Act (EIMP) and its implementing ordinance are thus applicable to the execution of foreign requests for mutual legal assistance by Swiss authorities (Art. 1(1) EIMP). Alternatively, other procedural laws, including the Administrative Procedure Act (PA) or the Criminal Procedure Code (CPP), shall apply (Art. 12(1) EIMP).

2 Art. 65 EIMP, however, provides for an **exception** to the aforementioned principle, ensuring that certain evidence collected in Switzerland pursuant to a letter rogatory can be used in foreign criminal proceedings. The purpose of mutual legal assistance, which consists, in particular, of assisting foreign authorities in their investigations, would in fact be rendered meaningless if the evidence transmitted by the authorities of the requested State were ultimately unusable due to violations of the procedural rules applicable in the requesting State. Therefore, Art. 65 EIMP permits, subject to Swiss public policy (Art. 1*a* EIMP; see also Art. 8 PAII CEEJ) and provided the conditions set forth *infra* are met, the application of certain formal rules of foreign law (*forum regit actum*) to investigative measures requested by the requesting State and carried out in Switzerland. The main cases in which foreign law applies include, in particular, sworn statements or solemn affirmations, as well as hearings conducted via videoconference. It should be noted that Art. 65 of the EIMP addresses the form of the proceeding and does not, in particular, regulate the probative value of the evidence thus obtained.

II. CONTENT OF THE PROVISION

A. Request by the Requesting State

Pursuant to Art. 65(1) *in initio* of the Mutual Legal Assistance Act (EIMP), Swiss executing authorities may apply foreign law upon an **express request** from the requesting State. 3

In the **absence of such a request**, Swiss authorities may draw the requesting authority's attention to the need to make such a request; otherwise, Swiss law will apply. This requires Swiss authorities to verify, in accordance with the aforementioned purpose of mutual legal assistance and in cases falling under Art. 65 of the Mutual Legal Assistance Act, whether the application of Swiss law is likely to render the evidence intended for transmission to the foreign authority inadmissible. 4

B. Evidence (para. 1)

1. Confirmation of Statements (subpar. a)

It follows from Art. 65(1)(a) of the Mutual Legal Assistance Act (EIMP) that, at the express request of the requesting State, the **statements of witnesses and experts** are confirmed in the form prescribed by the law of the requesting State, even if applicable Swiss law does not provide for such confirmation. 5

The term "**confirmation**" used in the aforementioned provision refers to statements made in a solemn form intended to support, or even substantiate, their content and authenticity with a view to their use as evidence. These primarily include sworn testimony and statements, namely a pledge to tell the truth made by invoking God or a sacred entity as a witness, or a solemn oath, which corresponds to the equivalent secular declaration. Such commitments, which are generally oral, are notably provided for under the law of *common law* jurisdictions, such as that of the United States of America (see Art. 9, para. 2, and Art. 12, para. 1, TEJUS). 6

The issue of confirming statements also arises in practice with regard to certain documents—particularly banking documents—intended for transmission to the requesting State. In several *common law* countries, notably the one mentioned above (see Art. 18 TEJUS), the probative value of such evidence depends, in principle, on its authentication by means of a written declaration, 7

generally in the form of an *affidavit*. Through this declaration, the author—usually the person who prepared the documentation—certifies that the transmitted documents are complete, accurate, and have not been altered in any way. This requirement stems from the special role that testimony has traditionally played in *common law* systems, where the credibility of evidence is often established through a person capable of guaranteeing its origin, integrity, and the manner in which it was obtained. At first glance, this practice may be likened to the formal requirements set forth in Art. 65(1)(b) of the Mutual Legal Assistance Act (IMPA), insofar as the*affidavit* is specifically intended to ensure the admissibility or usability of the evidence before the courts of the requesting State. The legal characterization of this measure, however, remains debatable under Swiss law. One may indeed question whether the preparation of such a document truly constitutes a mere formal procedure relating to evidence already collected, or whether it is instead an independent measure for the execution of the request for mutual legal assistance, *in casu* supplementary to the order to produce documents. In our view, the*affidavit* must be understood as an independent measure arising from the obligation to produce documents and classified as a written report within the meaning of Art. 145 of the Swiss Criminal Procedure Code (CPP), applicable by reference to Art. 12 of the International Mutual Legal Assistance Act (IMLA). This classification appears consistent with the restrictive case law established in ATF 131 II 132, since the purpose of the measure is no longer merely to comply with a form prescribed by foreign law, but rather to create a new piece of evidence intended to supplement those already obtained.

2. Other Evidence (Letter b)

8 Pursuant to Art. 65(1)(b) of the EIMP, upon the express request of the requesting State, the form required to render **other means of evidence** admissible before a court may be taken into consideration. In other words, an exception to the aforementioned principle of *locus regit actum* is also conceivable for other forms of evidence if compliance with specific formal requirements under the law of the requesting State is necessary for their admissibility and, consequently, their admissibility in foreign courts.

9 Although the provision appears relatively broad with regard to the formal requirements of foreign law that may be taken into account, they are nevertheless limited by the requirement of **compatibility with the fundamental**

principles of Swiss law (Art. 65(2) EIMP; see also Art. 8 PAII CEEJ) . It is important to bear in mind the purpose of the provision; otherwise, Swiss authorities could be required to carry out procedural acts that would not be admissible in Swiss courts, which would, moreover, be contrary to Art. 63 of the EIMP. Thus, Art. 65 of the EIMP allows for the implementation in Switzerland —in accordance with the forms prescribed by foreign law—of procedural acts recognized under Swiss law. It should be noted that for mutual legal assistance measures of a broad scope—particularly those in which evidence is transmitted to the requesting authority in real time before the Swiss mutual legal assistance proceedings have been concluded (e.g., hearings via videoconferencing or the deployment of foreign undercover agents)— the Federal Supreme Court requires a treaty-based legal basis as an expression of Switzerland's express international commitment. For mutual legal assistance to be permitted, it is therefore not necessary for the measure—of a broad scope – requested by the foreign authority—be based on Swiss law. Rather, it is sufficient that the mutual legal assistance measure be expressly provided for by a treaty binding on Switzerland, even if domestic law does not recognize the means of evidence in question (e.g., questioning by conference call) or if one or more conditions relating to that means are not met under Swiss law.

In legal scholarship, **the presence of the defendant and/or his or her defense counsel at a witness hearing** is cited as an example in the context of Art. 65(1)(b) of the Swiss Mutual Legal Assistance Act (EIMP). If the procedural requirement regarding the presence of the accused and/or their counsel during the execution of a mutual legal assistance measure carried out by Swiss authorities in accordance with Swiss procedural law is governed by Art. 65*a* of the International Mutual Assistance Act (IMAA), the provision at issue here may indeed apply when the mutual assistance measure is carried out in Switzerland in accordance with the rules prescribed by foreign law. Foreign law may thus, for example, make the validity of evidence obtained through a hearing conducted via videoconference or teleconference contingent upon the aforementioned presence. It should be noted that in its report on the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters, the Federal Council observed that the use of videoconferencing and teleconferencing could, in general, be authorized by Art. 65 of the Mutual Legal Assistance Act (EIMP) as a "required form" provided for by that provision. 10

a. Hearings by Videoconference

11 The **hearing of a witness or expert** by videoconference is specifically provided for in Art. 9 of the Second Additional Protocol to the European Convention on Mutual Legal Assistance (ECMLA), a protocol that entered into force for Switzerland on February 1, 2005.

12 Hearing by videoconference is **a secondary option** to the traditional method, in that it is permitted only if it would be inappropriate or impossible for the witness or expert to travel from the territory of the requested State, where they are located, to that of the requesting State to be heard there (Art. 9, paras. 1 and 3, PAII CEEJ). "Inappropriateness" refers, for example, to cases where the person to be heard cannot travel easily due to age or health. As for "impossibility," this refers, in particular, to a serious danger that the person concerned might face if they appeared in the territory of the requesting State. In addition to, among other things, the name of the judicial authority and the persons who will conduct the hearing, the requesting authority is required to indicate one of these grounds in support of its request (Art. 9, para. 3, PAII CEEJ).

13 Provided that the hearing by videoconference does not conflict with the fundamental principles of Swiss law (see Art. 65, para. 2, EIMP) and that Switzerland has the technical means necessary for its implementation, the Swiss authorities are required to grant a request to that effect made by a requesting State that is a party to the relevant protocol (Art. 9, para. 2, 1st sentence, PAII CEEJ) or a bilateral treaty providing for it, even if said **hearing** is **conducted by the competent foreign authorities in accordance with their own procedural law** (Art. 9, para. 5(c) and 7 PAII CEEJ; notably Art. VI, para. 5(c) of the CH-I EECJ Agreement; see also Art. 65, para. 1(b) of the EIMP).

14 The hearing by videoconference is governed by strict rules regarding its **procedural arrangements** (see Art. 9, paras. 4–7 of PAII EECJ). In particular, they are conducted under the supervision of the judicial authorities of the requested State, which, in accordance with the rules provided for by its legislation, are responsible for issuing the summons (Art. 9, para. 4, PAII CEEJ) and ensure compliance with the fundamental principles of its law, as well as the protection of the person to be heard and the safeguarding of that person's rights (Arts. 8 and 9, para. 5, subpars. a and b, PAII CEEJ; see also Art. 65, para. 2, EIMP). In particular, the witness or expert being heard may invoke the right

to refuse to testify that is recognized for them under both the law of the requested State and that of the requesting State (Art. 9, para. 5, subpar. e, PAII CEEJ; see also Art. 65, para. 3, EIMP). It should be noted that the consequences of a violation of the obligation to testify, as well as of perjury, are governed by the law of the requested State (Art. 9, para. 7, PAII CEEJ; see also Art. 163, para. 2, 176, and 177, para. 1, CPP; Art. 307 CP).

15 Although Art. 9 PAII CEEJ primarily concerns the examination of witnesses and experts, paragraph 8 of this provision allows States Parties to use videoconferencing also for the**examination of persons facing criminal charges or suspects**,provided that the following three cumulative conditions are met: (i) the judicial authorities of the requesting State and the requested State agree to use this method of hearing and have agreed on the terms; (ii) the arrangement they have reached complies with their national law as well as with applicable international treaties (e.g., Art. 6, para. 3, of the ECHR) ; (iii) the person subject to criminal proceedings or the suspect must have given their consent.

16 Although videoconferencing is a particularly practical tool for conducting hearings with an international component, it nevertheless poses numerous **challenges for integration into the EAW system** when Switzerland is the requested State. All persons present at the videoconference hearing—in particular the judicial authorities of the requesting State—may in fact directly hear the statements of the person being heard, even before a decision has been made regarding the transmission of the information in question to that State or before the entitled party has given consent thereto, thereby creating a risk of uncontrolled dissemination of information abroad. Given its immediate and instantaneous nature, this tool is therefore incompatible with the principles that must be observed under Swiss mutual legal assistance procedures, particularly the principles of proportionality and "potential usefulness," as well as the principle of specialty.

17 To minimize this inconsistency with the mutual legal assistance procedure provided for by the EIMP, the following **solutions** are proposed by legal scholarship and case law. In a **first scenario**, the hearing by videoconference is, like other mutual legal assistance measures, conducted between the decision to proceed and the decision to close the case. In this scenario, the Swiss executing authority must issue a decision to proceed within the meaning of Art. 80*a*(1) of the EIMP, combined with the interim enforcement decision, in

which it assesses whether the conditions for videoconferencing, as defined by the applicable treaty law, are met. Furthermore, by analogy with Art. 65*a* of the EIMP, the relevant Swiss authority must specify the requirement that the requesting State formally undertake, through a declaration of assurance, not to record or take minutes of the videoconference hearing and not to use the information obtained for the purposes of its proceedings until the final decision has become final. Prior to the the videoconference hearing takes place, the foreign authority that made the request for mutual legal assistance—generally the authority presiding over the proceedings—is required to submit the validly signed declaration of assurance to the Swiss authorities. Otherwise, the videoconference hearing will not take place. Pursuant to the principle of good faith and mutual trust between States, compliance with these guarantees by the requesting State is presumed. The interim decision to conduct the hearing by videoconference may be the subject of a separate appeal to the Complaints Chamber of the Federal Criminal Court (Art. 37(2)(a) LOAP in conjunction with Art. 25(1) EIMP) under the conditions set forth in Art. 80*e*(2)(b) EIMP (immediate and irreparable harm), applicable by analogy. Once the videoconference hearing has concluded, and to ensure the right to be heard as well as the principles of proportionality and specialty, the recording and/or the related minutes shall be provided to the person heard as well as to anyone authorized to appeal the mutual legal assistance decision. In the event that the entitled party has not consented to simplified execution pursuant to Art. 80*c* EIMP, the Swiss executing authority shall issue a final decision on the granting and scope of mutual legal assistance (Art. 80*d* EIMP), which may be appealed within 30 days to the Complaints Chamber of the Federal Criminal Court (Art. 80*e*, para. 1, and 80*k* of the Mutual Legal Assistance Act; see also Art. 37, para. 2, subparagraph a of the Act on the Protection of Persons Subject to Criminal Proceedings in conjunction with Art. 25, para. 1 of the Mutual Legal Assistance Act) . Once the decision to close the proceedings becomes final, the recording and/or the minutes of the hearing are transmitted to the foreign authority, and authorization to use the information obtained through the relevant mutual legal assistance measure is thereby granted. In the **second scenario**, the mutual legal assistance procedure is carried out to its conclusion, and the hearing by videoconference is conducted after the decision to close the case becomes final, thereby rendering unnecessary the provision of the aforementioned guarantees by the requesting State. In this case, the decision to initiate proceedings is effectively the same as the decision to close the case,

so that, unlike in the previous situation, only a single appeal—against the decision to close the case—may be filed. Although this scenario appears to better respect the principle of expeditiousness, it is not without its problems, since the executing authority is compelled to render a decision regarding the transmission of evidence that has not yet been collected, thereby depriving it, in particular, of the opportunity to assess the potential relevance of such evidence. Furthermore, the entitled party is deprived of the opportunity to assert their rights (notably the right to be heard). To address the above and prevent this option from being rejected, the FOJ recommends that the purpose of the videoconference hearing be clearly defined in advance through a list of questions provided by the requesting authority, thereby allowing, on the one hand, the Swiss executing authority to assess the potential usefulness of the information that may be gathered during the upcoming videoconference hearing and, second, the entitled party to assert their rights by being given the opportunity to comment on those questions based on the list of questions provided to them. In the event that the aforementioned questions cannot be transmitted to the entitled party due to the existence of a risk of collusion, the videoconference hearing is rejected, subject to the interested party's consent to simplified enforcement within the meaning of Art. 80*c* of the International Mutual Assistance Act (EIMP). During the videoconference hearing, the relevant Swiss authority must also ensure that the requesting authority does not deviate from the previously defined scope, thereby undermining the spontaneity of the hearing—during which the foreign judicial authority cannot freely expand its questioning in response to the statements made by the person being heard. Furthermore, the aforementioned advantage regarding compliance with the principle of expediency is undermined by the fact that any questions falling outside that scope must be the subject of a supplementary request for mutual legal assistance. Finally, upon completion of the mutual legal assistance proceeding in question, the executing authority transmits the minutes, as defined in Art. 9, para. 6, PAII CEEJ, to the foreign authority, accompanied by a reservation regarding the principle of specialty (Art. 67 EIMP).

b. Hearing by Conference Call

The examination of a witness or expert via **telephone conference** is governed, in particular, by Art. 10 PAII CEEJ. 18

19 In accordance with this provision, this form of hearing is conducted on the territory of the requested State upon **a request from the requesting authority** (Art. 10, para. 1, PAII CEEJ; see also Art. 65, para. 1, *in initio*, EIMP). The filing of such a request—the content of which is set forth in paragraph 4 of the aforementioned provision—presupposes that the hearing will be conducted by the judicial authorities of the requesting State.

20 This method differs from videoconferencing in that it is limited to the hearing of witnesses and experts and is subject to their express consent (Art. 10, para. 2, PAII CEEJ). Furthermore, it is not a substitute for the traditional form of hearing and is particularly useful when, for example, a witness is required to give testimony on a routine matter. For this form of hearing to be admissible, it must also be provided for under the national law of the requesting State (Art. 10, para. 1, PAII CEEJ) and the requested State must consent to it, having first ensured that this method does not conflict with the fundamental principles of its law (Art. 10, para. 3, PAII CEEJ) . As the requested State—or, in its case, the competent executing authority—Switzerland examines in this context how to proceed with the request made by the foreign authorities, based on Art. 65 of the Mutual Legal Assistance Act (EIMP).

21 The **practical arrangements** for conducting the hearing by conference call are determined by mutual agreement between the States concerned (Art. 10, para. 5, 1st sentence, PAII CEEJ), and, once these have been agreed upon, the requested authority undertakes to perform the tasks set forth in paragraph 5, second sentence, subparagraphs (a) through (c) of that provision. The practice followed by certain States Parties of hearing a witness or expert at a consulate located within the territory of the requested State without the assistance of that State is, for example, not contrary to Article 10 of the PAII CEEJ. Notwithstanding this and regardless of any agreed-upon arrangements, the requested State may, pursuant to paragraph 6, require compliance with the rules governing videoconferencing as set forth in Article 9, paragraphs 5 and 7 of PAII CEEJ.

22 With regard to issues related to the **instantaneous and immediate nature** of hearings by telephone conference—and, consequently, the requesting authority's access to evidence in real time—and the recommended solutions, the reader is referred to the considerations set forth in this regard concerning hearings by videoconference.

c. Concluding Remarks

Given the rise in international crime and due to their practicality, videoconferencing and telephone conferencing are set to grow in importance, particularly for complex proceedings. It would therefore be appropriate to make a **legislative amendment** in this regard and to include a provision in the EIMP (e.g., by adding Art. 65*b* or 65*c*) governing these two methods of hearing, modeled after the rules set forth in Arts. 9 and 10 of the PAII CEEJ. As Zimmermann rightly points out, " [b]y introducing into domestic law a specific provision governing [hearings via] videoconferencing [and by telephone conference], the legislature would provide a legal basis for mutual legal assistance granted by Switzerland to States with which it is not bound by a treaty or with which the concluded treaty does not provide for the possibility of conducting [such investigative acts]." Nevertheless, in the absence of a treaty-based legal basis, and to avoid the rejection of a hearing conducted in one of the aforementioned forms, the Federal Office of Justice proposes to negotiate with the requesting State the procedure to be followed for its implementation. In this context, an assurance of reciprocity from that State must be required, and the Federal Department of Foreign Affairs may also be asked to assess the reliability of that State's legal system. 23

C. Compatibility with Swiss law and absence of serious harm to persons participating in the proceedings (para. 2)

Pursuant to Art. 65(2) of the International Mutual Legal Assistance Act (EIMP), the form used to confirm statements and obtain evidence, in accordance with paragraph 1, must be **compatible with Swiss law** and must not cause **serious harm** to persons participating in the proceedings. 24

As noted *supra*, the requirement of **compatibility with Swiss law** was intended to limit the execution by Swiss authorities of mutual legal assistance measures—in the forms prescribed by foreign law—to those that are permitted under the Swiss legal system (see Art. 63 EIMP) and which, consequently, do not conflict with the fundamental principles of Swiss law. To give concrete effect to this condition, Art. 27 OEIMP specifies that the **oath**, as a form required for the confirmation of statements, is not permitted under Swiss law, pursuant to Art. 65(2) of the Mutual Legal Assistance Act (EIMP), if the law of the requesting state allows a choice between an oath and a solemn promise to 25

tell the truth, and the witness or expert being questioned refuses to take an oath. In the latter case, the person being questioned is, before testifying, urged to tell the truth (Art. 163(2) CPP) and warned of the consequences that Art. 307 CP attaches to a statement contrary to the truth.

26 Regarding the condition that there be **no serious prejudice to persons participating in the proceedings**, this was intended by the legislature to protect private secrets not guaranteed by Art. 65, para. 3, of the International Mutual Legal Assistance Act (EIMP), namely, in particular, the business or manufacturing secrets of witnesses and experts.

D. Right to Refuse to Testify (para. 3)

27 In principle, in the context of mutual legal assistance proceedings in which Switzerland is the requested State, the rules of **Swiss criminal procedure law** apply with respect to the obligation to testify or the right to refuse to testify (Art. 9 and 12(1) of the Mutual Legal Assistance Act; see also Art. 163(2) and 168–177 of the Swiss Criminal Procedure Code (CPP), as well as Art. 187(2) *in fine* of the CPP; Art. 265(2)(b) of the CPP). Art. 65(3) of the Mutual Legal Assistance Act, however, provides that the person being questioned may—in addition to the grounds for refusal provided for under Swiss law—invoke those established by the **legislation of the requesting State**. Pursuant to this latter provision, the right to refuse to testify is also recognized if giving testimony could result in criminal or disciplinary sanctions in the latter State or in the **State of residence** of the person being heard. In such a case, the person being heard may be assisted by an attorney (Art. 21, para. 2, EIMP).

28 The right to refuse to testify set forth in Art. 65(3) EIMP is established for the **protection of only witnesses and experts**. Therefore, persons implicated by them are not entitled to invoke said right.

29 At the beginning of the hearing conducted in Switzerland, the authority conducting the hearing is required to **inform** the witness or expert being heard of their right to refuse to testify on the grounds provided for under both Swiss law and the law of the requesting State (see Art. 143(1)(c) and Art. 177(3) of the Swiss Criminal Procedure Code; see also , for the examination of experts, Art. 187(2) *in fine* of the Swiss Criminal Procedure Code, which refers to the provisions governing the examination of witnesses). When providing this information, it is important to take into account—in addition to the foregoing—

that the person being heard may also invoke this right if their statements could result in criminal or disciplinary sanctions being imposed on them in the requesting State or in their State of residence. Furthermore, the authority conducting the hearing is also required, during the mutual legal assistance proceedings, to draw the person's attention to grounds for refusing to testify that were not raised at the beginning of the hearing and which may become apparent from their statements. However, it may be difficult for the Swiss executing authority to provide such information regarding the right to refuse to testify under foreign law, as it may be unaware of its existence, particularly when the hearing is conducted in accordance with the rules prescribed by Swiss law. This lack of knowledge may be due to the fact that no evidence in the case file—in particular, the mutual legal assistance request issued by the foreign authority or the statements made by the person concerned—allows for the conclusion that such a right is recognized for them in the requesting State. In cases where the hearing is conducted in Switzerland in accordance with the rules prescribed by foreign law (Art. 65, paras. 1 and 2, EIMP), full information regarding the right in question is presumed to be guaranteed provided that it results from prior consultation, as well as from cooperation during the hearing, between the foreign authority conducting the procedure and the Swiss executing authority present at the time. However, a difficulty may still arise when those authorities are unaware of the existence of the right to refuse to testify based on the law of the State of residence, which is, by assumption, different from that of the requesting State. Finally, it should be emphasized that insufficient information or its omission may render the information gathered unusable.

III. CASES COVERED BY ART. 65 OF THE MUTUAL LEGAL ASSISTANCE ACT (EIMP) AS GROUNDS FOR APPEAL

According to the terms of Art. 80*i*, para. 1, subpar. b of the Mutual Legal Assistance Act (EIMP), an **appeal** may be filed with the Complaints Chamber of the Federal Criminal Court (see Art. 80*e*, para. 1 of the EIMP in conjunction with Art. 25(1) EIMP and Art. 37(2)(a) LOAP) may be filed on the grounds of the unlawful or manifestly incorrect application of foreign law, in the cases discussed *above* and covered by Art. 65 EIMP. A person who is personally and directly affected by a mutual legal assistance measure and who has a legitimate interest in having that measure annulled or modified (Art. 80*h*, subpar. b, 30

EIMP), may thus raise before the appellate authority grounds of appeal regarding the unlawful or incorrect application of foreign law (procedural rules concerning the examination of witnesses and experts and the admissibility of other evidence), its conformity with Swiss law, as well as the violation of the right to refuse to testify. In this context, the aforementioned court may also examine the inaccurate or incomplete determination of the relevant facts, as well as the appropriateness of the contested decision in accordance with Art. 49(b) and (c) of the Administrative Procedure Act (PA) in conjunction with Art. 37(2)(b) of the Law on Mutual Legal Assistance (LOAP).

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COMMENTARY ON

Art. 67 IMAC

A commentary by Francesca Bonzanigo

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Art. 67 Principle of speciality

[1] Information and documents obtained through mutual assistance may not be used for investigative purposes or as evidence in the requesting State in any proceedings relating to an offence for which assistance is not admissible.

[2] Any further use shall be subject to approval by the Federal Office. This approval is not necessary if:

a. the act to which the request relates constitutes another offence for which mutual assistance would be granted; or

b. the foreign criminal proceedings are directed against other persons who have participated in committing the offence.

[3] Presence at the mutual assistance proceedings and access to the files shall be permitted under the same conditions (Art. 65*a* para.1).

CONTENT

I. Genesis of art. 67 IMAC ... 272
II. Absolute prohibition on use (para. 1) ... 275
A. The scope of the prohibition ... 276
B. The offence "for which mutual assistance is excluded" ... 277
1. Political, military or fiscal offences ... 277
2. Facts for which the double criminality condition is not met ... 278
III. Additional use of information transmitted (para. 2) ... 279
A. Use subject to approval by the Federal Office of Justice (para. 2, 1st sentence) ... 279
1. Secondary mutual assistance ... 280
2. Transmission of information to a third country ... 282
3. The use of information in other criminal proceedings (controversy) ... 283
B. Use not subject to approval by the Federal Office of Justice ... 284
1. The new legal characterization of the facts (para. 2 let. a) ... 285
2. Use of information against other persons involved in the offence (para. 2 let. b) ... 286
IV. Speciality and early access to information by the requesting state ... 287
A. In the presence of persons participating in foreign proceedings (art. 65a IMAC) (para. 3) ... 287
B. Spontaneous transmission (art. 67a IMAC) ... 288
V. Legal challenge ... 288
Recommended further reading ... 289
Bibliography ... 290

I. GENESIS OF ART. 67 IMAC

1 Art. 67 IMAC governs the principle of speciality, which has its origins in extradition law, in the area of minor mutual assistance. While the principle of speciality is well established among the principles governing extradition, to the point of being considered a "principle of the law of nations", its enshrinement in the field of small-scale mutual assistance is rarer, and Switzerland was initially the exception in transposing this principle to the field of small-scale mutual assistance.

2 The principle of speciality acts as a safeguard for the rules of small-scale mutual assistance. It is designed to ensure that the information transmitted is used only within the limits authorized by the Swiss authorities, and in accordance with the conditions governing cooperation. This guarantees not only the sovereignty of the requested state, but also the rights of those involved in the mutual assistance procedure.

3 In Swiss law, the establishment of the principle of speciality in matters of mutual assistance is linked to the principle of double criminality. At the end of the Second World War, many countries introduced restrictions on the free flow of payments, while at the same time incriminating behaviour that ran counter to them. Switzerland had no such restrictions, and at the time systematically made the granting of mutual assistance conditional on the principle of double criminality. Since such conduct was often combined with ordinary offences, a solution was needed to ensure that Switzerland could meet its commitments to third countries in terms of international cooperation in criminal matters, and that the information transmitted would not be used for purposes for which assistance had not been granted. Subsequently, international cooperation in criminal matters has developed in such a way as to restrict the scope of the double criminality principle in matters of minor mutual assistance. Indeed, the Council of Europe's European Convention on Mutual Assistance in Criminal Matters (ECCJ) does not make the granting of small-scale mutual assistance conditional on double criminality. When signing this convention, Switzerland nevertheless wished to maintain the double criminality requirement for minor mutual assistance, but only in cases where the execution of the request requires the use of coercive measures. A reservation to this effect has therefore been made to art. 5 par. 1 let. a CEEJ. Art. 64 IMAC incorporates the reservation made in art. 5 par. 1 let. a ECCJ into domestic

law. Today, the raison d'être of the principle of speciality no longer lies so much in the principle of double criminality, but rather in the fact that Switzerland is unwilling to cooperate with regard to certain offences, particularly those of a fiscal nature.

Before being included in the IMAC, the principle of speciality in matters of mutual assistance was introduced first by the practice of the Swiss authorities, then expressly in the conventions signed and ratified by Switzerland prior to the law. The reservation made to art. 2 of the ECCJ is the first time this principle has appeared in a legal text. At the time of signing this Convention, the reservation made by Switzerland read as follows: "Switzerland further reserves the right, in special cases, to grant mutual legal assistance under the Convention only on the express condition that the results of investigations carried out in Switzerland and the information contained in the documents or files transmitted shall be used exclusively to investigate and try the offences in respect of which mutual assistance is provided". 4

A provision relating to the principle of speciality in matters of minor mutual assistance was then introduced into art. 5 of the Treaty on Mutual Legal Assistance with the United States (TEJUS). It stipulates that "[t]he testimony, statements, documents, records, evidence or other items, including information contained therein, obtained from the requested State by the requesting State on the basis of this Treaty may not, in the requesting State, be used for the purposes of investigations, nor may they be produced as evidence in proceedings relating to an offence other than that for which mutual legal assistance has been granted". Despite the fact that it appears to be more restrictive than the reservation made in art. 2 ECCJ, legal writers consider that its scope does not diverge from the latter. Art. 5 TEJUS is more detailed than the reservation set out in art. 2 CEEJ, since it specifies in paras. 2 and 3 the use that the requesting State may make of the information transmitted, where this differs from the purpose for which assistance was granted, and, where applicable, the condition(s) to which this use is subject. 5

The principle of speciality, inspired in particular by art. 5 TEJUS, was enshrined in art. 67 IMAC when this law was adopted. It initially consisted of just two paragraphs, the first of which stipulated that "[i]nformation obtained through mutual assistance may not, in the requesting State, be used for investigative purposes, nor may it be produced as evidence in proceedings for which mutual assistance is excluded. Any other use is subject to the approval 6

of the Federal Office". Art. 67 IMAC was amended when the IMAC was revised in 1997. At issue was the definition of "any other use", which was subject to approval by the FOJ. The second sentence of art. 67 al. 1 aEIMP was therefore transferred to art. 67 al. 2 IMAC, and supplemented by two letters specifying the situations in which the FOJ's approval is not required for a use other than that for which mutual assistance was initially granted. Prior to the revision, Art. 67 para. 2 aEIMP governed the application of the principle of speciality to the acquisition of information by a foreign state in the context of Swiss criminal proceedings. It would appear from the Federal Council's Message that the legislator simply wished to transfer it to art. 67 para. 3 IMAC, without modifying its substance and adapting its wording to "take account of all persons authorized to take part in criminal proceedings in Switzerland as injured parties". In reality, this is not what is apparent from the letter of the law. In fact, the provision now refers to art. 65a IMAC, and no longer deals with the situation in which a person is authorized to consult the file of a Swiss national criminal proceeding, but rather that in which the consultation takes place in the mutual assistance proceeding. The marginal heading of art. 67 IMAC was also changed during the revision, from "[u]se of information" to "[r]egulation of speciality".

7 During the revision, the legislator also modified the proviso to art. 2 CEEJ, to bring it into line with art. 67 IMAC. A new letter c has been added to the reservation, covering the cases provided for in art. 67 al. 2 let. a and b IMAC for which the principle of speciality does not prevent the use of the information transmitted. The reference to "special cases" in letter b of the reservation, criti-
cized by legal writers as undefined and superfluous, has also been deleted.

8 Whether initially introduced in art. 67 IMAC in 1981 or revised in 1997, the principle of speciality was not discussed in Parliament, so the provision was adopted, and then amended, according to the version proposed by the Federal Council.

9 The difficulty of formulating the principle of speciality in the field of small-scale mutual assistance, as pointed out by the commission of experts charged with drafting the IMAC, can be seen in the fact that the content of these first three enactments differs, although the substance is intended to be the same. There is also a difference in the terms used in the different language versions of these provisions, since in the case of the reservation to art. 2 ECCJ and art.

5 para. 1 TEJUS, the term "strafbaren Handlungen", i.e. the facts for which mutual assistance is granted, is used in German, whereas the French and Italian versions use the terms "infractions" and "reati" respectively. With regard to art. 67 para. 1 IMAC, while the German and French versions agree in that they use the term "Taten", respectively "infractions", the Italian version uses the term "fatti". As a result, the concrete scope of the principle of speciality is difficult to define, and subject not only to divergent opinions in the legal literature, but also to a practice that deviates from the text of the law. As a result, the contours of the principle of speciality are unclear. However, a precise definition of the principle is necessary, in particular to ensure that enforcement authorities correctly and accurately express the reservation of the principle of speciality when responding to a foreign request.

In its current wording, art. 67 IMAC defines the scope of the principle of speciality by providing, on the one hand, for an absolute prohibition on the use of information (art. 67 al. 1 IMAC; infra II) and, on the other hand, for the additional use of information (art. 67 al. 2 IMAC; infra III.). In the latter category, a distinction is made between additional use subject to authorization by the Federal Office of Justice (art. 67 al. 2 1ère ph. IMAC; infra III. A.) and additional use not subject to authorization (art. 67 al. 2 let. a et b IMAC; infra III. B.). Finally, art. 67 para. 3 IMAC deals with the application of the principle of speciality to one of the mechanisms for early access to information by the requesting state (art. 65a IMAC; infra IV). 10

II. ABSOLUTE PROHIBITION ON USE (PARA. 1)

Art. 67 para. 1 IMAC provides for an absolute prohibition on the use of information and documents transmitted. It stipulates that such information and documents may not be used in the requesting state for the purposes of investigations, nor may they be used as evidence in criminal proceedings relating to an offence for which mutual assistance is excluded. The absolute nature of the prohibition imposed by art. 67 para. 1 IMAC is also apparent from the FOJ's model form concerning the reservation of speciality. The form divides the use of transmitted information into three categories: "permitted use", "excluded use" and "use with prior consent". Configurations covered by art. 67 para. 1 IMAC are essentially included in the "excluded use" category. 11

The absolute prohibition on the use of information applies not only to the proceedings for which assistance has been requested, but to all proceedings in 12

the requesting state, whether pending or not, and against the same persons or third parties.

13 In contrast to extradition, the prohibition on use in art. 67 para. 1 IMAC has no time limit. Whether a person can waive the application of the principle of speciality in the same way as provided for in art. 38 para. 2 let. a IMAC is a matter of controversy in the legal literature. The answer depends on whether the principle of speciality is intended to safeguard the interests of the requested state or those of the person concerned. Moreover, the person concerned by the execution of the request for mutual assistance is not necessarily the person involved in the foreign criminal proceedings, as is the case with extradition. A waiver of the principle of speciality cannot therefore be envisaged insofar as it would affect the rights of a third party.

A. The scope of the prohibition

14 The scope of the prohibition on use imposed by art. 67 para. 1 IMAC is total, encompassing both investigative purposes and production as evidence. In particular, this prohibition is broader than that contained in art. 67a IMAC concerning spontaneous transmission, where secret information transmitted to the foreign state may be used for investigative purposes, but not as evidence. On the other hand, it is similar to the prohibition imposed on persons taking part in the proceedings abroad and assisting in the execution of the request for mutual assistance in Switzerland under art. 65a IMAC.

15 For the offences referred to in art. 67 para. 1 IMAC, the authorities of the requesting state may not, on account of this prohibition, use the information transmitted to implement coercive measures and obtain evidence which they would not have been able to obtain without this information. As for using the information to request mutual assistance from another state, this would already fall within the scope of the investigative purposes for which the information may not be used, in view of the absolute prohibition contained in art. 67 para. 1 IMAC. However, legal scholars point out that prohibiting the requesting State from using information provided by the Swiss authorities to request mutual assistance from a third State would constitute an excessive interference in its sovereignty.

B. The offence "for which mutual assistance is excluded"

1. Political, military or fiscal offences

The notion of "offence for which mutual assistance is excluded" refers in particular to the offences mentioned in art. 3 IMAC which, due to their nature, cannot give rise to cooperation. These include offences of a political, military or fiscal nature, or acts which contravene monetary, commercial or economic policy measures. The nature of the offence is determined in accordance with the conceptions of the requested state, and the requesting state may not rely on the fact that, under its domestic law, the offence concerned falls within the scope of ordinary law. 16

The offence of a political nature is not defined by law. The situations covered by this exception are therefore difficult to determine. However, case law distinguishes three categories of political offence: absolute political offence, relative political offence and offence connected with a political offence. The prohibition on using information obtained in criminal proceedings of this nature does not extend to investigative proceedings initiated by a parliamentary committee of the requesting state. The Federal Court held that it would be contradictory to grant mutual assistance for the prosecution of an ordinary offence, without allowing the requesting state to use the information transmitted to decide on the political consequences of the offence committed. He also pointed out that neither art. 2 ECCJ nor art. 3 para. 1 IMAC preclude the use of the information transmitted for political purposes. The answer would be different if the state of affairs the parliamentary committee was concerned with included offences for which mutual assistance is excluded. 17

The term "fiscal offence" refers to any act which "appears to be aimed at reducing tax revenues". The prohibition does not extend to tax fraud, for which mutual assistance is permitted (art. 3 al. 3 let. a IMAC). It must also be interpreted in accordance with Switzerland's commitments, so that offences relating to indirect taxation in relations with the Schengen states, for which mutual assistance is permitted (art. 50 and 51 CISA), are not covered by the reservation. The same applies to cooperation with the States party to 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 detrimental to their financial interests (AAF). 18

19 In a 1981 ruling, the Swiss Federal Supreme Court held that the absolute prohibition on the use of information transmitted in tax matters also applied to non-punitive tax proceedings, in particular administrative taxation procedures. Consequently, the Federal Office could not authorize the requesting State to use the information in such proceedings. As this ruling was handed down at a time when Switzerland had not made any commitments to any state with regard to administrative assistance in tax matters, and was systematically refusing to cooperate in this area, this solution should no longer prevail today. Switzerland now also cooperates in tax matters, and has entered into double taxation agreements with many countries. Any additional use of information for non-punitive taxation purposes should therefore no longer be considered as an (absolutely) excluded use, but as an additional use requiring the approval of the FOJ within the meaning of art. 67 para. 2 1st ph. IMAC. The FOJ's guidelines seem to go in the opposite direction, since they stipulate that for "related tax proceedings", "[i]nformation transmitted under primary mutual assistance may not be used in the requesting state in another tax procedure without the FOJ's approval".

2. Facts for which the double criminality condition is not met

20 According to case law, the principle of speciality does not preclude the use of information, in the requesting State, to prosecute and judge acts which, in Switzerland, would not constitute an offence. In other words, an offence in the requesting state that does not meet the condition of double criminality is not an "offence for which mutual assistance is excluded".

21 Scholarly opinion does not agree with the solution adopted by case law, and considers that the principle of speciality precludes the use of information for the prosecution of facts that do not constitute an offence under Swiss law. Indeed, insofar as art. 64 para. 1 IMAC makes mutual assistance subject to the condition of double criminality, any use of information must be considered excluded when the facts that the requesting state wishes to pursue do not constitute an offence punishable under Swiss law.

22 We do not share the criticism of the doctrine. The solution adopted by case law is consistent with the system of mutual legal assistance, since the principle of double criminality only applies, under art. 64 IMAC, if the execution of the foreign request requires the use of coercive measures. In fact, the principle of double criminality is only intended, in matters of minor mutual assistance, to

ensure that a person is not subjected, in Switzerland, to coercive measures in favor of a foreign state if, even though the facts had taken place in Switzerland, the authorities would not have been able to implement such measures. Consequently, if the authorities are already in possession of the information, the principle of double criminality is no longer a condition for granting mutual assistance. However, when the question arises of the additional use of information already transmitted abroad, it is no longer necessary to implement new coercive measures.

The case law solution is also consistent with the principles governing the analysis of the double criminality condition. Unlike in extradition cases, where mutual assistance is requested in respect of different offences, it is sufficient for the facts to constitute a single offence under Swiss law, without the analysis having to be carried out for each of the offences presented. 23

Finally, this solution is consistent with a literal analysis of the law. By using the term "offence" (Tat) in art. 67 para. 1 IMAC, the legislator seems to have intended to attribute a specific legal qualification to the state of affairs in which the requesting state is interested, and for which the use of the information transmitted is excluded. This expression is the same as that used in the marginal heading of art. 3 IMAC (nature of the offence; Art der Tat) and it would therefore appear that it does not refer to any act for which mutual assistance is excluded, but rather to the legal qualification of the act concerned. In this respect, the Italian version of art. 67 para. 1 IMAC is confusing in that it uses the term "fatti" and not "reato". 24

III. ADDITIONAL USE OF INFORMATION TRANSMITTED (PARA. 2)

A. Use subject to approval by the Federal Office of Justice (para. 2, 1st sentence)

Art. 67 para. 2 1st ph. IMAC provides that "[a]ny other use [of the information transmitted] is subject to the approval of the Federal Office". This sentence establishes the principle of approval. It is very broadly worded, and poses difficulties of interpretation, since it does not specify which "other uses" are concerned. However, making additional uses subject to FOJ approval is an important issue, since it gives rise to rights for those involved in the mutual assis- 25

tance procedure. When authorization is required, the FOJ has to issue a new decision (known as an "extension of speciality"), which is subject to appeal. The time limit and standing to appeal against this decision are determined in accordance with the rules governing original mutual assistance (i.e. art. 80k IMAC for the time limit and art. 80h IMAC cum 9a OEIMP for standing to appeal).

1. Secondary mutual assistance

26 The use of information transmitted in proceedings other than criminal proceedings is subject to the principle of approval. The term "secondary" mutual assistance is used here, insofar as such cooperation necessarily presupposes prior mutual assistance of a strictly criminal nature, known as "primary" mutual assistance. Unlike "primary" mutual assistance, the execution of which is generally entrusted to a public prosecutor, the FOJ is exclusively competent to rule on "secondary" mutual assistance.

27 Mutual assistance in criminal matters governed by the IMAC is granted only for proceedings "connected with a criminal case" within the meaning of art. 63 para. 1 IMAC. A request for mutual assistance in criminal matters made with the sole aim of circumventing the rules on mutual assistance in civil or administrative matters would be considered abusive. In other words, a foreign state may not attempt to obtain through mutual assistance in criminal matters - and by applying its more incisive measures - what it could not obtain through mutual assistance in civil or administrative matters. Art. 67 al. 2 1st ph. IMAC is therefore an exception to the principle that in order to obtain the information required for proceedings other than criminal proceedings, the corresponding mutual assistance procedure must be used.

28 The FOJ's approval of "secondary" mutual assistance is subject to strict conditions, depending on the nature of the proceedings in which the requesting state wishes to use the information. In the case of civil proceedings, approval may be granted if (i) the subject matter of the proceedings is clearly defined in terms of both substance and the persons concerned, (ii) they are connected with criminal proceedings and (iii) they are intended to compensate persons affected by the offence. In the case of proceedings conducted by a parliamentary committee of inquiry to determine the political consequences of a common law offence, the request must (i) describe with sufficient clarity the political purpose for which the information will be used and (ii) set out a sufficient

link between the proceedings conducted by the committee of inquiry and the offence for which mutual assistance was originally granted. Finally, secondary mutual assistance may also be granted for administrative proceedings where it is intended to answer a preliminary question which is decisive for the criminal proceedings for which the information was transmitted, and which is therefore related to the latter. In essence, as Harari points out, the decisive factor for the FOJ's approval in non-criminal proceedings appears to be a sufficiently close connection with the criminal proceedings for which assistance was originally granted.

29 The Federal Supreme Court has clarified the boundary between "primary" and "secondary" mutual assistance. It has ruled that any procedure aimed at the restitution to the rightful owner of assets obtained through the commission of an offence, whether criminal, civil or administrative, remains in the category of "primary" mutual assistance, and is therefore not subject to the principle of approval. The same applies a priori to claims for damages by the injured party based on the harm caused by the offence giving rise to the request for mutual assistance. Although it has left the question open, the Federal Court recommends interpreting art. 67 IMAC in accordance with art. 5 par. 3 let. a TEJUS. This latter provision states, in general terms, that information may be used for proceedings concerning the payment of damages in relation to proceedings for which legal assistance has been provided, without making any distinction according to the nature of the claim. The advantage of such a solution is that it sets out a simple criterion - that of a link with proceedings for which mutual legal assistance has been provided - rather than the more complex criterion based on the nature of the claims, which also depends on the law of the requesting state. Moreover, it would be contradictory to prohibit a person from using the information transmitted in separate civil proceedings, whereas no such restriction exists in the case of civil proceedings which are ancillary to the criminal proceedings for which mutual assistance has been granted. In the light of this case law, the clarification in the FOJ's model form that "for Schengen States, no prior agreement is required for civil proceedings joined to criminal proceedings in accordance with art. 49 lit. d of the Convention implementing the Schengen Agreement" appears curious. Apart from being superfluous in the case of the Schengen States, this exception does not appear to be limited to them.

2. Transmission of information to a third country

30 The principle of approval also governs the (re-)transmission of information to a third state. The requesting state's application for such approval must set out the details of the proceedings conducted in the third state in sufficient detail, so that the requirements of art. 28 IMAC (respectively art. 14 ECCJ) are met. According to case law, the FOJ must analyze what would have happened to a request for the extension of speciality to a third country if that country had sent it directly to Switzerland. It also follows that the appellant is entitled to invoke all the objections he could have raised if the request had been made directly by the third country (right to be heard, general grounds for refusing mutual assistance, ne bis in idem, proportionality, etc.). The Federal Criminal Court also analyzed the complaint of double criminality, which should not apply under art. 64 para. 1 IMAC, since coercive measures do not, in fact, have to be implemented in Switzerland in response to the request to extend the principle of speciality. Nevertheless, in a judgment concerning a request for extension of the principle of speciality by Bulgaria in favor of Italy, it held that "[t]he surrender of bank documents is a measure of constraint within the meaning of art. 63 al. 2 let. c IMAC, which can only be ordered, according to art. 64 al. 1 IMAC [...] if the state of facts set out in the request corresponds to the objective elements of an offence punishable under Swiss law". The handing over of bank documents is an act of mutual assistance, but cannot be considered as a measure of coercion. Coercion may be applied beforehand, when the documents are collected. Thus, the principle of double jeopardy only applies if it is assumed that the executing authority has taken coercive measures in response to a direct request from the third country.

31 The situation is different where the requesting State wishes to use the information transmitted to submit a request for mutual assistance to a third State. Such use of information is not subject to the principle of approval. The requesting state is authorized to make full use of the information in the proceedings for which assistance has been granted, and is limited only by its own criminal procedural law. Nor is the transmission of information to another criminal authority in the requesting state subject to the principle of approval.

32 Exceptions to the application of the approval principle for the (re-)transmission of information to a third state may arise from international conventions or treaties that Switzerland has ratified. This is particularly the case with art. 5 par. 2 to 5 AAF, which authorizes the contracting parties to freely (re-)trans-

mit information obtained in application of the agreement, provided it is not intended for use in proceedings for which mutual assistance is excluded. Moreover, art. 5 para. 3 AAF specifies that such (re-)transmission is not subject to appeal in the contracting party initially requested.

With regard to the law applicable to such a request for extension of the principle of speciality, the Federal Criminal Court appears to base itself both on the law governing relations with the requesting State and on the law applicable to the third State in whose favor the request for extension has been made. However, its case law does not specify which aspects of the request are governed by the law applicable to the requesting state and which by the law applicable to the third state. However, since the Federal Criminal Court holds that the Swiss authority deciding on a request for extension is obliged to analyze what would have been the fate of the request had it been addressed directly to Switzerland, we consider that the conditions for extension are governed exclusively by the law applying between Switzerland and the third country. The law applicable between Switzerland and the requesting state only applies to those aspects strictly related to the principle of speciality, and more specifically to its scope and limits. 33

3. The use of information in other criminal proceedings (controversy)

More controversial is the question of whether the use of information in criminal proceedings other than those for which assistance was originally granted is subject to the principle of approval. This additional use can be described as "proper" in the sense that the facts against which the requesting State wishes to use the information differ from the facts for which mutual assistance was originally granted. 34

The majority of legal writers consider that any additional use of information in criminal proceedings other than those for which assistance was originally granted is subject to approval by the FOJ, pursuant to art. 67 para. 2 IMAC. This interpretation of the principle of speciality is corroborated by the Federal Council's 1995 message on the revision of the IMAC, which states in general terms that "the State wishing to use the information in other proceedings must submit a supplementary request", without making any distinction according to the nature of the proceedings concerned. 35

36 Practice, on the other hand, adopts a much more flexible interpretation of the principle of speciality, according to which the requesting State may freely use the information transmitted, not only in the criminal proceedings for which mutual assistance has been granted, but also in any other criminal proceedings. The only restriction is that the information must not be used to prosecute or try an offence for which mutual assistance is excluded under art. 67 para. 1 IMAC. According to the FOJ, the information transmitted may thus "be used freely in the proceedings for which mutual assistance was requested, as well as in any other criminal proceedings conducted in the requesting state". The model form for the reservation of speciality also stipulates that "[t]he evidence and information obtained through mutual assistance may be used in the requesting State for investigative purposes and as evidence in the criminal proceedings for which mutual assistance has been requested, as well as in any other criminal proceedings". As for jurisprudence, while it seemed to hold, in two rulings dating back to 1986, that the use of information in (criminal) proceedings other than those for which mutual assistance had been granted was subject to approval by the FOJ, it now holds that this is not the case. Going beyond the wording of the law, it applies the principle of approval only if the requesting state wishes to use the information for additional proceedings that are not criminal in nature.

37 In our view, a satisfactory response to this controversy requires following the text of the law. It is clear from this that the exceptions to the principle of approval are exhaustively listed in art. 67 al. 2 let. a and b IMAC. Thus, if the additional criminal proceedings that the requesting state wishes to carry out do not fall within the scope of art. 67 al. 2 let. a and b IMAC, they must be submitted to the FOJ for approval. However, the additional use "proper" to which we refer here is not covered by the exceptions of art. 67 al. 2 let. a and b IMAC.

B. Use not subject to approval by the Federal Office of Justice

38 Letters a and b of art. 67 al. 2 IMAC govern exceptions to the principle of approval. They deal with a use of the information which differs from that for which assistance was granted, but which is not subject to approval by the FOJ. This additional use may be termed "improper use" or "alternative use", insofar as the facts underlying the request - and for which the requesting state wishes to use the information - remain unchanged, with a change occurring only in

the legal characterization of the facts or in the circle of persons to whom the state of affairs is attributed.

1. The new legal characterization of the facts (para. 2 let. a)

Art. 67 para. 2 let. a IMAC stipulates that the FOJ's approval is not required if 39
the facts giving rise to the request constitute another offence for which mutual assistance may be granted. In order to determine whether the requesting State wishes to use the information in an alternative manner, but still for the same facts, Fiolka proposes using the criterion of "identity of material facts, understood as the existence of a set of facts indissociably linked together", developed by the CJEU in its case law concerning the ne bis in idem principle enshrined in art. 54 CISA. In our view, this criterion is too narrow. On the one hand, it is inconsistent with the text of the law, which does not limit itself to authorizing a legal re-characterization of the offence, but rather a new legal characterization of the facts. Secondly, it would lead to an excessively strict application of the principle of speciality, which would not be compatible with the Swiss system of judicial cooperation. Indeed, mutual legal assistance is governed by the principle of proportionality, analyzed from the angle of potential usefulness. In this respect, case law regularly reminds us that "[i]t is the very nature of mutual assistance to promote the discovery of facts, information and evidence, including those of which the foreign prosecuting authority is unaware. The aim is not only to help the requesting state prove facts uncovered by its own investigation, but also to uncover others if they exist. For the executing authority, this implies a duty of completeness, which justifies communicating all the elements it has gathered that may be of use to the foreign investigation, in order to shed light on all aspects of the criminal mechanism being pursued in the requesting State". The Swiss authorities are thus called upon to actively assist the requesting State in the proceedings it is conducting. A conception of the same facts in art. 67 para. 2 let. a IMAC, such as that derived from art. 54 CISA, would not be reconcilable with this broad interpretation of the principle of proportionality. The broad transmission of information as advocated by case law would be irrelevant if the requesting state could not use it from the outset. In a case of mutual assistance with Spain, the Swiss Federal Supreme Court held that information transmitted in connection with drug trafficking offences could be freely used by the requesting state to prosecute and try money laundering offences "closely connected" with the first proceedings. Thus, the facts at the origin of the request must be broadly under-

stood as facts that form part of the criminal mechanism presented by the requesting State.

40 The requesting State remains limited as to the new legal characterization of the facts by art. 67 para. 1 IMAC. The facts cannot be analyzed from the angle of an offence for which mutual assistance is excluded. Furthermore, where the requesting state wishes to use the information to analyze the facts from the perspective of tax fraud, the exception in art. 67 al. 2 let. a IMAC does not apply, and the FOJ's approval is required. This requirement ensures that the information is not used in proceedings relating to an offence for which mutual assistance is excluded, particularly as the nature of the offence is determined by the law of the requested state.

2. Use of information against other persons involved in the offence (para. 2 let. b)

41 The second exception to the principle of approval is governed by art. 67 para. 2 let. b IMAC and concerns the use of information against persons other than those named in the request for mutual assistance. For such use to be permissible, the letter of the law stipulates that the persons concerned must have "participated in the commission of the offence". We agree with Fiolka, for whom this exception concerns the fact presented in the request, determined from the angle of the principles developed with regard to art. 54 CAAS. If the information is used against persons who have committed another offence which is nevertheless part of the criminal mechanism presented in the request, the exception in art. 67 al. 2 let. a IMAC will apply in accordance with what we have retained supra n. 39.

42 The notion of "persons having participated in the commission of the offence" is not clearly defined. Case law has never ruled on this aspect, while evasively mentioning that the notion concerns the "Mittäter etc.". In our view, it refers to any form of participation, whether principal (co-activity, mediation) or accessory (complicity, instigation).

43 The solution adopted in art. 67 para. 2 let. b IMAC differs from that of TEJUS, which allows the use of information against persons suspected or accused of having participated in an offence for which mutual legal assistance has been granted, or of having promoted such an offence, on condition that the requested State has been able to "give its opinion" (art. 5 para. 2 let. b TEJUS).

IV. SPECIALITY AND EARLY ACCESS TO INFORMATION BY THE REQUESTING STATE

A. In the presence of persons participating in foreign proceedings (art. 65a IMAC) (para. 3)

Art. 67 para. 3 IMAC specifies that the principle of speciality also applies when persons participating in foreign proceedings are authorized to be present at the execution of the request for mutual assistance (art. 65a IMAC). This provision applies only to information arising from the mutual assistance proceedings in which the person is exceptionally authorized to take part. It does not (or at least no longer) govern the situation in which a person becomes aware of information in Swiss criminal proceedings. Nevertheless, as far as the foreign authority is concerned, the principle of speciality will also apply in this case, by virtue of art. 34 al. 2 OEIMP, which stipulates that if a foreign authority receives authorization to consult a Swiss file outside mutual assistance proceedings, the Swiss authorities must draw its attention to the fact that the information provided may not be used in proceedings for which mutual assistance is excluded (art. 34 al. 1 let. a OEIMP) and that any other use of the information is subject to the consent of the Federal Office (art. 34 al. 1 let. b OEIMP). On the other hand, the principle of speciality cannot be invoked against a foreign, non-state plaintiff who has acquired knowledge of the information by consulting the file of Swiss domestic criminal proceedings and wishes to use it in civil proceedings abroad. 44

Art. 67 para. 3 IMAC was introduced in the 1997 revision and refers directly to art. 65a IMAC, also introduced at that time. In view of the latter provision, the reservation made in art. 67 para. 3 IMAC in favour of the principle of speciality seems superfluous. In fact, art. 65a para. 3 IMAC stipulates that the presence of persons participating in the proceedings abroad in the mutual assistance procedure "may not result in facts falling within the sphere of secrecy being brought to their knowledge before the competent authority has ruled on the granting and scope of mutual assistance". Case law interprets this provision as meaning that "consultation of the file must be carried out in such a way as to ensure that no information of use to the requesting authority reaches it before the closing decision has come into force". This is embodied in the obligation on the requesting State to provide guarantees, prior to consultation of the file, whereby it undertakes to adopt a passive attitude and not to make 45

any use, either for investigative purposes or as evidence, of the information of which it becomes aware, before it is transmitted to it by virtue of the closing decision. It follows that the mechanism of art. 65a IMAC - like that of art. 67a IMAC to which we refer - already provides cautèles aimed at preventing the use of information contrary to art. 67 IMAC.

B. Spontaneous transmission (art. 67a IMAC)

46 Art. 67 IMAC does not apply directly to spontaneous transmission (art. 67a IMAC). However, the principle of speciality also applies in this area, but in an "adapted" form, according to case law, derived from art. 67a para. 5 IMAC. In fact, the system set up by art. 67a IMAC provides for safeguards which restrict the foreign state's power of disposal over the information transmitted, and which have the effect of guaranteeing compliance with the principle of speciality set out in art. 67 IMAC. The same applies a priori to the system set up by art. 80dbis IMAC (advance transmission of information and evidence) and art. 80dter ff IMAC (governing joint investigation teams). In other words, as far as spontaneous transmission is concerned, art. 67a para. 5 IMAC acts, among other things, as a "safety net for the safety net" of mutual assistance rules on spontaneous transmission.

47 Art. 67a para. 5 IMAC has two main aspects. The first is that the Swiss authorities must not spontaneously transmit secret information to the foreign state if it appears from the outset that this concerns an offence for which mutual assistance is excluded. The second is that the information must be used in the requesting state solely for investigative purposes, in particular to submit a request for mutual assistance to Switzerland. It may not be used as evidence. Such use of the information will only be possible once mutual assistance - if requested - has been granted. In this case, the transmission of information will follow the ordinary procedure ending with the closing decision, which will reserve the principle of speciality (art. 67 IMAC).

V. LEGAL CHALLENGE

48 In mutual assistance proceedings in Switzerland, as the requested state, the risk of violation of the principle of speciality may be raised in the appeal against the closing decision. In theory, such a risk could lead the Swiss authorities to refuse mutual assistance. It can only be raised by the person entitled to appeal against the decision (art. 80h IMAC cum 9a OEIMP), and the al-

leged risk must be likely to affect him or her personally. In other words, the risk cannot be invoked to protect the interests of third parties. As the principle of trust prevails in international relations, the chances of success of such a claim are slim, given that, to our knowledge, it has never yet been accepted by the courts. Moreover, a past violation by the requesting State of the principle of speciality is not sufficient to establish the existence of such a risk and break the trust that reigns in inter-State relations.

An appeal may also be lodged in Switzerland, as the requested state, against 49
the decision to extend speciality. Standing to appeal is determined according to the rules governing standing to appeal against the decision to close the procedure, i.e. under art. 80h IMAC cum 9a OEIMP. The consequence of this is that if the extension of speciality is granted in favour of using the information against a third party mentioned in the banking documentation but who is not the holder of the account which was the subject of the original request for mutual assistance (art. 9a let. a OEIMP and the relevant case law), this person should probably not be granted standing to appeal against the extension decision. The same applies, mutatis mutandis, to an extension decision in favor of the use of information against a person who has not been directly subjected to the search within the meaning of art. 9a let. b OEIMP (and the relevant case law).

If the requesting state does not respect the principle of speciality once the in- 50
formation has been transmitted, the persons concerned have no real legal means, in Switzerland as the requested state, to complain about this violation. The most they can do is report the matter to the FOJ, which will decide on the consequences of the violation for future relations with the requesting state. There is no right to demand a reaction from the Swiss authorities, in particular by ordering the requesting state to destroy or return the information transmitted. Violation of the principle of speciality may be invoked in foreign proceedings in order to exclude evidence considered unlawful, it being specified that the existence of this legal remedy depends exclusively on the law of the foreign state.

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COMMENTARY ON

Art. 67a IMAC

A commentary by Daniel Schaffner / Yves Rohner

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Art. 67*a* Spontaneous transmission of information and evidence

[1] An authority prosecuting offences may, without being requested to do so, transmit to a foreign authority prosecuting offences information or evidence that it has gathered in the course of its own investigation, when it determines that this transmission may:

a. permit the opening of criminal proceedings; or

b. facilitate an ongoing criminal investigation.

[2] The transmission as defined in paragraph 1 does not have any effect on the criminal proceedings pending in Switzerland.

[3] The transmission of evidence to a State with which Switzerland does not have an international agreement shall be subject to authorisation by the FOJ.

[4] Paragraphs 1 and 2 do not apply to evidence that is subject to the rules on secrecy.

[5] Information that is subject to the rules on secrecy may be transmitted if it may enable the foreign State to present a request for mutual assistance.

[6] A record shall be made of each spontaneous transmission.

CONTENT

I. History 297
II. Classification of the provision in the context of international criminal law cooperation 298
A. Characteristic: exception to the request principle in mutual assistance 298
B. Systematic location in the law 299
C. Demarcation 299
1. Within international mutual assistance in criminal matters 299
a. Ordinary mutual assistance upon a foreign request 299
b. Active mutual assistance on the part of Switzerland 301
2. Mutual assistance external context 301
a. International administrative assistance 301
b. International police cooperation 302
D. International legal bases for unsolicited (mutual assistance) transmission 302
1. Overview 302
2. Relationship to Art. 67a IMAC 303
E. Practical relevance of Art. 67a IMAC 304
III. Detailed regulatory content of Art. 67a IMAC 305
A. Overview 305
1. The forms of unsolicited transmission in accordance with Art. 67a IMAC 305
a. Related to the subject of the transmission: information or evidence (not concerning the secret area) 305
b. With regard to the (non-)existence of a mutual assistance request: advance and supplementary forms 305
2. Authorities involved 306
3. General section: Definitions 307
a. Information and evidence 307
b. Secret area 309
4. Art. 67a IMAC as an optional provision 310
B. The general conditions and limits of mutual assistance also apply to unsolicited submissions 310
C. The two types of transmission under Art. 67a IMAC 311
1. Unsolicited transmission of evidence (and information) not relating to classified information 312
a. Subject of the transmission: evidence (and information) gathered for a criminal investigation that is not secret (para. 1) 312
b. Purpose of transmission: Assumed suitability with regard to future criminal proceedings or a pending criminal investigation abroad 313
c. Negative requirement: no effect on Swiss criminal proceedings (para. 2) 315
d. Basis: international treaty or consent of the Federal Office of Justice 316

2. Unsolicited transmission of information concerning classified material 316
a. Subject of transmission: information concerning the secret area 316
b. Purpose of the transmission: assumed suitability for filing a request for mutual assistance to Switzerland 316
c. Further requirements 318
3. Procedure for unsolicited transmission 318
a. In general 318
b. Observance of the specialty principle in particular 319
c. Recording requirement under Art. 67a para. 6 IMAC 320
d. Right to be heard? 320
D. Legal protection in connection with unsolicited transfers under Art. 67a IMAC 321
1. (Limited) legal protection in Switzerland 321
2. Other legal consequences of unlawful unsolicited transfers 322
Bibliography 323
Materials 329

I. HISTORY

In 1997, Art. 67*a* IMAC entered into force. It was described by the then Minister of Justice, Mr. Koller, as an "important innovation in the Mutual Assistance Act". The Federal Council considered the new provision on unsolicited transmission as a **modern means of combating organized crime** and **cross-border economic crime**; the aim was to prevent the misuse of Switzerland as a financial center for such purposes. In view of the fact that the criminal acts were considered to be spread across different countries, thus preventing the relevant conduct from being prosecuted, (new) official counter-strategies were considered indispensable, with a particular focus on increasing the effectiveness of international criminal law cooperation. Art. 67a IMAC provided a paradigm shift: The unsolicited transmission regulated here breaks away from the typical request principle of international mutual assistance in criminal matters, according to which mutual assistance in criminal matters is provided solely upon request (request) by the requesting state to the requested state. If information and certain evidence can also be transmitted to another state without being requested, this should enable the Swiss authorities to play an active role in preventing useful circumstances for criminal proceedings abroad from going untapped because the competent authority there is not even aware of them. In addition, Art. 67a IMAC was created with the aim of establishing the criminally relevant circumstances in connection with international crime as quickly as possible. 1

During the parliamentary debates, Art. 67a IMAC **was not without controversy**. For example, the lack of legal protection in connection with unsolicited transmission was criticized: efficiency must find its limit where the rule of law is endangered. According to the provision, the possibility of passing on secret information to third parties without being asked threatens to unhinge the entire Mutual Assistance Act. Ultimately, Parliament rejected the proposal, which was raised during its deliberations, to restrict the scope of Art. 67*a IMAC* to serious acts with international implications, but added Para. 6 (obligation to record unsolicited transmissions). 2

The creation of an unsolicited transmission option as an instrument of mutual assistance should be seen in the context of Switzerland's 1993 **ratification of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime** of November 8, 1990 (the 3

"MLA"). Art. 10 of the Money Laundering Convention contains a provision on the "spontaneous transmission of information". Art. 67*a of the* IMAC is regarded as its – more extensive – domestic implementation, in particular because it refers not only to information but also to evidence.

4 However, unsolicited assistance for foreign authorities was not a new phenomenon when Art. 67a IMAC was created: on the one hand, corresponding instruments relating to information were **already established as part of police cooperation** at the time, and on the other hand, unsolicited assistance was **sometimes** provided *praeter legem* (as "entraide sauvage").

II. CLASSIFICATION OF THE PROVISION IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW COOPERATION

A. Characteristic: exception to the request principle in mutual assistance

5 The authorization of Swiss mutual assistance in criminal matters to foreign countries without a corresponding prior request constitutes the actual *raison d'être* of Art. 67*a* IMAC: information and certain evidence can be transmitted by the Swiss authorities to foreign countries in accordance with the marginal note "unsolicited" (spontaneously) – i.e. without the existence of a corresponding foreign request for legal assistance – by way of mutual assistance. The absence of a request means *eo ipso* that a final procedural order specifically with regard to unsolicited submissions is no longer required, since Art. 80*d* IMAC explicitly requires a completed request for such an order. Accordingly, Art. 67*a* IMAC can ultimately be seen in the context of the instruments of so-called **dynamic legal assistance**: Their common denominator is that, for reasons of effectiveness and expediency, mutual assistance is provided to foreign countries without a final decree at all, as in the case of Art. 67a IMAC, or, as in the case of an early transmission under Art. 80*d*^{bis} IMAC, at least before the final decree takes legal effect.

6 The **waiver of a request for mutual assistance** has significant consequences:

- In the case of an unsolicited transfer, the subject matter of the transfer cannot be restricted to the **requests** made in the request for mutual assistance, which raises doubts with regard to the principle of proportionality.

- Furthermore, it is precisely the request, namely the description of the facts attached to it (see, for example, Art. 28 para. 3 let. a IMAC), that forms the starting point for the examination to be carried out by the requested state as to whether the **conditions for granting mutual assistance** are met or whether there are no obstacles to such assistance.
- Finally, there are far-reaching consequences for **legal protection** in connection with unsolicited transmissions: It is precisely the final ruling – which does not exist in the case of Art. 67*a* IMAC – that opens up the (preventive) legal process in the IMAC system.

B. Systematic location in the law

As a provision of Part Three of the Act, Art. 67*a* IMAC refers **exclusively to 'other' ('limited') mutual assistance**. The handover of the objects referred to in the provision (evidence and information) is also a feasible legal assistance measure within the framework of 'other' legal assistance (see Art. 63 IMAC: information, procedural acts permitted under Swiss law and other official acts). The other forms of international mutual assistance in criminal matters (see Art. 1 para. 1 IMAC) are not accessible to unsolicited execution based on Art. 67a IMAC: Switzerland cannot extradite unsolicitedly, nor prosecute vicariously without a corresponding request, nor execute a criminal judgment vicariously. However, there is the possibility that an unsolicited transmission by Switzerland in accordance with Art. 67a IMAC could lead to a later request (concerning all forms of mutual assistance) addressed to Switzerland. 7

C. Demarcation

1. Within international mutual assistance in criminal matters

a. Ordinary mutual assistance upon a foreign request

If Switzerland provides international mutual assistance in criminal matters upon a request addressed to it, then, precisely because of the existence of the request, it is, by definition, not an unsolicited transmission; recourse to Art. 67*a* IMAC is out of the question. The specifics that apply in this regard, namely the limited legal protection, do not apply. There is **no right of choice for the Swiss authorities**: if a request for legal assistance is covered by a request, they may not transmit unsolicited information. However, a point of contact 8

may arise if the request for legal assistance has been made on the basis of a prior unsolicited transmission (in particular Art. 67*a* para. 5 IMAC). In this case, it can also be argued against the final decree issued in the ordinary legal assistance proceedings that the conditions for the unsolicited transmission that took place were not met at the time.

9 Against this background, the **interpretation of requests for mutual assistance addressed to Switzerland in terms of their content or scope proves to** be central in connection with Art. 67*a* IMAC. The starting point here is the prohibition of excess, derived from the principle of proportionality, according to which the request may not go beyond the requests made in the request. Nevertheless, Switzerland interprets the request submitted to it broadly, in accordance with the purpose of the legal assistance sought, i.e. generously in favor of the requesting state: The request should cover any assistance, even if not explicitly mentioned, that may be considered potentially relevant for the other state. This includes not only incriminating circumstances with regard to a criminal offense under foreign criminal law, but also those that may have an exculpatory effect with regard to the allegations under investigation. The interpretation practice therefore has an overall restrictive effect on the scope of application of Art. 67*a of the* IMAC.

10 In the context of distinguishing spontaneous transmission of information from mutual assistance provided in response to a request, **two special cases** must be considered:

- It is not considered spontaneous transmission if Switzerland returns a request addressed to it to the requesting state for the purpose of **improvement or supplementation** (Art. 78 para. 3 IMAC, Art. 28 para. 6 IMAC) or asks it follow-up questions (Art. 80*o.* IMAC): there is again a reference to a request, which specifically excludes the application of Art. 67*a.* IMAC.
- Under the heading of "provisional measures", the Federal Office of Justice is granted the authority under **Art. 18 para. 2 IMAC** to maintain the status quo (in particular to secure endangered evidence) or to protect threatened legal interests in the event of imminent danger, even if no request for mutual assistance has yet been submitted, provided that it has merely been announced. These measures are lifted if the other state does not submit a request by the deadline. This ultimately irrevocable link to a request shows that Art. 18 para. 2 IMAC does not concern unsolicited transmission. Fur-

thermore, the provision does not confer any authority to actually provide mutual assistance, but is aimed solely at ensuring that it is provided domestically.

b. Active mutual assistance on the part of Switzerland

The fact that there is no request addressed to Switzerland means that the unsolicited transmission does not become active mutual assistance in the sense that Switzerland would request mutual assistance from abroad. Rather, **Art. 67*a* IMAC** is a **special case of passive mutual assistance**: Switzerland provides mutual assistance under Art. 67*a* IMAC even though it is not based on a prior request that would include the specific assistance. Thus, unlike a Swiss request for legal assistance, the unsolicited transmission primarily serves the interests of the (other) state that receives it. Following the unsolicited transmission, the latter either does not contact Switzerland because it does not require any further assistance, or it submits a (proper) request for legal assistance to Switzerland based on the information obtained through the unsolicited transmission. 11

According to Federal Supreme Court case law, active mutual assistance requested by Switzerland **(subsequent) precludes unsolicited transmissions**. 12

2. Mutual assistance external context

a. International administrative assistance

Administrative assistance is a different form of cross-border cooperation between authorities that is relevant in practice and should be distinguished from mutual assistance. In particular, the procedures and legal protection are structured differently in each case. In the context of Art. 67*a* IMAC, administrative assistance-based cooperation is occasionally mentioned, especially since the provision also refers to information that is typically passed on on the basis of administrative assistance. An unsolicited transmission of information based on Art. 67*a* IMAC in accordance with Art. 67*a* para. 5 IMAC should therefore be referred to as an "administrative assistance-like spontaneous transmission". This dogmatic observation does not alter the fact that **unsolicited transmissions under Art. 67*a* IMAC** are, at least in principle, based **on the principles of mutual legal assistance**, given the legal basis. For example, the legal protection in connection with Art. 67a IMAC – to the extent that it exists – is 13

generally exercised in the first instance by the Federal Criminal Court, which is the competent court for matters of mutual assistance, and not by the Federal Administrative Court, which is usually the court of first instance for administrative assistance.

b. International police cooperation

14 Art. 67a IMAC governs unsolicited transfers by law enforcement authorities, which in this context specifically excludes police authorities. However, the **legal bases for specific police cooperation** that are relevant for their international cooperation sometimes **also contain provisions on transfers without prior request**. Examples of bilateral agreements are Art. 11 of the Swiss-German police treaty ("information transmission without request") or Art. 11 of the agreement between the Swiss Federal Council and the French Republic on cross-border cooperation in justice, police and customs matters ("unrequested cooperation", regarding information). Art. 46 of the Schengen Convention also provides a legal basis for the international spontaneous transmission of information in the context of police cooperation.

D. International legal bases for unsolicited (mutual assistance) transmission

1. Overview

15 Apart from the Swiss federal legal basis according to Art. 67*a of the* IMAC, regulations concerning the provision of mutual assistance without prior request can also be found **in international treaties**. Of particular relevance to European mutual assistance is Art. 11 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 2001 ("Spontaneous Information"). In addition, bilateral mutual assistance treaties that Switzerland has concluded – as supplementary treaties to the European Mutual Assistance Convention (EMAC) or outside the European judicial area (e.g. with Mexico or Brazil) – must be observed. Sector-specific international treaties may also contain corresponding legal assistance provisions (e.g. Art. 10 of the United Nations Convention against Transnational Organized Crime in connection with combating money laundering or Art. 46 para. 4, para. 5 of the United Nations Convention against Corruption with regard to combating corruption). Spontaneous transmission – of evidence and information – is then

countered in the legal assistance relationship between Switzerland and the European Union.

2. Relationship to Art. 67*a* IMAC

The existence of international treaty provisions concerning unsolicited transmission also requires a determination of when the Swiss authorities, in an individual case, rely on unsolicited transmission for an intended legal assistance service and when, on the other hand, action is to be taken in accordance with Art. 67*a* IMAC. It is also questionable whether Switzerland can resort to Art. 67a IMAC in the context of treaty-based mutual assistance if the relevant international treaty does not specifically regulate unsolicited transmission. 16

The starting point is Art. 1 para. 1 IMAC: in accordance with the general **primacy of public international law over domestic law** under Swiss law, the IMAC applies only to the extent that "international agreements do not provide otherwise". Consequently, unsolicited transmission is governed primarily by the general rules, in accordance with any existing international treaty provisions of a self-executing nature that are to be observed in mutual assistance with the respective state. Nevertheless, Art. 67*a* IMAC is also relevant in mutual assistance practice in contractual relations: 17

- On the one hand, international treaty provisions regarding unsolicited transmission contain **references back to national law**, so that Art. 67a IMAC is also relevant. Incidentally, according to the case law of the Federal Supreme Court, such an express reservation is even dispensable: if the international treaties contain mere **"may" provisions** for unsolicited transfers, no mutual assistance that goes beyond national law (more permissive) may be provided on the basis of them. Overall, Art. 67*a IMAC* consequently substantiates the international law provisions, if more restrictive in individual cases.
- In connection with the application of Art. 67a IMAC, the case law also relies on the **principle of favorability under mutual assistance law**, according to which the IMAC also applies to treaty-based mutual assistance if "Swiss domestic law sets lower requirements for mutual assistance." In concrete terms, this means in particular that the mutual assistance instruments available on a treaty basis are extended in individual cases to include the options provided for under domestic law. With regard to Swiss-Ukrainian mutual assistance, the Federal Supreme Court explicitly linked

Art. 67*a* IMAC with considerations of favorability: According to the court, Art. 67*a* IMAC aims to serve as a legal basis for the unsolicited transmission of information and evidence to all states that are not linked to Switzerland by a treaty with an equivalent standard. Since mutual assistance between Switzerland and Ukraine was at the time handled solely on the basis of the 1951 Convention, which itself contains no provision regarding unsolicited transmission, the Federal Supreme Court considered the supplementary recourse to Art. 67*a of the* IMAC to be legitimate. Based on the favorability principle, Art. 67*a* IMAC thus comes into play if the applicable treaty contains no such provision or a less far-reaching one, i.e. one that is less permissive with regard to the permissibility of unsolicited transmission.

The principle of favorability under the law of mutual assistance has meanwhile been criticized in legal writing. In general, the accompanying facilitation of the broadest possible mutual assistance – in view of the often conflicting individual interests that must also be taken into account in international criminal proceedings conducted on the basis of the international division of labor – is seen as one-sided in a way that is to be rejected. In the specific context of unsolicited transmission, the article convincingly points to the protection of individuals inherent in Art. 67*a* Para. 3 IMAC (requiring either a treaty basis or the consent of the Federal Office of Justice), which specifically requires a the national law, e.g. with regard to the scope of application or the means of transmission, to apply a more restrictive state treaty provision regarding unsolicited transmission, without enabling (unsolicited) legal assistance via Art. 67a IMAC.

E. Practical relevance of Art. 67a IMAC

18 Pursuant to the duty of the Swiss authorities providing unsolicited information, as established by the Federal Supreme Court, to inform the Federal Office of Justice – which is the supervisory authority for international mutual assistance in criminal matters (see Art. 3 IMAC) – about all mutual assistance provided on the basis of Art. 67*a* IMAC, statistical material is available regarding the practical relevance of Art. 67*a* IMAC: While 117 cases are listed for 2023, there were 128 in 2022 and 116 in 2021. The **previous high** was reached **in 2020, with 168 unsolicited transmissions**.

As far as can be seen from the available case law, the practice exclusively relies on Art. 67a IMAC in order to **unsolicitedly transmit information concerning the secret area to foreign countries** (para. 5). The possibility of transmitting evidence not concerning the secret area (para. 1, 4), which is also included in the provision, does not appear to be used. 19

III. DETAILED REGULATORY CONTENT OF ART. 67*A* IMAC

A. Overview

The provision of international mutual legal assistance by Switzerland requires a legal basis, particularly in view of its **relevance to individual rights**, but also due to the official secrecy that binds Swiss (criminal) authorities and is punishable under Art. 320 SCC. Art. 67a IMAC governs when and under what circumstances mutual assistance can be provided to foreign countries without a request from Switzerland, and thus allows the authorities involved to deliberately lift official secrecy. 20

1. The forms of unsolicited transmission in accordance with Art. 67a IMAC

a. Related to the subject of the transmission: information or evidence (not concerning the secret area)

Art. 67a IMAC inherently differentiates between evidence and information. In principle, both categories can be the subject of an unsolicited transmission, but the law treats them differently: if the **secret area is affected**, **evidence**, unlike information, which can in principle be transmitted, cannot **be handed over under Art. 67*a*** IMAC (cf. paras. 4 and 5). 21

b. With regard to the (non-)existence of a mutual assistance request: advance and supplementary forms

Depending on whether the unsolicited transmission by Switzerland **occurs in parallel with a request for mutual assistance** that the foreign state has submitted to Switzerland, or not (independently), a distinction is made be- 22

tween a "forme complémentaire" (complementary to a request) and a "forme anticipée" (anticipating a request):

- According to the Federal Supreme Court's definition, the "**anticipée**" refers to unsolicited transmissions that take place independently of any mutual assistance proceedings ("indépendamment de toute procédure d'entraide") and that are likely to result in a request for mutual assistance (see Art. 67*a para.* 5 IMAC).
- In the case of the "**forme complémentaire**", information can be transmitted that is not requested in the request, even on the basis of a broad interpretation in line with practice, or that concerns a matter that is not covered by the request, but which, from the point of view of the Swiss authorities, is likely to advance the proceedings in the requesting state. In this sense, the existence of a request for mutual assistance does not *ipso facto* preclude recourse to Art. 67*a* IMAC. This supplement to pending requests for mutual assistance addressed to Switzerland by means of unsolicited submissions in the form of a "complementary request" relativizes, as does the broad interpretation of the request, the fundamental limitation of a requested mutual assistance to the requests made in the request (prohibition of excess). In the scenario of the coexistence of ordinary mutual assistance proceedings in response to a request and unsolicited transmission by means of the "forme complémentaire", it is necessary to determine in each case the basis on which a particular assistance has been provided, since legal protection has been specifically defined in connection with Art. 67*a* IMAC. However, it is correctly pointed out that, due to the broad interpretation of requests for mutual assistance addressed to Switzerland, the "forme complémentaire" pursuant to Art. 67*a* IMAC is of only marginal importance.

2. Authorities involved

23 The authorities entitled to make unsolicited transmissions based on Art. 67a IMAC are **primarily public prosecutors or the Office of the** Attorney General. In the literature and the Federal Council Dispatch, reference is also made to Swiss criminal justice authorities, with (criminal) courts also mentioned. However, the police or administrative authorities are not permitted to proceed in accordance with Art. 67*a* IMAC. Assistance under Art. 67*a* IMAC must be provided to the authority to which the Swiss authority would turn if it

had been contacted in the matter in question by means of a request for mutual assistance, in accordance with the legal basis applicable in the respective individual case in relation to the assisted state.

3. General section: Definitions

a. Information and evidence

In addition to Art. 10 of the GWÜ, Art. 67*a* IMAC includes not only information as the subject of a possible unsolicited transmission, but also evidence; this is a **Swiss specificity**. 24

Even though practice seems to be focused on the unsolicited transmission of information concerning the secret area, the distinction between the term "information" and the term "evidence" proves to be central to the handling of Art. 67a IMAC, since the ability to transmit *de lege lata* has been subject to different regulations (exclusion for evidence for affected secret areas, but not for information, Art. 67*a* para. 4, 5 IMAC). A Swiss authority that transmits unsolicited information must therefore determine whether the subject of the transmission is actually information. In this regard, there is a certain uncertainty in practice with regard to the substantive specification of the two terms. According to established case law, the determining factor is not the type of procurement in Switzerland, but the **possible use in the state** receiving the unsolicited transmission. The Federal Supreme Court considers the establishment of general definitions to be "délicat" in this regard, since the contours of the terms could overlap and the difference is more of a matter of degree than of principle. Whether the matter at hand is information or evidence must therefore be decided on a case-by-case basis. According to case law, evidence is characterized by the fact that it can be assumed that the foreign state could use it directly for evidential purposes – due to its nature, a high degree of detail or its official character – or base a prosecution on it. 25

In the case law of the Federal Criminal Court, there is also an approach that draws on systematic considerations, according to which – in order to substantiate the concept of evidence – one should, as a fallback, **be guided by the rules of procedure**: In Switzerland, this includes examination records, video and telephone conference recordings (Art. 144 of the Swiss Criminal Procedure Code), written reports in accordance with Art. 145 of the Swiss Criminal Procedure Code (instead of examinations), expert opinions (Art. 185 CrimPC) 26

and records of inspections (Art. 193 para. 3 CrimPC), objects of evidence in accordance with Art. 192 CrimPC, reports and information in accordance with Art. 195 CrimPC, as well as files consulted on the basis of Art. 194 CrimPC. By contrast, information ("simple information") is – in negative terms – defined as all data available to the prosecuting authority that cannot be equated with evidence or cannot be used as such; this is also referred to as pre-evidence.

27 A glance at the concept of evidence in Swiss criminal procedural law in particular harbours a certain potential for misunderstanding: the question arising in connection with Art. 67a of the IMAC is whether **an object of transmission in proceedings** *in a foreign country* can be evidence. However, the Swiss authorities do not, as a matter of principle, examine the relevant code of criminal procedure of the state receiving the unsolicited transmission. Instead, the criteria presented – which are always based on an understanding of Swiss law, not only when the terms of the CrimPC are explicitly included – are used as a point of reference to distinguish between evidence and information.

28 **Examples of explicit qualifications by case law**:

- "Documentation bancaire" under the protection of Art. 47 BankG (in particular bank statements and bank correspondence): (Evidence concerning the secret area)
- Indication of the existence of a bank account, stating in particular the ownership and the beneficial ownership: (Information concerning the secret area)
- Indication of the existence of an account, including those of their family members, at Swiss banks named by name, in connection with an alleged criminal conduct: (Information concerning the secret area)
- Table ("summary table" with the names of the persons accused in Swiss criminal proceedings, the case numbers, as well as information on date of birth, professional activities, marital status and ID card number, bank account number, any authorized persons, the amounts in the accounts and any comments on the freezing of the assets: (information concerning the secret section)
- Summary of the results of a Swiss criminal investigation, including information about a person who holds the beneficial ownership of companies

and whose accounts were frozen as a result of the investigation, as well as the location of the accounts without exact details: (information concerning the secret area)

- MROS report mentioning a banking relationship: information
- Information about the opening of criminal proceedings in Switzerland: information
- Photographs of archaeological objects found in Switzerland: (Presumed) information
- Hearing transcripts: Evidence

The conventional distinction made in practice between evidence and information on the basis of the "nature of the elements to be transmitted" with a view to the foreign proceedings, but with recourse to Swiss concepts, has **in the new literature rightly been criticized**. 29

b. Secret area

The concept of the secret area is referenced in **Art. 67*a* IMAC in paras. 4 and 5** and thus defines the subject matter of admissible unsolicited transmissions in more detail: evidence relating to the secret area may – in contrast to information (para. 5) – not be transmitted unsolicited (para. 4). 30

The law does not specify what is meant by the secret area in the context of Art. 67a IMAC. Only Art. 9 IMAC makes a general statement about the "protection of the secret area": this is based on the (criminal procedural, cf. Art. 12 para. 1 sentence 2 IMAC) right to refuse to give evidence, whereby Art. 246 - 248 CrimPC apply mutatis mutandis to the search of records and the sealing of evidence. The literature, with reference to the materials, predominantly assumes that the scope of the secret area within the meaning of Art. 67a IMAC is to be defined **more broadly than that according to Art. 9 IMAC** and includes all legally protected secrets. This corresponds to the opinion of the rapporteur in the parliamentary deliberations, according to which the secret area in this context is protected by constitutional, civil and criminal law provisions, so that in addition to the protection of secrets under criminal procedural law, in particular manufacturing, business and banking secrecy are covered. 31

This view has also been established in case law, with **banking secrecy being at the forefront**. 32

4. Art. 67a IMAC as an optional provision

33 The unsolicited transmission is not an automatism, but is at the **(discretionary) discretion of the Swiss authorities** ("can" provision). In accordance with the general principles, this discretion must be exercised in accordance with the duty of office. In connection with the exercise of discretion specifically in connection with Art. 67a IMAC, case law and legal literature emphasize, with reference to the Federal Council Dispatch, the fundamentally required restraint in the application of the provision, in order not to encourage circumvention of the rules of mutual assistance, in particular denunciations or an uncontrolled flow of information to other states. In addition, the decision on whether to make unsolicited submissions is also determined by Art. 67*a para.* 2 IMAC, according to which priority is generally given to the Swiss (criminal) proceedings in the context of which the potentially transferable items are collected.

B. The general conditions and limits of mutual assistance also apply to unsolicited submissions

34 Although it is a special case, unsolicited transmission involves 'minor' criminal law assistance provided by Switzerland to other countries. It follows that the **generally applicable conditions and restrictions for this must also be taken into account with regard to the application of Art. 67*a*** IMAC, insofar as the provision does not deviate from it as a *lex specialis*. This is particularly necessary with regard to Art. 67*a* para. 5 IMAC, since the unsolicited transmission of information concerning the secret area aims to enable a request for mutual assistance from the other state: however, if this is prevented from the outset by foreseeable obstacles, it is not permitted to transmit the information unsolicitedly, as there would be no point in doing so.

35 The **international treaties** that may be applicable for the general conditions and limits of mutual assistance as well as the **rules of the IMAC** are relevant. For the latter to be invoked, criminal proceedings must be supported abroad (see Art. 1 para. 3 IMAC) and there must be no grounds for exclusion within the meaning of Art. 2 IMAC (flawed proceedings in the other state, especially with regard to the human rights situation) and Art. 3 IMAC (para. 1: political and military offense, para. 3: fiscal offense). Moreover, unsolicited transmission is not permitted if the right to prosecute has expired, whereby either

Swiss or foreign law is relevant (Art. 5 IMAC). In connection with Art. 67a IMAC, questions of reciprocity also arise (Art. 8 IMAC).

The specific exceptions to the general principles that apply to Art. 67a IMAC are, on the one hand, the waiver of a request for mutual assistance addressed to Switzerland, which is typical for unsolicited transfers, and, on the other hand, the **requirement of dual criminality** according to case law. The IMAC presupposes this for "small-scale" mutual assistance under Art. 64 para. 1 IMAC, provided that mutual assistance measures are requested that require the imposition of procedural compulsion in Switzerland: In this case, it is required that the act being prosecuted abroad (hypothetically considered) exhibits the objective characteristics of an offence punishable under Swiss law. The Federal Supreme Court's reasoning for the dispensability of dual criminality in connection with unsolicited transmission is that the subject matter of the transmission has already been "collected for their own criminal investigation" (Art. 67*a para.* 1 IMAC) by the Swiss authorities, so that there is no coercion that requires special legitimation under Art. 64 IMAC. 36

Overall, the lack of a request in the case of unsolicited transmissions may in fact make it more difficult to verify the general conditions and limits of mutual assistance, since the Swiss authorities, which are responsible for this, have fewer clues, particularly regarding the criminal proceedings to be supported in the state receiving the support. However, this does not change the generally applicable **principle of investigation** for (passive) Swiss mutual assistance proceedings, which must be complied with. The Swiss authorities transmitting information without being requested to do so under Art. 67*a* IMAC are obliged to pay particular attention with regard to the assessment of admissibility. 37

C. The two types of transmission under Art. 67*a* IMAC

Art. 67*a* IMAC contains two fundamental types of unsolicited transmission, depending **on whether the secret area is affected or not**: 38

- **Non-affected secret area**: *sedes materiae* is formed by para. 1 and para. 4, supplemented by para. 2, para. 3 and para. 6. The subject matter of the transmission may be, on the one hand, evidence, in accordance with the wording of Art. 67*a* para. 1 IMAC, or, on the other hand, information by analogy.

- **Classified area concerned**: The starting point is para. 5 and para. 4, supplemented by para. 1 concerning the provenance of the object of transmission and para. 2 and para. 6. *A priori*, only information, but not evidence, can be transmitted.

1. Unsolicited transmission of evidence (and information) not relating to classified information

a. Subject of the transmission: evidence (and information) gathered for a criminal investigation that is not secret (para. 1)

39 If the secret area is not affected, both **evidence** and – *praeter verba legis* – **information** may be transmitted without being requested.

40 Art. 67*a* para. 1 IMAC imposes a restriction with regard to the **legal provenance of the subject matter of the transmission**. In the absence of a mutual assistance request, which is a necessary condition, it cannot have been provided in Switzerland on the basis of mutual assistance law. Therefore, the law requires that the evidence be linked to Swiss criminal investigations: the Swiss authorities can, in principle, transmit the evidence gathered in this context to foreign authorities without being asked to do so, based on Art. 67*a of the* IMAC.

41 With regard to the requirements for this procedure in Switzerland, from which the objects to be transmitted under Art. 67a IMAC arise, **no opening of investigation proceedings within the meaning of Art. 309 of the Swiss Code of Criminal Procedure (CrimPC) is no longer required** as an indispensable prerequisite since a change in practice in 2014: Rather, the Federal Supreme Court has that a Swiss public prosecutor was lawfully seized on the basis of a report from the Money Laundering Reporting Office Switzerland (MROS) in accordance with Art. 23 para. 4 let. b AMLA and that there was sufficient suspicion to assume that the content of this report could be forwarded, even if it did not subsequently lead to an order to open proceedings under the CrimPC. The reason given for the dispensability of opening an investigation in Switzerland – despite the wording "for their own criminal investigation", which actually suggested it, of Art. 67*a* para. 1 IMAC – was in particular that the Swiss interest in prosecution is not the main focus in the context of Art. 67*a* IMAC. Rather, the main purpose is to promote the initiation or progress of foreign criminal proceedings.

Even if an order to open proceedings is technically unnecessary, the Federal Office of Justice maintains that Switzerland may only transmit unsolicitedly if **at least in principle Swiss criminal jurisdiction** exists, understood as the territorial application of Swiss criminal law. It also goes without saying that the criminal proceedings undertaken in Switzerland, regardless of the stage reached in the preliminary proceedings, must not constitute a mere pretext for unsolicited transmission ("réelle et sérieuse"). 42

The Federal Supreme Court does not want to stand in the way of an unsolicited transmission if the **collection of the subject matter of the transmission in Switzerland is unlawful**, and thus not in accordance with its own requirements: As far as the unlawfulness of evidence collected in Switzerland is concerned – and, consequently, its possible invalidity – this must be raised in the foreign proceedings, to which Switzerland contributes by means of the unsolicited transmission. In the view represented here, this shift to the proceedings supported by Switzerland can sometimes prove problematic for those affected by the international division of labor in criminal prosecution. This is particularly the case if there is no possibility in the state conducting the initial criminal proceedings to object to deficiencies in the Swiss collection of the subject matter of the unsolicited transmission. 43

b. Purpose of transmission: Assumed suitability with regard to future criminal proceedings or a pending criminal investigation abroad

The unsolicited transmission of circumstances not relating to the secret area may take place in accordance with Art. 67*a* para. 1 IMAC if, from the point of view of the Swiss authority becoming active, it is suitable for **either initiating criminal proceedings** (lit. a) **or facilitating a criminal investigation pending abroad** (lit. b) in the state receiving legal assistance. 44

Whether an unsolicited transmission is subsumed under a) or b) of Art. 67*a* para. 1 IMAC with regard to the purpose is irrelevant, since the law does not differentiate between the two variants. The conceptual distinction between 'criminal proceedings' (lit. a) and 'criminal investigation' (lit. b) is equally inconsequential; the only thing that matters is that the supported (pending or pending) foreign proceedings are criminal **proceedings in accordance with Art. 1 para. 3 IMAC**. 45

46 The initiation of criminal proceedings abroad that is to be targeted also means the substantive extension of proceedings that have already been conducted. As far as facilitating criminal prosecution in terms of Art. 67*a* para. 1 let. b IMAC is concerned, this may consist of the foreign state being put in a position to address a **request for mutual assistance to Switzerland**, as Art. 67*a* para. 5 IMAC stipulates as the (sole) purpose of transmission with regard to secret information.

47 The subject of an unsolicited transmission may **also include exculpatory circumstances**. These may also facilitate a criminal investigation abroad in accordance with Art. 67*a* para. 1 let. b IMAC.

48 As with every mutual assistance measure, unsolicited transfers must always prove to be **overall proportionate** with regard to the legally prescribed purpose of the transfer of initiating proceedings or facilitating investigations abroad, although Art. 67*a* para. 1 IMAC only explicitly mentions the suitability criterion as the first part of the principle of proportionality. Even the fact that unsolicited transmission, by definition, lacks a request as a starting point for proportionality considerations (prohibition of excess) does not legitimize an overall disproportionate handling of Art. 67a IMAC. In this sense, an application of Art. 67*a* IMAC without any connection between the documents to be sent and the offense being or having been prosecuted would prove to be inadmissible under the principle of proportionality. Moreover, mutual assistance must be designed in such a way as to protect the individual right as much as possible (necessity) and, on the basis of a comprehensive weighing of interests, be reasonable for all parties involved. In the literature, a restriction of Art. 67*a IMAC* to serious crimes, however these may be defined, is sometimes also derived from the principle of proportionality – corresponding to the failed efforts in this regard in the course of legislative work and on the part of case law, which has not yet been adopted as far as can be seen. Regardless of whether it is at all feasible *de lege lata* to define an exhaustive list of foreign offences in this sense, in respect of which unsolicited transmissions are considered permissible, it seems indispensable that the severity of the allegations at issue, which Switzerland wishes to help address by transmitting incriminating and exculpatory circumstances under Art. 67*a* IMAC, forms part of the general proportionality assessment.

c. Negative requirement: no effect on Swiss criminal proceedings (para. 2)

Art. 67a IMAC provides guidance on the relationship between an unsolicited transmission and the Swiss (criminal) proceedings in the context of which the subject matter of the transmission was collected, by stating that the former has no influence on the latter. The main message of this not easily comprehensible formulation is that mutual assistance (or mutual assistance proceedings) and any Swiss criminal proceedings based on the same facts "**are in principle independent of** each other". This means two things: 49

- On the one hand, it is stated that an unsolicited transmission to a foreign country **does not** *eo ipso* result in **consequences for local criminal proceedings** – such as, in particular, a suspension, a waiver of one's own right to prosecute or a change of judge.
- On the other hand, the literature derives from Art. 67*a* para. 2 a requirement for the handling of the resolution discretion inherent in Art. 67*a* IMAC ("may [...] transmit") as to whether or not an unsolicited transmission to a foreign country is to be made: It should not be made if it would endanger the **success of the investigation in Switzerland**. This particularly refers to the situation where secret surveillance measures (Art. 269 et seq. CrimPC) are still ongoing in Switzerland. The fact that Swiss criminal authorities do not counteract their own proceedings by providing voluntary legal assistance is basically obvious in terms of criminal procedure, since the choice of the factually appropriate conduct of the investigation is at the dutiful discretion of the public prosecutor (Art. 16 para. 2 in conjunction with Art. 6 para. 1 CrimPC). Art. 67*a para.* 2 IMAC also establishes this priority of separate (criminal) proceedings for the law of mutual assistance. For the individual concerned, however, an understanding of Art. 67*a IMAC* in these terms, as a provision relating to Swiss (criminal) proceedings, is disadvantageous in that it carries the risk that unsolicited transfers of *exonerating* circumstances to foreign countries may, at least for a certain period of time, fail due to the Swiss right to prosecute. In order to avoid one-sided results, an open consideration of the interests is required here, taking into account the significance of the Swiss proceedings.

However, Art. 67*a* para. 2 does not preclude Switzerland from deciding **at a later date**, on the basis of the foreign proceedings supported by an unsolicit- 50

ed transmission, to **ask the other state to prosecute on its behalf** and to dispense with its own domestic proceedings.

d. Basis: international treaty or consent of the Federal Office of Justice

51 The dispatch of the Federal Council describes this as a restriction: the transmission of evidence in accordance with Art. 67*a IMAC* to a state with which there is no international treaty providing for unsolicited transmission requires the **(prior) consent of the Federal Office of Justice**.

2. Unsolicited transmission of information concerning classified material

a. Subject of transmission: information concerning the secret area

52 Art. 67a para. 5 IMAC governs unsolicited transmission within the secret area. This is only permitted **for information**: Art. 67*a* para. 4 IMAC merely excludes evidence concerning the secret area from unsolicited transmission in accordance with paras. 1 and 2 of Art. 67*a* IMAC, but since Art. 67*a* para. 5 IMAC also does not mention such evidence, there is *a contrario* no legal basis for its unsolicited transmission. They can therefore only be transmitted to a foreign country as part of ordinary legal assistance proceedings initiated in response to a corresponding request. Art. 67*a* para. 5 IMAC is to be regarded as a consequence of Art. 67*a* paras. 1 and 4 IMAC.

53 In connection with the unsolicited transmission of information concerning secret areas in accordance with Art. 67*a* para. 5 IMAC, practice also addresses para. 1 of Art. 67*a* IMAC in so far as the **provenance of the transmitted object** is concerned: correctly, it must also have been collected by Switzerland 'for its own criminal investigation'.

b. Purpose of the transmission: assumed suitability for filing a request for mutual assistance to Switzerland

54 Unlike evidence (and information) that is not secret according to Art. 67a IMAC, the sole purpose of the benefit associated with the unsolicited transmission of information within the secret area for the foreign criminal proceedings must be to enable the competent foreign state to approach Switzerland with a request for mutual assistance. In this respect, an unsolicited transmission by Switzerland is, precisely with a view to the envisaged ordinary mu-

tual assistance proceedings, an *invitatio ad offerendum* or a preliminary stage. Under Art. 67*a* para. 5 IMAC, the foreign criminal proceedings are not supported directly, but rather through future Swiss mutual assistance proceedings. At least a fundamentally positive prognosis regarding the usefulness of the unsolicited information is required. According to the view presented here, this must not only refer to the possibility of a request for mutual legal assistance addressed to Switzerland, as expressly mentioned in Art. 67a para. 5 IMAC, but also – as far as possible and without prejudice to any subsequent passive legal assistance proceedings, also on the benefit, at least in principle, of Switzerland's possible subsequent (ordinary) legal assistance for the receiving state.

The fact that the state receiving the unsolicited transmission bases a **subsequent request for mutual assistance** addressed to Switzerland on the circumstances that were previously communicated to it by the Swiss authorities without a request corresponds to the objective of unsolicited transmissions from the point of view of the Federal Criminal Court and does not constitute a defect. 55

The transmission of information in accordance with Art. 67*a para.* 5 IMAC mainly occurs **in connection with bank accounts** located in Switzerland: Since this concerns evidence relating to the secret area, the unsolicited transmission of "documentation bancaire" is ruled out; however, the foreign authority may – with a view to a future request for mutual assistance – be made aware, for example, of the existence of a bank account and information such as ownership or beneficial ownership. 56

Art. 67*a* para. 5 IMAC requires only *suitability* with respect to the unsolicited transmission of secret information**, to enable the submission of a request for mutual assistance**, so that it does not constitute a violation of the provision if the other state does not use unsolicited information that is suitable for this purpose to obtain information from Switzerland by means of a request. 57

It goes without saying that the underlying purpose of Art. 67*a* para. 5 IMAC with regard to the unsolicited transmission (purely to enable a request for mutual assistance) vis-à-vis the state to which the information is transmitted must be adequately safeguarded by means of a **speciality clause**. 58

Incidentally, the fundamental **applicability of the general requirements for international mutual assistance in criminal matters** to be provided by 59

Switzerland also follows from the purpose of the transfer assumed in Art. 67*a* para. 5 IMAC, namely to enable a request for mutual assistance: The transfer of secret information for the purpose of formulating a request that it is already foreseeable that Switzerland will not be able to fulfill one day would not stand up to the principle of proportionality.

c. Further requirements

60 As far as the remaining paragraphs of Art. 67*a* IMAC are concerned, there is no apparent reason why **Art. 67*a* para. 2 IMAC** should not also be observed for the unsolicited transmission of information concerning the secret area. The relationship to possible Swiss criminal proceedings cannot be any different here than if transmission is carried out in accordance with Art. 67*a* para. 1 IMAC.

61 However, the Federal Supreme Court expressly does not extend the scope of Art. **67*a* para. 3 IMAC** to the unsolicited transmission of secret information, which is relevant in practice. Such transmissions under Art. 67*a* para. 5 IMAC should therefore not be subject by analogy to the alternative conditions of either a state treaty or the consent of the Federal Office of Justice.

3. Procedure for unsolicited transmission

a. In general

62 Art. 67a IMAC does not address the form to be used by the Swiss authorities for the actual execution, understood as the forwarding to a foreign country, of an unsolicited transmission. According to practice, this can be done between authorities **informally** (in particular "communications [...] téléphoniques ou verbales"), but it must always be accompanied by a written communication to the other state ("**note remise**"): "[L]a transmission spontanée d'informations doit dans tous les cas faire l'objet d'une communication écrite aux autorités de l'Etat destinataire." The Federal Supreme Court justifies this requirement with the need to ensure the best possible protection of the rights of the parties in foreign criminal proceedings. It must be possible to determine the origin and content of the unsolicited information by consulting the files, which means that the person concerned can, if necessary, defend themselves against its use in proceedings, in accordance with the requirements of foreign law. However, care must always be taken to ensure that the "note remise" (e.g. by affixing of-

ficial seals) does not constitute separate evidence that should not or must not be transmitted.

63 The Federal Court precludes the filing of an appeal in Switzerland against the transmission document, so that – as not necessary with regard to their protection – the Swiss authorities' obligation to serve the **persons concerned** with a **copy of the written material** addressed to foreign countries is also **denied** without their having to request it. In contrast, the **Federal Office of Justice**, in its capacity as a supervisory authority (Art. 3 IMAC), must be provided with a **copy of the transmission communication and the protocol** in accordance with Art. 67*a* para. 6 IMAC, irrespective of Art. 67*a* para. 3 IMAC.

b. Observance of the specialty principle in particular

64 Even if they forward information unsolicited, Swiss authorities must in principle ensure that the subject matter of the transmission is not used abroad contrary to the intention for which they provided the mutual assistance. This is ensured by the principle of speciality, which is a restriction on mutual assistance. The Federal Supreme Court has ruled that the principle of speciality applies in an adapted form ("dans une forme adaptée") to the unsolicited transmission of information concerning the secret area, which is relevant in practice, in accordance with Art. 67*a para.* 5 IMAC:

- Firstly, it must be ensured that the information is not transmitted with a view to a criminal charge that *a priori* would **not be subject to mutual assistance** (see Art. 3 IMAC) if the state receiving the unsolicited assistance subsequently approaches Switzerland with an (ordinary) request.
- Secondly, in the absence of an international treaty that regulates the scope of unsolicited transmission, which consists of enabling Switzerland to submit a request for mutual assistance, the foreign authority must be **expressly reminded of this purpose.** This must be done (in writing) at the latest when the information is transmitted, whereby the principle of good faith between states applies.

65 The use by the foreign state concerned of Swiss assistance obtained under "minor" mutual assistance in violation of the principle of speciality constitutes "**entraide sauvage**".

c. Recording requirement under Art. 67*a* para. 6 IMAC

66 According to Art. 67*a* para. 6 IMAC, **each unsolicited transmission shall be recorded in a protocol**. It follows from the wording that the duty to keep a record of the proceedings applies comprehensively, i.e. both in connection with the unsolicited transmission of evidence and information not relating to the secret area and with secret information. The placement of para. 6 as the last paragraph of Art. 67*a of the* IMAC confirms this from a systematic point of view.

67 During the parliamentary debates, Art. 67*a para.* 6 IMAC was described as indispensable: in the context of unsolicited transfers, a (file-related) trace must remain in order to be able to prevent the arbitrary and abusive use of Art. 67a IMAC. In this context, case law also cites the same party-related motivation as in the case of the 'note remise'. Together with the protocol, the protocol must be sent to the Federal Office of Justice so that it can exercise its supervisory function. The Federal Criminal Court has denied the data subject's right to be served directly with a copy of the protocol. As for the **content of the protocol**, it should include the **date** and **form** of the unsolicited transmission, as well as the **terms of any supervision by the Federal Office of Justice**.

68 **Complaints brought before the courts in connection with the protocol pursuant to Art. 67*a* para. 6 IMAC** have so far been unsuccessful as far as can be seen: the Federal Criminal Court has in principle ruled that the absence of a protocol may constitute a violation of Art. 67*a* IMAC, with the consequence that the Swiss authority may have to decide on surrender or non-use with regard to the foreign country. However, the case law avoids this by accepting that it is sufficient that at least the letter to the foreign authority ("note remise") was placed on the files of the Swiss criminal proceedings. The Federal Supreme Court views the failure to notify the Federal Office of Justice as an "omission regrettable", which, however, remains without consequence as a "défaut mineur".

d. Right to be heard?

69 The existence of a **prior right to be heard** on the intended unsolicited transfers is overwhelmingly denied in the literature, with reference to BGE 125 II 238.

With regard to the **right of access to records**, the legal assistance standards are relevant if an unsolicited transfer has provoked a request for legal assistance addressed to Switzerland and the documents are added to the records of the (passive) Swiss legal assistance proceedings in connection with Art. 67*a* IMAC: Art. 80*b* IMAC applies – whereby the restriction to the necessity for safeguarding interests (para. 1) and the legally prescribed grounds for restriction (para. 2) are relevant – as well as, in addition, Art. 26 f. APA in conjunction with Art. 12 para. 1 sentence 1 IMAC. The Federal Criminal Court has assumed a violation of the right to be heard in the following situation: the documents relating to an unsolicited transfer from Switzerland were not part of the mutual assistance files regarding the request that the Ukrainian authorities had subsequently submitted to Switzerland, even though they were referenced in the final ruling. 70

D. Legal protection in connection with unsolicited transfers under Art. 67*a* IMAC

1. (Limited) legal protection in Switzerland

It has been established practice immediately after the creation of Art. 67*a* IMAC that an unsolicited transfer under this provision constitutes an "acte d'entraide matériel spécifique" and not a final decree within the meaning of Art. 80*d* IMAC. This means that there is no object for appeal under Art. 80*e* IMAC, which in turn makes it impossible to defend oneself before Swiss courts of appeal prior to the transmission. Specifically, there is **no preventive legal protection**, which is otherwise a fundamental principle of Swiss law on international mutual assistance in criminal matters: "Spontaneous transmission under Art. 67*a* EIMP ne peut pas directement faire l'objet d'un recours.» From a formal point of view, this seems obvious in that the form of action under the law of mutual assistance that opens the appeal route, the final decree, requires a request (Art. 80*d* IMAC: "If the executing authority considers the request to be settled in whole or in part"), which, in the context of Art. 67*a* IMAC, is *by definition* lacking. Accordingly, the protocol in accordance with Art. 67*a para.* 6 IMAC and the 'note remise' are also denied contestability. 71

Meanwhile, it has been recognized by case law from the outset that **violations of Art. 67***a* IMAC **can in principle be asserted** if the unsolicited transmission results in **the state that received the assistance approaching** 72

Switzerland with a request for mutual assistance or supplementing an existing one. If an appeal is made to the Federal Criminal Court (Art. 25 para. 1 IMAC, Art. 80*e* para. 1 IMAC) against a final ruling in this regard, deficiencies with regard to the unsolicited transmission that took place beforehand can be objected to in this context. If this reveals a violation of Art. 67a IMAC – for example, the lack of consent from the Federal Office of Justice (para. 3) or the protocol (para. 6), or the transmission of evidence relating to the secret area (para. 4) – this is a form of "entra , whereby the legal consequence used in the case law is that the Swiss authority can be invited ("pourrait être invité") to ensure the return of the transmitted item by the other state or at least to request that it not be used in its criminal proceedings. In this context, the case law denies a fundamental duty of the foreign state to cooperate on the grounds that it is not responsible for the Swiss authorities' erroneous actions. In any case, as the case law also states in a formulaic manner, intervention vis-à-vis the state that has received the unauthorized unsolicited transmission should be superfluous if it turns out in retrospect that the substantive requirements for (ordinary) mutual assistance (upon request) would have been met or a positive decision on the granting of ordinary mutual assistance can be expected in the near future. In this case, a kind of healing is assumed.

73 If, following the unsolicited transmission, there is **no request for mutual assistance addressed to Switzerland from the previously supported state** in accordance with Art. 67*a* IMAC, then, according to the established *modus operandi* of case law, there is no interest worthy of protection within the meaning of Art. 80*h* let. b IMAC that would justify intervention by the Swiss judiciary.

74 The **Federal Supreme Court** has explicitly ruled that these procedural safeguards, which have become established practice in connection with Art. 67*a* IMAC (no "possibility of direct judicial review of the spontaneous transmission of information"), are **ECHR-compliant**, particularly with regard to Art. 13 ECHR.

2. Other legal consequences of unlawful unsolicited transfers

75 In addition, or, especially if no request for mutual assistance is addressed to Switzerland and it therefore does not issue a final decree, the only measure that can be considered is **proceeding against the use of the subject matter of the transfer in the** state (and according to its procedural rules) **which has**

been supported by Switzerland on the basis of Art. 67*a* IMAC. The prospects of success will depend primarily on the nature of the foreign legal system.

Other possible (legal) reactions to unlawful unsolicited transfers include the assertion of **state liability claims**, criminal proceedings, in particular for **breach of official secrecy**, and **supervisory measures**. 76

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MATERIALS

Botschaft betreffend die Änderung des Rechtshilfegesetzes und des Bundesgesetzes zum Staatsvertrag mit den USA über gegenseitige Rechtshilfe in Strafsachen sowie den Bundesbeschluss über einen Vorbehalt zum Europäischen Übereinkommen über die Rechtshilfe in Strafsachen vom 29.3.1995, BBl 1995 III 1–66, abrufbar unter https://www.fedlex.admin.ch/eli/fga/1995/3_1_1_1/de (zit. Botschaft IRSG 1995).

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COMMENTARY ON

Art. 74 IMAC

A commentary by Corinne Corminboeuf Harari

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Art. 74 Handing over of evidence

[1] On request, objects, documents or assets seized as evidence as well as records and decisions shall be made available to the competent foreign authority after conclusion of the mutual assistance proceedings (Art. 80*d*).

[2] If a third party with rights acquired in good faith, an authority, or the victim who is habitually resident in Switzerland claim that they have rights over the objects, documents or assets under paragraph 1, their handing over shall be subject to the condition that the requesting State gives the guarantee to return them free of charge after the conclusion of the proceedings.

[3] Return may be delayed if the objects, documents or assets are necessary for criminal proceedings pending in Switzerland.

[4] Article 60 applies to fiscal liens.

CONTENT

I. Genesis of the standard 334
II. Content: general points 335
III. Examination paragraph by paragraph 337
A. Paragraph 1 - Retention of evidence until the end of the proceedings 337
B. Paragraph 2 - Rights of third parties 338
C. Paragraph 3 - Requirements for criminal proceedings pending in Switzerland 340
D. Paragraph 4 - Rights of lien in favor of the tax authorities 341
Bibliography 342

I. GENESIS OF THE STANDARD

1 Art. 74 IMAC, whose marginal note initially referred to the "surrender of objects" abroad, came into force with the Mutual Legal Assistance Act on December 31, 1982.

2 The adoption of this standard represented a significant change in Swiss law, since unlike extradition, for which a law had been in existence since the end of the 19th century, there was at the time no domestic legal provision in Switzerland for the surrender to a foreign state of objects seized in Switzerland outside extradition proceedings. Prior to the adoption of the IMAC, such surrender was reserved for states with which Switzerland was bound by an international agreement providing for probationary surrender. The content of these agreements was often succinct on the conditions surrounding surrender. The European Convention on Mutual Assistance in Criminal Matters of April 20, 1959, which entered into force in Switzerland on March 20, 1967, represented a first step towards codifying, to a certain extent, the rules enshrined in international practice in this field.

3 Initially, art. 74 IMAC applied to the handing over to a foreign state of any "object" "relevant to the decision to be taken in a criminal case". Paragraph 2 of this regulation also expressly referred to the return of "other" objects or valuables to "rightful claimants". Although the legal text was not clear on this point, the Federal Court held that this norm allowed not only for the surrender of evidence (probatory surrender) but, in certain circumstances, also for the surrender of the proceeds of the offence to the foreign state with a view to their confiscation or restitution (confiscatory surrender).

4 Art. 74 IMAC was amended as part of the reform of the IMAC of October 4, 1996, which came into force on February 1, 1997.

5 In the context of this revision, the legislator made a clear distinction between probatory and confiscatory remissions. The purpose of the current art. 74 IMAC has thus been restricted to the delivery of "means of proof", and its content clarified. At the same time, the content of art. 34a IMAC, relating to the surrender of objects or valuables in the context of extradition, has been transferred to art. 59 IMAC after a number of modifications. Finally, a new article 74a IMAC has been adopted, specifically governing confiscatory surrender.

II. CONTENT: GENERAL POINTS

Art. 74 IMAC now governs only the surrender of evidence seized in Switzerland to a foreign state, and should be read in conjunction with : 6

- art. 59 IMAC, which deals specifically with the surrender of objects or valuables found in the possession of the person to be extradited (whether evidence or the proceeds of the offence),
- article 74a IMAC, which deals with the surrender of objects or valuables with a view to their confiscation or restitution.
- art. 90 IMAC, which provides for the handover of "exhibits" at the same time as the file of criminal proceedings, in the event that criminal proceedings are delegated abroad.
- As things stand, the seizure or surrender of assets as a compensatory claim is only possible under the restrictive conditions set out in art. 94 et seq. of the IMAC (exequatur of a final and enforceable decision of a foreign state).

Probationary surrender is also provided for in several international instruments, such as article 6 CEEJ (RS 0.351.12), article 35 TEJUS (RS 0.351.933.6), article 10 TEJArgentina (RS 0.351.915.4) and article 9 al. 1 TEJMexico (RS 0.351.956.3). The scope of these provisions, reserved by art. 1 para. 1 IMAC, does not go beyond that of art. 74 IMAC. 7

The notion of "means of proof" referred to in art. 74 IMAC remains broad. According to the text of the law itself, it can refer to any object, in particular any document or value "seized as evidence". This may include securities, bank documents, works of art and so on. They may also include media containing audio or video recordings, or computer data. Depending on their nature and content, the delivery of objects abroad may therefore constitute not only an infringement of the right of ownership (at least in the temporary form of an infringement of possession), but also an infringement of privacy or business secrecy (delivery of computer data, audio and video recordings or secret documents). Art. 74 IMAC also covers any file or decision of a Swiss administration or court. However, this does not apply to the handing over of judicial decisions rendered in the course of the mutual assistance procedure itself, or to any documents produced by the parties in this context. 8

The objects, assets or documents to be handed over must be related to the acts being prosecuted in the criminal proceedings underway in the requesting 9

state. According to the case law of the Federal Supreme Court, however, there is no need to lay down strict requirements as to the suitability of the object in question as evidence, as the final assessment rests with the foreign trial judge. In particular, the requirements for evidentiary surrender are less stringent than in the case of surrender of objects or valuables for confiscation or restitution under art. 74a IMAC. It is therefore sufficient that, prima facie, the object in question appears suitable for use as evidence. Any connection between the acts prosecuted abroad and the object in question is sufficient.

10 The principle of proportionality, which derives from art. 5 para. 2 of the Swiss Constitution and art. 63 para. 1 of the IMAC, nevertheless applies. Depending on the needs of the foreign criminal proceedings, a simple copy of the documents or media seized may be handed over to the requesting state. Surrender is unnecessary if the fact to be proven is well known or already supported by sufficient evidence. However, the executing authority limits its examination to the "potential usefulness" of the documents handed over. According to jurisprudence, the requested state must not substitute its own assessment for that of the foreign magistrate, since it generally does not have the information that would enable it to decide on the appropriateness of administering the evidence in question.

11 Prior to handover, a seizure order must be issued - or even an urgent provisional seizure order within the meaning of art. 18 IMAC - allowing the seizure of objects considered useful for establishing the truth. In the case of mutual assistance, a request for surrender implicitly includes a request for prior seizure. On the other hand, the reverse is not true: a request for seizure is not equivalent to a request for surrender, and a new request for mutual assistance may be necessary if the first request was only for precautionary measures. The principles applicable to the search and possible sealing of documents or objects whose contents are covered by secrecy are those of the Swiss Criminal Procedure Code.

12 In practice, the Federal Office of Justice has found that probationary surrender poses few problems as long as the quantity or value of the transferred goods remains low. Art. 33 OEIMP provides for special arrangements for high-value items, in particular the adoption of specific protective measures and the obligation to insure them against damage or loss during transport.

III. EXAMINATION PARAGRAPH BY PARAGRAPH

A. Paragraph 1 - Retention of evidence until the end of the proceedings

Art. 74 para. 1 IMAC provides for the surrender of evidence "at the request of the competent foreign authority" only "at the end of the mutual assistance procedure". The handover of evidence takes the form of a closing decision within the meaning of art. 80d IMAC, to which art. 74 para. 1 IMAC expressly refers. As long as the closing decision is not final and enforceable, the secret documents, objects and valuables are retained in Switzerland. Unlike in the case of international administrative assistance, this provision enshrines the principle of "retention" of evidence in Switzerland until the closure decision has come into force. This ensures that the rightful claimants have been informed in advance of the planned seizure and handover, and, where applicable, have been able to assert their right to be heard before the competent courts prior to its execution. This principle is considered fundamental in international mutual assistance in criminal matters. 13

However, the principle of withholding evidence is not inviolable under the IMAC. In recent years, the legislator has already created two exceptions to this principle, in articles 18b and 80dbis IMAC. These provisions allow, under certain restrictive conditions, the "anticipated" and sometimes even "spontaneous" transmission of certain means of evidence abroad, before the person concerned has been able to assert his or her right to be heard. The law sets out safeguards for these exceptions, in particular a temporary prohibition (pending a ruling on the closing decision) on the requesting state using the elements thus obtained as "evidence". Only use for "investigative purposes" is therefore possible in the meantime, until such time as a ruling is handed down in Switzerland on the closure decision. 14

For its part, art. 67a para. 5 IMAC allows the spontaneous transmission to a foreign state, not of evidence stricto sensu, but of "information" falling within the sphere of secrecy, with the aim of enabling a foreign state to send Switzerland a request for mutual assistance. According to case law, the distinction between "information" and "means of proof" is assessed on a case-by-case basis; in particular, the Swiss authority wishing to communicate "mere information" must endeavor not to transmit "data or official documents which, 15

by their nature, very detailed information content or official character, could directly serve as evidence in foreign proceedings".

16 Other procedural acts may also lead to the premature transmission of information to the requesting state, such as the authorization given to foreign investigators to attend the execution of the request (art. 65a IMAC), hearings by videoconference or telephone conference, means of investigation involving the participation in Switzerland of foreign investigators (cross-border observation, controlled delivery, discreet investigation and joint investigation teams) or access to the file granted to a party. These various acts are permitted under Swiss law, subject to special precautions developed by case law.

17 Finally, case law does not penalize non-compliance with the principle of retention in an absolute manner, noting in particular that a prohibited transmission of information or evidence prior to the entry into force of the closing decision can be "repaired" if it appears, after the interested parties have had an opportunity to put forward their objections, that the conditions for mutual assistance had been met and that the disputed documents should in any case have ended up in the hands of the foreign authority. On the other hand, if the competent courts ultimately refuse mutual assistance, the foreign authority must be asked by the Swiss authorities to immediately remove from its file and destroy the documentation which is the subject of the Swiss transmission.

B. Paragraph 2 - Rights of third parties

18 Paragraph 2 of art. 74 IMAC deals with the rights of third parties to objects, i.e. the bona fide purchaser, an authority or the injured party who has his habitual residence in Switzerland, codifying the case law developed under the former version of art. 74 IMAC. Neither the person against whom the foreign proceedings are directed, nor the persons who have acquired rights to the objects with knowledge of the facts under investigation abroad, are therefore protected by this norm, failing to meet the requirement of good faith. As far as the bona fide acquirer is concerned, art. 74 al. 2 IMAC does not require, unlike art. 74a al. 4 let. c IMAC, that his rights have been acquired in Switzerland or that he resides in Switzerland. According to some authors, this is an unintended loophole that should be filled, by requiring a relationship between the third party and Switzerland similar to that provided for in art. 74a para. 4 let. c IMAC. This question has not been settled in case law.

The requesting state's right to probationary surrender in principle takes precedence over the rights of third parties to the objects. Indeed, the legislator has taken the view that, in principle, their right of ownership is not really threatened, since the evidence is simply made available to foreign proceedings and must then be returned at the end of the foreign proceedings. It is therefore only a question of a temporary loss of possession. The question of confiscatory surrender at the end of the proceedings is reserved, if the requesting state submits a request to this effect. In this case, the conditions of art. 74a IMAC will have to be examined by the Swiss enforcement authority, which provides further safeguards to guarantee the rights of third parties. This also applies in the event that the evidence constitutes objects endangering security, morality or public order within the meaning of art. 69 para. 1 in fine of the Swiss Criminal Code, in which case it should be possible to waive the return of objects handed over for evidentiary purposes, notwithstanding the claims of third parties, since such objects would in any case be liable to confiscation. 19

As far as the requesting State is concerned, the aforementioned restitution obligation derives either from a general agreement binding it to the requested State (an obligation which the requested State may waive in a specific case), or from a specific reservation given in connection with the surrender of the disputed object. In the absence of a legal basis providing for restitution under an international agreement between the requested and requesting states, and in the absence of a reservation to this effect made at the time of surrender, the requesting state remains free to dispose of the objects in accordance with its own legislation. 20

In order to guarantee the return of objects by the requesting state, and hence respect for the rights of third parties, art. 74 para. 2 IMAC provides for the possibility of requiring the requesting state to give a guarantee that it will return the objects handed over free of charge at the end of its procedure. This is a condition subject to acceptance within the meaning of art. 80p IMAC. In order to fulfil its purpose, obtaining the required guarantee must precede the probationary handover. According to case law, these principles also apply by analogy to the delegation of criminal prosecution. If the requesting state fails to comply with the guarantee it has given, it incurs international liability. Nevertheless, the State's undertaking to return the property at the end of its proceedings does not always provide sufficient protection for the rights of third 21

parties, particularly in the case of cultural property for which the requesting State may benefit from immunities. In principle, the requested State must presume that the requesting State will act in accordance with its commitments and the principle of good faith, within certain limits. In a case concerning the probationary handover of three archaeological objects to Libya, the TPF considered that, in view of the serious deterioration in the political situation in that country, it was not possible to obtain sufficient guarantees regarding the return of the objects. The TPF nevertheless authorized the handover of the documentation relating to the disputed items, while proposing that an expert appraisal of the objects be carried out by Libyan experts on Swiss soil, and reserving any confiscatory handover, within the meaning of art. 74a IMAC, for a later stage in the proceedings.

22 It should be noted that possible infringements of other third-party interests (such as privacy or business secrecy) arising from knowledge of the content of documents or content carriers are not protected by the IMAC, particularly since the deletion of art. 10 aIMAC when the IMAC was revised and came into force on January 1, 1997. In any case, the practical scope of this standard prior to its abolition was very limited.

C. Paragraph 3 - Requirements for criminal proceedings pending in Switzerland

23 According to para. 3 of art. 74 IMAC, the evidentiary surrender abroad of objects seized in Switzerland may be postponed if the objects, documents or assets are required for criminal proceedings pending in Switzerland. This may be the case, for example, if the Swiss criminal proceedings are already well advanced, or if the main part of the offence took place in Switzerland. In this context, the judge must take into account the respective needs of his investigation and that conducted abroad, as well as the nature of the disputed objects, by weighing up the interests involved. For example, in a case involving quantitatively and culturally significant archaeological artefacts, the Federal Court noted that, in view of the risks involved in transporting the artefacts, it could be justified not to hand over the artefacts, but rather to authorize the foreign investigators to travel to Geneva to examine them. However, this is not always possible, particularly when there is a large number of items to be examined, as it is too costly for the foreign state.

When the links between the disputed facts and Switzerland are tenuous, when the alleged offenders do not reside in Switzerland and are not likely to be extradited there, and when Switzerland is involved solely because the disputed objects are located on its territory, it may be appropriate for the Swiss authority to facilitate the progress of the foreign investigation by granting the surrender of the seized objects, or even to delegate criminal prosecution abroad within the meaning of art. 88 et seq. of the IMAC. If the proceedings are delegated abroad, art. 90 IMAC provides for the handover of the exhibits together with the criminal case file. This is the logical consequence of the transfer of jurisdiction: The requesting State must hand over to the requested State everything that may be useful for the prosecution of the delegated offences, in order to enable it to carry out its mission... The notion of "evidence" within the meaning of art. 90 IMAC corresponds to that of "means of proof" within the meaning of arts. 74 and 59 IMAC. The Swiss authority may not delegate proceedings in order to allow the transmission of objects which the conditions of art. 74 and 74a IMAC would not allow. Finally, the rules necessary to protect the rights of third parties (cf. para. 2 above) are applicable by analogy in the case of surrender of objects within the meaning of art. 90 IMAC. 24

D. Paragraph 4 - Rights of lien in favor of the tax authorities

Paragraph 4 of Art. 74 IMAC refers to Art. 60 IMAC, which governs the right of lien in favor of the tax authorities in extradition cases. According to this provision, if the objects or valuables are handed over without reservation of restitution, the customs lien or any other real guarantee instituted by Swiss customs or tax law cannot be invoked, unless the owner who has suffered damage as a result of the offence is himself liable to pay. Waiver of this right of lien may be subject to reciprocity. In this context, it is also necessary to take into account art. 23 OEIMP, which specifies the circumstances in which rights of lien in favor of the tax authorities may be invoked, while at the same time designating (para. 2) the Directorate General of Customs as the authority competent to waive rights of lien within the meaning of art. 60 IMAC. 25

The FOJ points out that this issue is of little practical importance. 26

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COMMENTARY ON

Art. 74a IMAC

A commentary by Sandrine Giroud / Louise Aellen

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Art. 74*a* Handing over of objects or assets for the purpose of forfeiture or return

[1] On request, objects or assets subject to a precautionary seizure may be handed over to the competent foreign authority after conclusion of the mutual assistance proceedings (Art. 80*d*) for the purpose of forfeiture or return to the person entitled.

[2] The objects or assets referred to in paragraph 1 include:

a. instruments which were used to commit the offence;

b. products of or profits from the offence, their replacement value and any unlawful advantage;

c. gifts and other contributions which served to instigate the offence or recompense the offender, as well as their replacement value.

[3] The handing over may take place at any stage of the foreign proceedings, normally based on a final and executable decision from the requesting State.

[4] However, the objects or assets may be retained in Switzerland if:

a. the victim is habitually resident in Switzerland and they have to be returned to him;

b. an authority asserts rights over them;

c. a person not involved in the offence and whose claims are not guaranteed by the requesting State shows probable cause that he has acquired rights over these objects and assets in good faith in Switzerland, or if he is habitually resident in Switzerland, in a foreign country; or

d. the objects or assets are necessary for pending criminal proceedings in Switzerland or appear, because of their nature, to be subject to forfeiture in Switzerland.

[5] Whenever a person claims to have rights over the objects or assets under paragraph 4, its handing over to the requesting State shall be postponed until the legal situation is clear. The objects or assets claimed may be handed over to the person entitled if:

a. the requesting State agrees;

b. in the case of paragraph 4 letter b, the authority gives its consent; or

c. the claim has been recognised by a Swiss court.

[6] Article 60 applies to fiscal liens.

[7] Objects and assets to which Switzerland is entitled according to an asset sharing agreement based on the Federal Act of 19 March 2004 on the Division of Forfeited Assets shall not be handed over in accordance with paragraph 1.

CONTENT

I. Background 348
II. General information 349
A. Procedure 349
B. Discretion of the enforcement authorities 350
C. Interaction with international agreements 351
III. Delimitations 354
A. Delimitation with art. 59 IMAC 354
B. Delimitation with art. 70 ff of the Swiss Penal Code 354
C. Delimitation with art. 94 ff IMAC 355
D. Delimitation with the Privacy Act 355
IV. Paragraph 1 - Surrender 356
V. Para. 2 - Objects and assets 359
VI. Para. 3 - Time of surrender 362
VII. Para. 4 - Grounds for refusal to surrender 364
A. Rights of the injured party (letter a) 365
B. Rights of an authority (letter b) 365
C. Rights of bona fide third parties (letter c) 365
D. Need for proceedings or confiscation in Switzerland (let. d) 367
VIII. Para. 5 - Suspension of surrender 368
IX. Paragraph 6 - Tax liens 369
X. Para. 7 - Division of confiscated assets 370
XI. Legal remedies 370
Bibliography 372

I. BACKGROUND

1 The IMAC, adopted on March 20 1981, was amended on October 4 1996. The aims of this amendment were, on the one hand, to combat economic crime effectively and, on the other, to remedy the weaknesses of the legal system previously in place by simplifying and accelerating the procedure for executing requests for mutual assistance. The Pemex and Marcos cases highlighted certain weaknesses in the law, such as the length of the execution procedure. This proved to be excessive, both because of the numerous appeals available, and because the procedure varied widely from one canton to another.

2 This revision led in particular to the modification of art. 74 IMAC and the addition of a new art. *74a* IMAC, previously combined with art. 74a IMAC. This makes it possible to distinguish between the surrender of evidence to the requesting state, now governed by art. 74 IMAC, on the one hand, and the surrender of objects or valuables for the purpose of their confiscation or restitution to the rightful owner in the requesting state, now governed by art. 74a *IMAC* , on the other.

3 Art. *74a* IMAC also clarifies the procedure to be followed in the event of surrender of objects and assets seized in Switzerland, and replaces a complex body of case law which previously required foreign confiscation or restitution orders to be subject to an exequatur procedure. Under the new provision, all that is required is a summary review of the foreign decision, based on a finding of compliance with fundamental procedural rights.

4 In the parliamentary debate, the National Council adopted the proposed Art. *74a* without discussion. The Council of States accepted the proposal to introduce, in para. 3, the words “as a general rule”; however, it declined to amend this provision so as to make the surrender of the proceeds of crime conditional in all cases on the existence of a final and enforceable judgment in the requesting state. The National Council endorsed this solution.

II. GENERAL INFORMATION

A. Procedure

The 1996 revision of the IMAC made a distinction between evidentiary seizure, which concerns only means of proof, and **precautionary seizure**, which concerns objects or assets for the purpose of confiscation. Seizure may only be aimed at the restitution of objects or assets to the rightful owner or injured party (which may be the requesting State), or at their confiscation or destruction. In the case of restitution, the consequence is to re-establish the previous situation of the entitled party. Art. 74a *IMAC* thus allows, at the request of the requesting state, the surrender of goods seized in Switzerland for confiscation or restitution to the rightful owner in the requesting state. 5

Surrender for the purpose of restitution can now take place in principle at **all stages of foreign proceedings**, provided that the requesting state issues a final and enforceable decision (art. *74a* para. 3 IMAC). The principle of trust between States leads us to accept that, as a general rule, there should be nothing to prevent the surrender of objects or valuables once the requesting State has rendered a decision, and that there is therefore no need to proceed with the exequatur of this decision, within the meaning of art. 94 et seq. of the IMAC. 6

The expression **"as a general rule"** was used by the legislator in order to allow, on an exceptional basis, a swift and unbureaucratic procedure in cases where restitution is clearly required, for example when there is no doubt as to the illicit origin of the seized assets and the merits of returning them to the rightful owner (cf. paras. 42 and 47 *below*). 7

Prior to delivery by way of mutual assistance with a view to confiscation or restitution, the competent authority must **be in possession of the objects and assets to be returned**. To this end, it may order provisional measures within the meaning of art. 18 IMAC, such as protective sequestration. The objects or valuables may finally be handed over to the requesting state following a final and enforceable decision within the meaning of art. *80d*. The surrender of objects and assets within the meaning of art. *74a* IMAC - unlike the surrender of evidence - is final, and the foreign state may dispose of the surrendered objects or assets. Once transferred, Switzerland loses all control over them. 8

9 Art. 74a IMAC is supplemented by art. 33a OEIMP , which governs the duration of seizure.

10 The surrender of objects and assets with a view to their confiscation or restitution constitutes a serious infringement of the fundamental rights of the person concerned. In contrast to art. 74 IMAC, the infringement of fundamental rights is more serious, as the objects and assets are definitively handed over to the person concerned. Among the fundamental rights affected are the guarantee of property (art. 26 Cst.), economic freedom (art. 27 Cst.) and the protection of privacy (art. 13 Cst. and 8 ECHR). A surrender decision based on art. 74a *IMAC* must therefore comply with the conditions of art. 36 Cst.

B. Discretion of the enforcement authorities

11 This is a **potestative provision** (*Kann-Vorschrift*), unlike art. 59 and 74 IMAC. The Swiss enforcement authority must therefore assess all the circumstances of the case in order to determine whether and when a surrender should take place; in doing so, it has broad discretionary powers. If this power does not allow it to question - subject to a violation of public policy - the content of the foreign decision, the executing authority is obliged to examine whether the requested collaboration remains within the framework authorized by art. *74a* IMAC. In this way, the requested authority can ensure that the assets for which restitution is requested do indeed correspond to the objects described in art. 74 para. 2 letters a to c IMAC, i.e. that they are indeed the instrument or proceeds of the offence, or even the reward awarded to the perpetrator. The foreign proceedings must also satisfy the general guarantees of the ECHR or the UN Covenant II. The claims of the injured party, an authority or bona fide third-party purchasers, as well as the requirements of criminal proceedings in Switzerland, must also be taken into account under art. *74a* para. 4 IMAC.

12 If necessary, the Swiss enforcement authority may **ask** the requesting state for **further information** (art. 80o IMAC). It can also make the granting of mutual assistance subject to **conditions** when the foreign procedure has certain shortcomings that can be remedied by guarantees from the foreign state (art. 80p IMAC). These conditions may include an undertaking to comply with procedural rules, in particular those laid down in international instruments, to guarantee the independence and impartiality of the judging authority, or to comply with the principle of speciality. These guarantees can

be obtained *a posteriori*. However, such guarantees should be treated with caution. Even if possible, the application of art. 80p IMAC to the surrender of property to the requesting state is to be relativized, since a surrender based on art. 74a*IMAC* is in principle only possible on the basis of a final and enforceable decision in the foreign state. Otherwise, mutual assistance should be refused.

The TF has repeatedly stressed the need to take account of the **rights of persons harmed** by the offence in question, and to ensure that surrender to the requesting state under art. *74a* IMAC is not to their detriment. This being the case, the TF has so far only restrictively accepted a surrender based on art. *74a* IMAC with specific conditions. The case concerned the early surrender to the Philippines, prior to the pronouncement of a confiscation judgment, of assets belonging to the former Philippine head of state Ferdinand Marcos and his family. At the time, the TF left open the possibility for victims of human rights violations committed by Ferdinand Marcos and his regime to claim compensation from the funds to be handed over to the Philippine state. He also stressed the need to interpret art. 74a IMAC in the light of (i) the principles underlying the IMAC, including the respect for human rights enshrined in art. 2 IMAC, and (ii) Switzerland's international obligations, including in particular the guarantee of rights under the UN Covenant II and the UN Convention against Torture, including the right to a fair trial and the right to compensation. Insofar as the requesting state is unable to implement these rights, Switzerland should take them into account, notably by making mutual assistance conditional on specific undertakings by the requesting state, as permitted by art. 80p IMAC . However, the Federal Court emphasized that, even if the Philippine State was bound by its international obligations to make reparation to the victims, the mutual assistance requested should enable it to decide on the fate of the assets in question, thus recalling the sovereignty of the requesting State over the assets to be handed over. 13

C. Interaction with international agreements

Under art. 1 para. 1 IMAC, international laws or agreements take precedence over the IMAC. Treaty provisions take precedence over the domestic law governing the matter, i.e. the IMAC and the OEIMP, which are applicable in the case of questions not explicitly or implicitly regulated by treaty law and when domestic law is more favorable to mutual assistance. Indeed, according to the 14

principle of favoritism, the law most favorable to mutual assistance must apply. The existence of a treaty thus does not deprive Switzerland of the option of granting mutual assistance under any broader rules of its domestic law, since mutual assistance treaties are intended to foster international cooperation; they do not therefore preclude a broader grant of such assistance under Swiss law. Among the international treaties relevant to art. 74a IMAC are the following:

- **The European Convention on Extradition of** December 13, 1957, which entered into force in Switzerland on March 20, 1967, allows the surrender of objects liable to seizure or confiscation, but only on condition of restitution (art. 20 al. 3 CEExtr) and subject to the rights of the requested State or third parties over these objects (art. 20 al. 4 CEExtr).
- **The European Convention on Mutual Assistance in Criminal Matters** of April 20, 1959, which entered into force in Switzerland on March 20, 1967, does not deal directly with the surrender of objects and valuables. It is, however, provided for in art. 12[2e] p.a. CEEJ.
- **The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime** of November 8, 1990, which entered into force in Switzerland on September[1,] 1993. This is a special convention supplementing the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959, in accordance with art. 26 para. 2 and para. 3 of the ECCJ.

The CBI is an important instrument of international cooperation for regulating the investigation and confiscation of the instruments and proceeds of a criminal offence (art. 7 CBI). It lays down a minimum standard of measures to be taken at national level (chap. II) and establishes the principle of the widest possible cooperation at all stages of criminal proceedings (chap. III). These various measures are ordered in accordance with domestic law, the latter also being applicable where it lays down more favourable conditions for mutual assistance. Article 13 imposes an obligation on the requested State to confiscate the proceeds of crime, either in execution of a foreign confiscation order, or by instituting domestic proceedings. Swiss law, through art. *74a* para. 2 IMAC and 94 ff IMAC concerning respectively the surrender of instruments and proceeds of crime and the enforcement of foreign decisions, thus complies with the requirements of the present Convention. The TF emphasized

that the IWC does not permit the establishment of modes of cooperation not provided for under national law.

Different arrangements between States parties to the Convention remain reserved, for example by providing for the sharing of confiscated proceeds between cooperating States.

- **The United Nations Convention against Corruption** of October 31, 2003, which entered into force in Switzerland on October 24, 2009, is a global instrument in the fight against corruption. It devotes an important chapter to the recovery of assets of illicit origin (chap. V). It is the first international instrument to establish, at multilateral level, the principle of the restitution, under certain conditions, of illicitly acquired assets (art. 57). At the time of its adoption, the Federal Council considered that the UNCAC did not entail any changes to domestic law, since Switzerland had already transposed the principles set out in the UNCAC into its legislation, particularly with regard to the confiscation of assets already governed by art. 70 ff of the Swiss Penal Code and art. 74a of *the IMAC* . In the case of embezzlement of public property, art. 57 par. 3 let. a UNCAC provides for an obligation to hand over confiscated property to the requesting state when confiscation has been executed in accordance with art. 55 UNCAC and on the basis of a final judgment rendered in the requesting state, a requirement which the requested state may waive. In other cases, notably those covered by art. 57 par. 3 let. b and c UNCAC, there is no automatic right in favor of the requesting state. In cases where the requesting State cannot assert overriding rights over confiscated assets, other solutions will have to be found, notably in favor of the victims of corruption.
- **Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property** of November 14, 1970, which entered into force in Switzerland on January 3, 2004. Its aim is to improve the protection of cultural property in States Parties, and to safeguard the cultural heritage of mankind through international cooperation. It lays down the minimum legal and administrative standards that States Parties must apply to curb the illicit trade in cultural property. Its main thrusts are the fight against theft, clandestine excavations and the illegal import and export of cultural property. The Convention also calls for the restitution of stolen cultural property and the return of illegally exported goods. The 1970 Unesco Convention is not di-

rectly applicable, however, and requires States Parties to legislate for its implementation. This is what Switzerland has done with the LTBC, which came into force on June[1,] 2005. Art. 7 of the Unesco Convention stipulates that States Parties shall take appropriate measures to seize and return stolen property at the request of the country of origin, "provided that the requesting State pays fair compensation to the person who is the bona fide purchaser". Art. 13 of the Unesco Convention completes this provision, requiring states parties to admit actions for the return of lost or stolen cultural property.

The 1970 Unesco Convention makes no provision for the restitution or return of stolen or illegally exported cultural property, while respecting the rights of the bona fide purchaser. This is why, in 1984, the International Institute for the Unification of Private Law (UNIDROIT) was asked by Unesco to draw up a convention to regulate these matters, resulting in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of June 24, 1995. Switzerland signed the Convention on June 26, 1996, but has not yet ratified it. Under the UNIDROIT Convention, stolen cultural property (or that which has been illegally excavated) is subject to a right of restitution for 50 years (75 years in exceptional cases) (art. 3); similarly, illegally exported cultural property, the export of which harms important cultural or scientific interests, is subject to a right of return for 50 years (art. 5). If the cultural property has been acquired in good faith, the purchaser is entitled to fair compensation (art. 4 and 6).

III. DELIMITATIONS

A. Delimitation with art. 59 IMAC

15 Art. 74a *IMAC* is the counterpart to art. 59 IMAC, which applies to extradition. Art. 59 IMAC does not create a separate surrender procedure from that provided for in art. 74 and 74a *IMAC* . It does, however, allow objects or valuables in the possession of the person to be extradited to be handed over to the requesting authority at the time of extradition.

B. Delimitation with art. 70 ff of the Swiss Penal Code

16 While art. 70 et seq. of the Swiss Criminal Code sets out the conditions for the confiscation of assets in Swiss criminal proceedings, art. 74a *IMAC* lists the cases in which Switzerland, as the requested State, may withhold the ob-

jects or assets in question or suspend their delivery to the requesting State, in particular if the objects or assets are required for criminal proceedings pending in Switzerland or are liable to confiscation in Switzerland (art. *74a* para. 4 let. d IMAC).

C. Delimitation with art. 94 ff IMAC

Art. 74a *IMAC* and art. 94 ff IMAC are two separate procedures for the enforcement of foreign confiscation orders. In Bottinelli's terms, art. *74a*, which allows assets to be handed over to the foreign authority "with a view to confiscation or restitution to the rightful owner", constitutes an extradition procedure: the assets are delivered to the foreign state so that it can enforce its domestic confiscation order against them; conversely, the exequatur provided for under art. 94 ff IMAC amounts to transforming the foreign confiscation order into a Swiss confiscation order. These procedures therefore have a different center of gravity: in the case of art. 74a IMAC , the center of gravity will be in the requesting state, which will operate according to its domestic law, whereas in the second case, the center of gravity will be in Switzerland, where the foreign decision will have to be implemented. 17

D. Delimitation with the Privacy Act

The Privacy Act is an innovative law that governs the freezing, confiscation and restitution of assets of politically exposed persons abroad or their close relatives, where there is reason to assume that these assets have been acquired through acts of corruption or disloyal management, or through other crimes. It follows on from the Federal Council's practice of freezing potentate assets, which was previously based on art. 184 para. 3 of the Swiss Constitution and then codified in the Federal Act on the Restitution of Assets of Illicit Origin of Politically Exposed Persons of October[1,] 2010 (Restitution of Illicit Assets Act, aLRAI), which the Privacy Act replaces and supplements. The LVP provides for a dual mechanism for freezing assets: preventive freezing with a view to mutual legal assistance (art. 3 LVP) and freezing with a view to confiscation if mutual legal assistance fails (art. 4 LVP). Preventive freezing aims to support criminal investigations and international legal assistance by freezing assets so as not to make their future restitution to the state of origin impossible. Confiscatory freezing only comes into play at a later stage in the proceedings, when restitution through international legal assistance has proved im- 18

possible. The LVP is therefore a subsidiary system to the international mutual assistance provided for under the IMAC, which can only be activated in specific and limited cases.

19 The confiscatory freeze LVP is in principle followed by a confiscation procedure (art. 14-16 LVP), or a restitution procedure (art. 17-19 LVP). Art. 14 para. 4 PVG expressly provides for the subsidiary nature of a confiscation based on the PVG in relation to the remission and confiscation mechanisms provided for under the IMAC.

IV. PARAGRAPH 1 - SURRENDER

20 According to art. *74a* para. 1 IMAC, at the request of the competent foreign authority, objects or assets seized for safekeeping may, at the end of the mutual assistance procedure (art. *80d* IMAC), be **handed over for confiscation or restitution to the rightful owner**. Generally speaking, seizure is intended to ensure the execution of the requested acts of assistance and necessarily entails a subsequent decision. Para. 1 reiterates that the ultimate purpose of seizing objects or assets in the context of mutual assistance proceedings is to hand them over to the requesting state, which then orders the confiscation or restitution of the property seized in domestic proceedings.

21 In principle, the requesting state will ask for the **seizure** to be carried out before or with its request for surrender. However, if the requesting state does not expressly make such a request, it is accepted that the request for surrender from the requesting state also includes a request for precautionary measures, i.e. an implicit request for seizure. Case law even goes so far as to authorize Switzerland to freeze potentially embezzled funds if the requesting state is likely to ask for them to be handed over in accordance with art. *74a* IMAC. The executing authority may thus proceed with the protective sequestration in the absence of an express request, especially if there is a risk of collapse (art. 18 al. 2 IMAC). In this case, it must ask the requesting authority to clarify this point.

22 Conversely, an express request for restitution from the requesting state is required for Switzerland to surrender the goods and assets, as a **request for seizure is not in itself equivalent to a request for surrender**. Surrender to the requesting state is normally effected on the basis of a final and enforce-

able judgement which rules on confiscation or surrender to the rightful owner (cf. paras. 42 and 47 *below*).

Art. 33*a* OEIMP specifies that **objects and valuables remain seized** until receipt of a final and enforceable decision from the requesting State, or until the requesting State makes it known that such a decision is no longer possible under its own law, notably due to prescription. In particular, the Federal Court ruled that sequestration must be maintained even if the mutual assistance procedure is suspended. Switzerland will return the objects and valuables notwithstanding the occurrence of the statute of limitations under Swiss law, provided that the statute of limitations had not expired at the time of the seizure. 23

The duration of a sequestration must, however, respect the principle of **proportionality** and cannot be maintained indefinitely. In the case of administrative proceedings initiated at the request of a foreign state, practice is generally more tolerant of sequestration periods than in criminal proceedings. However, case law has repeatedly recognized that this system can lead to unacceptable situations. As a result, after a certain period of time, the Swiss authorities may be obliged to lift the sequestration or refuse to grant mutual assistance. The private interest of the owners of sequestered assets must be weighed against the public interest of the requesting state and the private interest of the victims in obtaining the handover of assets for confiscation or restitution, as well as against Switzerland's duty to fulfil its international obligations and not to serve as a safe haven for funds of criminal origin. 24

The proportionality of the measure is assessed in particular according to the conduct and progress of the proceedings in the requesting state. Depending on the circumstances, the executing authority may need to keep abreast of developments in the foreign proceedings. The analysis of the proportionality of contested seizures must also be based on the degree of complexity of the case. When neither the requesting state nor the executing authority can be blamed for any particular delay, the duration of the sequestration is not in itself sufficient to justify lifting the measure or refusing legal assistance. Different criteria may also be taken into account in the analysis of proportionality, depending on the specificities of the case, such as the adoption of a new confiscation law which would require the reintroduction of a request in the requesting state on the basis of these new provisions, the fact that the accused is on the run, making it difficult to carry out an investigation abroad, or the need 25

of the person concerned by the mutual assistance measure to have access to the blocked funds.

26 On the basis of these criteria, the Federal Court ruled in the Marcos case involving mutual assistance with the Philippines that the principle of proportionality had not been violated, even though fifteen years had elapsed since the sequestration, with a final deadline of five years for the requesting authorities to issue a first-instance decision confiscating assets that had been seized for more than twenty years. Conversely, in the Duvalier case, it rejected a Haitian request for mutual assistance thirteen years after a sequestration order had been issued, as the requesting State had failed to respond to requests for information demonstrating that it still had an interest in executing the request.

27 Proceedings based on art. *74a* IMAC inevitably lead to several years elapsing between the seizure and the handover of assets, not least because of the procedural requirements of the requesting state. What's more, certain offences or confiscation measures are subject to very long statutes of limitation in some countries, or are even imprescriptible. Maintaining the sequestration of objects and valuables during this period thus creates the risk of a disproportionate restriction of the fundamental rights of the persons concerned, in particular the guarantee of ownership provided for in art. 26 para. 1 of the Swiss Constitution, or the obligation to act promptly enshrined in art. 29 para. 1 of the Swiss Constitution. For these reasons, some legal scholars consider that art. *33a* OEIMP (cf. *supra* para. 23) does not constitute a sufficient legal basis to justify the serious infringement resulting from a sequestration with a view to surrender under art. 74a IMAC . On the contrary, this serious restriction of fundamental rights requires a formal legal basis.

28 The freezing or surrender of objects and valuables must also comply with the principles laid down in art. 2 let. a IMAC, which provides that a request for mutual assistance must be refused if the proceedings abroad do not respect certain fundamental procedural guarantees. Art. 2 let. a IMAC applies first and foremost to extradition and to cases where the accused is on the territory of the requesting state and can assert a concrete risk of violation of his procedural rights. In the TF's view, the surrender of objects and valuables must be equated with extradition insofar as it confers on the requesting state control over the accused, or his property, which justifies the application of art. 2 let. a IMAC in such cases.

Measures of constraint imposed in mutual assistance proceedings must still respect the **principle of double criminality**. The Swiss authorities may therefore only hand over objects or assets to the requesting authority with a view to confiscation or restitution to the rightful owner, provided that confiscation or restitution to the rightful owner complies with art. 70, respectively art. 73 of the Swiss Criminal Code. 29

Lastly, surrender to the requesting state cannot take place before the entry into force of a **decision to close** the Swiss mutual assistance procedure (art. *80d* IMAC), which will take place at the end of an ordinary or simplified procedure (art. 80c*IMAC*) if the person concerned consents. 30

V. PARA. 2 - OBJECTS AND ASSETS

Art. *74a* para. 2 IMAC sets out the nature of the objects and assets to be handed over. The list in art. 74a *para.* 2 IMAC is identical to that in art. 59 para. 3 IMAC, and reflects the definitions in art. 70 ff. of the Criminal Code. The list in art. 74a IMAC should be considered exhaustive. 31

In the first instance, they include the **instruments used to commit the offence** (*instrumenta sceleris*, let. a). These are objects that compromise personal safety, morality or public order, such as weapons, machines used to mint counterfeit money or forged cheques. 32

They then include the **proceeds of the offence** (*producta sceleris*, let. b *ab initio*) and the **results of the offence** (*quaesita sceleris* or *fructa sceleris*, let. b *ab initio*). The former refers to the objects and values obtained through the commission of the offence, such as the stolen painting or the sum of money involved in the swindle, while the latter refers to objects and values that have been produced as a result of the offence, such as the forged painting, counterfeit money or bribes. The funds removed from an enforcement measure also constitute the result of the offence. 33

The same applies to **unlawful advantage** (let. b *in fine*), which includes any increase in the perpetrator's assets as a result of his unlawful conduct. This advantage need not be pecuniary or at the expense of others. Typical examples are interest earned on stolen money deposited in a bank. Profits from transactions carried out using funds of criminal origin are assimilated to illicit advantages. 34

35 These may also include **gifts and other benefits which were used or intended to be used to decide or reward the offender** (*praetium sceleris*, let. c).

36 Finally, if the illicit proceeds, results or advantages obtained as a result of the offence (let. b) or the gifts and other advantages that served or were intended to serve to decide or reward the offender (let. c) are no longer available, the remission may relate to the **replacement values** (let. b and c *in fine*) acquired in exchange for them. These assets remain confiscable as long as their movement can be reconstructed in such a way as to establish their link with the offence.

37 These objects and assets must necessarily be **connected** with the offence. This relationship is given when there is a causal link between the offence and the obtaining of the objects and assets, such that the latter appears to be the direct and immediate consequence of the former. In other words, the offence must be the essential and adequate cause for obtaining the assets to be confiscated. This is the case when the original product of the offence can be identified with certainty and documented, i.e. as long as its "*paper trail*" can be reconstructed in such a way as to establish a link with the offence. This rule is also based on the principle of speciality. Assets whose acquisition was only facilitated by an offence, without any connection with it, are therefore not subject to confiscation.

38 The question of the admissibility of seizure to satisfy a **compensatory claim** is not expressly addressed in art. 74*a* para. 2 IMAC. Following the adage that "crime does not pay", some authors consider that this is a gap that should be filled by case law. In particular, they invoke art. 71 al. 3 CP, which would be applicable through the general reference in art. 12 IMAC. However, another part of the doctrine argues, and in our view rightly so, for qualified silence. It justifies its position by arguing that art. *74a* para. 2 IMAC requires a connection between the offence committed on the one hand and the objects or assets seized on the other, which is lacking with the compensatory claim. Moreover, the institution of the compensatory claim was known at the time of the revision of the IMAC, so that the legislator knowingly decided not to include it in the mechanism of art. 74a *IMAC* . Moreover, there is no other provision in the field of small-scale mutual assistance that would authorize seizures for the payment of a compensatory claim. Moreover, handing over funds to the foreign state for the purposes of a compensatory claim would confer an unjus-

tified preferential right from the point of view of debt collection law, insofar as no such preferential right exists under domestic law (art. 71 para. 3 StGB). Lastly, remission with a view to payment of a compensatory claim would not ensure sufficient protection and equality of creditors, as is the case with the procedure provided for in art. 71 PC. In any case, foreign judgments awarding compensatory claims can be enforced in Switzerland on the basis of art. 94 ff IMAC (enforcement of judgments). The position of the courts has long been confused. The case law of the TPF has fluctuated considerably, sometimes admitting the delivery of securities for the purposes of a compensatory claim, sometimes excluding it from the scope of art. *74a* IMAC. After detailed reasoning, the Federal Court definitively followed the latter approach, holding that the omission of the compensatory claim from art. *74a* IMAC constituted a qualified silence on the part of the legislator. It follows that any remittance of assets in execution of a foreign decision imposing a penalty corresponding to a compensatory claim in Switzerland can only be considered in application of art. 94 ff IMAC. In this respect, the terminology used by the foreign state is of little importance. What is decisive is whether, in the case in point, the Swiss authorities would have ordered a confiscation or a compensatory claim.

These developments are, however, limited by art. 7 ch. 2 let. b CBI, by which 39
Switzerland has undertaken to implement a legal basis allowing the remittance of funds for the payment of a compensatory claim. This provision is not yet directly applicable and has not yet been transposed into Swiss law. *De lege ferenda*, however, art. *74a* para. 2 IMAC should expressly mention the compensatory claim.

Where the foreign request concerns the surrender of funds derived from the 40
activities of a **criminal organization**, the rule set out in art. 72 of the Swiss Criminal Code applies to the surrender within the meaning of art. *74a* para. 3 of the IMAC. Art. 72 PC provides for the confiscation of assets over which a criminal organization has power of disposal, combined with a reversal of the burden of proof on the person having participated in or supported such an organization. The Federal Court has used this provision to confiscate assets considered to belong to **potentates**. In particular, it described the entourage of former Nigerian president Sani Abacha as a criminal organization within the meaning of art. ^{260ter} of the Swiss Criminal Code, and found that the structure set up by Abacha was intended to embezzle funds from the Central Bank of Nigeria for private purposes, as well as to profit from corruption opera-

tions. Consequently, funds belonging to a criminal organization are presumed to be of criminal origin, unless the holders can prove otherwise. If they fail to rebut the presumption set out in art. 72 CP, second sentence, surrender is ordered under art. *74a* para. 3 IMAC, without further examination of the origin of the funds claimed.

41 Finally, art. *74a* para. 2 IMAC refers only to objects and assets that are within the **perpetrator's power of disposal**. Immediate possession is not required, however, so that it is permissible to seize assets deposited in the hands of third parties, such as bank balances.

VI. PARA. 3 - TIME OF SURRENDER

42 According to Art. *74a* para. 3 IMAC, surrender no longer has to wait until the end of foreign criminal proceedings. It can take place **at any stage of the foreign criminal proceedings**, as a general rule when the requesting state has issued a final and enforceable confiscation or restitution order. It is therefore not necessary for the accused to have already been convicted by a final judgment, and the presumption of innocence is no obstacle to surrender. In practice, confiscation or restitution of seized valuables or objects is often only possible once the foreign criminal and seizure proceedings have been concluded, and in principle only in the presence of an enforceable confiscation order.

43 The foreign order may be issued by a **criminal, civil or administrative authority**. Art. *74a* IMAC requires only that the confiscation (or restitution) relates to objects or assets obtained by criminal means (art. *74a* para. 2 IMAC) and that it is ordered by a court. An independent confiscation order already suffices (by analogy with art. 376 of the Swiss Criminal Code).

44 The confiscation or restitution order issued by the requesting state **determines the unlawful origin of** the objects and assets seized and their **rightful owner**, and **orders their confiscation or restitution to the rightful owner**. It clarifies the facts and constitutes a binding decision under the law of the requesting state, on the basis of which the authorities of the requested state can generally order the return of the confiscated objects or assets without further action. At the same time, the requirement of an enforceable decision enables the requested state to check a posteriori that the decision complies with the rule of law.

During the consultation procedure, several voices were raised in favor of making the surrender of objects or valuables by Switzerland subject to an **ex-equatur procedure** for the foreign decision, to enable the latter's validity to be verified. However, the Federal Council took the view that the principle of trust between States, which is particularly important in the field of mutual assistance, did not authorize Switzerland to review the merits of decisions taken by a sovereign foreign judicial authority, provided that these decisions did not manifestly violate Swiss public policy or the fundamental principles of the ECHR. Moreover, a foreign confiscation or restitution order should not be the subject of an exequatur order within the meaning of Part V of the IMAC, as it is not a sanction within the meaning of art. 11 IMAC. 45

Switzerland is thus **not authorized to examine the merits of** the decisions of an independent foreign judicial authority, unless these decisions manifestly violate Swiss public policy or elementary principles of the ECHR. It is sufficient for the enforcement authority to examine the foreign decision summarily, after ascertaining that the foreign state is a state governed by the rule of law, and that it respects the general principles mentioned. If necessary, the executing authority may call on the requesting state to obtain further information (art. *80o* IMAC), or make the granting of mutual assistance subject to conditions (art. *80p* IMAC). 46

By **way of exception**, the executing authority may also grant a request for surrender **before the end of the foreign proceedings**, i.e. in the absence of a final and enforceable decision, as indicated by the phrase “as a general rule”. Art. *74a* para. 3 does not specify the grounds for deviating from the general rule, and thus confers broad discretionary powers on the enforcement authority. However, this discretion must not have the effect of rendering the requirement for a final and enforceable decision meaningless. In order to proceed with an advance surrender, the situation must be clear, both in terms of the identification of the objects or valuables and their criminal origin. The circumstances must be so obvious that there is absolutely no need to clarify the criminal origin, and that making surrender conditional on obtaining a confiscation order would appear disproportionate. In this respect, the executing authority must take into account all the concrete circumstances of the case and examine the particularities that justify dispensing with a final and enforceable decision. In such cases, the interest of the requested state is limited, according to the TF, to respecting the elementary guarantees of a procedure in line with 47

the requirements of the ECHR or the UN Covenant; account must also be taken of Switzerland's essential interest, within the meaning of art. *1a* IMAC, in not providing a safe haven for the considerable sums illegally embezzled by representatives of dictatorial regimes.

48 A typical example is the handing over of a clearly identifiable stolen painting, such as a painting by Piero della Francesca stolen from the Galleria dei Uffizi in Florence. For example, the Federal Court has accepted the surrender of a painting stolen from France in the absence of a final confiscation order, basing its decision on the international public interest in the protection of cultural property. It also allowed the assets of the late Ferdinand Marcos, seized in Switzerland, to be handed over in the absence of an enforceable decision, given Switzerland's interest in the immediate restitution of the assets and their manifestly criminal origin, on condition that the Philippines guarantees a restitution or confiscation procedure in compliance with UN Covenant II. "

49 The executing authority may also waive the requirement for a final decision in the case of assets held by a **criminal organization** within the meaning of art. 260 StGB and art. 72 StGB if the holders of the assets are unable to prove their legitimate origin.

VII. PARA. 4 - GROUNDS FOR REFUSAL TO SURRENDER

50 Art. 74a provides *for* the definitive surrender of objects and assets to the requesting state (cross-reference to para. 1). To mitigate this strict regime, art. 74a para. 4 IMAC introduces **safeguards that may prevent** such surrender. This paragraph lists the grounds justifying the retention of objects or valuables in Switzerland, despite the request of the requesting state. These include the rights of the injured party (let. a), those of an authority (let. b) and those of third parties (let. c), or the needs of proceedings or confiscation in Switzerland (let. c). Third-party claims entail suspension of the surrender procedure until the law is known (cf. paras. 67 ff. *below*).

51 Like para. 1 of this provision, art. 74a*para.* 4 IMAC is drafted as a **potestative norm**, unlike its counterpart in domestic law, art. 70 para. 2 PC, which constitutes a peremptory norm. However, the latitude enjoyed by the authority on this basis must be aimed solely at preventing abuses, and must under no circumstances lead to third parties being treated less favourably in the context of a confiscation ordered by a foreign state than in a purely domestic situation.

Thus, the claims of a third party or an injured party must in principle, if they appear likely, lead to the suspension of the surrender procedure.

The **TF has extended the circle of persons entitled to oppose surrender** beyond the text of art. *74a* para. 4 IMAC. They now also include (i) injured parties who do not reside in Switzerland and who are not compensated by the defendant, the requesting state or a third party; (ii) victims of human rights violations by the government of the requesting state; or (iii) financial intermediaries who are simultaneously obliged by a third state other than the requesting state to retain the assets whose surrender is requested. Any third party that does not meet the criteria of art. *74a* para. 4 IMAC will have to take action before the courts of the requesting state to assert its rights to the assets in question. 52

A. Rights of the injured party (letter a)

The **injured party's claims for restitution** may prevent the surrender of objects and assets abroad, provided that the injured party has his habitual residence in Switzerland. Only restitution is covered by this provision, not general claims for compensation. 53

B. Rights of an authority (letter b)

Switzerland may also waive the surrender of objects or assets to the foreign authority when a **Swiss authority asserts rights** over them. In our view, by analogy with the rights of bona fide third parties referred to in let. c (cf. para. 55 *below*), this covers rights in rem or limited rights in rem belonging to an entity governed by Swiss public law, in particular federal, cantonal or communal authorities, the Confederation, cantons or communes, vested with public power. Rights of lien for the benefit of the tax authorities and the question of objects or assets required for Swiss proceedings are dealt with separately (art. 60 IMAC, respectively art. *74a* para. 4 let. d IMAC). 54

C. Rights of bona fide third parties (letter c)

Art. *74a* para. 4 IMAC also protects acquisition by " **persons not involved in the offence** " acting in good faith. 55

The law does not refer to a third party, but to a person unrelated to the offence, i.e. distinct from the accused. This concept excludes, in particular, a le- 56

gal entity that is entirely controlled by the accused, where the latter continues to exercise effective power over the assets resulting from the offence. On the other hand, case law does not preclude any link with the offence, and recognizes that persons who have received assets linked to the offence in good faith may oppose their surrender to the requesting state.

57 The legal text also requires a certain **link with Switzerland**. In order to benefit from the protection afforded by art. 74a*para.* 4 IMAC and to prevent surrender, the person concerned must demonstrate that he or she has acquired the rights he or she is claiming in Switzerland or, failing that, that he or she is resident in Switzerland if he or she acquired the rights abroad.

58 The rights claimed in respect of these objects or assets must be **real rights or limited real rights**, such as a pledge, and not mere personal rights, such as a contract. A right of retention of the goods may thus be the basis for refusal of delivery.

59 In application of the Swiss legal principle that **criminal sequestration takes precedence over civil sequestration** in the event of conflict, a civil sequestration does not establish any substantive lien. It is merely a provisional measure designed to secure a claim, but does not prevent the return of objects or assets to the foreign authority, as does a transfer order subsequent to the sequestration.

60 It should also be noted that objects or valuables can only be retained in Switzerland on the basis of art. *74a* para. 4 IMAC if the claims of the foreigner involved in the offence **are not adequately protected in the requesting state**, either in the context of the current criminal proceedings or in other civil or criminal proceedings. The protection of these claims is deemed adequate in States bound by art. 6 par. 1 ECHR and subject to the subsidiary control of the Strasbourg bodies. As in the case of extradition, this presumption should in our view be rebutted if there is clear evidence that these rights are not being respected.

61 The notion of **good faith** under art. 74a para. 4 IMAC is understood in the criminal sense (art. 70 CP) and not in the civil sense (art. 933 ff CC). A third party acquiring assets in ignorance of the facts that would have justified confiscation is therefore considered to be acting in good faith. On the other hand, as soon as the third party is aware or cannot ignore these facts, he or she is no longer protected. This is the case in particular when the third party was aware

of the nature of the reward or proceeds of the offence, or should have presumed this in the light of the case in question. All circumstances must be taken into account, such as the third party's ability to obtain information. Knowledge of the de facto and de jure organs of a company is imputed to the latter. In any event, the purchaser must have taken the most elementary precautions and must take all necessary steps in good time to ascertain the origin of the assets or object.

The **burden of proof** lies with the purchaser. The law does not require strict proof in this respect, but rather that the third party make his good faith plausible. The enforcement authority should therefore limit itself to verifying whether the purchaser's allegations are sufficiently precise and substantiated to admit the plausibility of his claims. This should not exempt the third party from proving the circumstances under which he acquired the object or assets, such as the place and date of acquisition and the identity of the seller, and from providing documentary proof of payment or remittance. 62

D. Need for proceedings or confiscation in Switzerland (let. d)

In some cases, objects or assets may be **the subject of both mutual assistance and domestic criminal proceedings in Switzerland**, for example in the case of money laundering offences. Art. *74a* para. 4 let. d IMAC provides that Switzerland may refuse to hand over the goods to a foreign authority if it intends to confiscate them as part of a domestic criminal proceeding. 63

If the goods and assets are to be confiscated in Switzerland, confiscation in Switzerland will generally take precedence over surrender to the foreign state. For the rest, **the choice of whether to favour Swiss or foreign criminal proceedings** will be governed by mainly pragmatic considerations, such as the chances of success, efficiency, procedural economy, respect for the principles of Swiss law, the possibility of sharing the confiscated assets with the foreign state, or the risk of the assets being re-appropriated illegitimately in the requesting state. In principle, if the requesting authority intends to return the objects or valuables to the injured party, the Swiss authorities will order the return even if these objects or valuables are also the subject of Swiss criminal proceedings. If there is no direct victim of the offence, as in the case of drug trafficking for example, the Swiss procedure should be preferred. 64

65 In the event of **competing foreign requests for surrender**, the IMAC does not contain a rule allowing the claims of one state to be preferred to those of another. In principle, the rules set out in the previous paragraph will apply, with Switzerland again enjoying very broad discretionary powers.

66 The **interests of the requesting state** may be taken into account in the context of a sharing agreement (cf. art. 11 et seq. of the Swiss Civil Code, see para. 73 *below*). In this respect, Switzerland has a wide margin of discretion, since apart from the particular configuration provided for in art. 57 par. 3 let. a UNCAC, Switzerland has no international obligation to hand over confiscated assets to the foreign authority. Its only obligation is to confiscate the proceeds of crime (see not. art. 7 para. 2 let. a CBI). The requesting State has no right to require Switzerland to proceed by means of a surrender within the meaning of art. *74a* IMAC, rather than by domestic confiscation for the benefit of the Swiss treasury, which would be less favorable to the requesting State. However, this discretion should not be used to circumvent the rules of international law on mutual legal assistance and the resulting obligations of Switzerland. In application of the principle of good faith, the Swiss authorities must refrain from any unfair approach which would unilaterally favour Swiss interests to the detriment of foreign interests.

VIII. PARA. 5 - SUSPENSION OF SURRENDER

67 Art. 74 para. 5 IMAC states that surrender to the requesting state is **suspended in the event of claims by entitled parties** on the objects and assets until the law is known. The legal text does not specify the circle of rightful claimants, but in our opinion it concerns the injured party (art. *74a* para. 4 let. a), including any heirs, and third parties acting in good faith (art. *74a* para. 4 let. b).

68 This provision also lays down the **conditions under which the seizure may be lifted and the objects or valuables handed over to these entitled parties**, either if the requesting State consents (let. a), in the case of para. 4 let. b if the authority consents (let. b) or if the claim is recognized as well-founded by a Swiss judicial authority (let. c). In our view, these conditions are alternative, in accordance with the wording of the law.

69 In the majority of cases, the rightful claimant who invokes his rights to the objects or assets in question will have to present a **judgment from a Swiss**

court (art. *74a* para. 5 let. c), the hypothesis of the consent of the requesting State (art. *74a* para. 5 let. a) or of the Swiss authority (art. *74a* para. 5 let. b) appearing rare. If he does not already have the benefit of such a judgment, the rightful claimant should therefore in principle bring an action for determination before a Swiss court. In case of doubt, the enforcement authority must set a deadline for the beneficiary to file a civil action. The text of the law is silent on the nature of the judicial decision, and it must therefore be assumed that it includes both a final civil judgment on the merits, delivered at the end of the procedure, and a substitute, such as a judicial settlement. It is only once the Swiss courts have ruled on these rights that it is necessary to determine whether the objects and valuables should be handed over to the requesting state. In our view, a foreign judgment should also be admissible if it meets the conditions for recognition in Switzerland.

That said, one author rightly considers that art. 74a*para.* 5 let. c is formulated too absolutely, and that the competent authority should be able to decide on the release of objects or assets to the rightful claimant when the legal situation is clear, without the need for a civil judgment. This would typically be the case where the right invoked is documented, and can therefore be easily proven and evaluated. In this way, the civil judge would only intervene if there were any doubt as to the rights of the interested party. This solution would save procedural costs and possible interest charges for the various parties involved. 70

IX. PARAGRAPH 6 - TAX LIENS

Pursuant to art. 60 para. 1 IMAC, applicable by reference to art. *74a* para. 6 IMAC, if the objects or assets are handed over without reservation of restitution, the **customs lien or any other real security established by Swiss customs or tax law cannot be enforced**, unless the owner injured by the offence is himself liable to pay. Waiver of this right of lien may be subject to reciprocity (art. 60 al. 2 IMAC). 71

Art. 23 OEIMP, although relating to extradition, applies by analogy. This provision **specifies the situations in which it is appropriate to invoke or waive rights of lien in favor of the tax authorities**, i.e. if the objects to be handed over (a) are liable to confiscation in the requesting State or (b) belong to a requesting State which, in the opposite case, does not waive its rights of lien. 72

X. PARA. 7 - DIVISION OF CONFISCATED ASSETS

73 Pursuant to art. 11 et seq. of the Swiss Criminal Code, the Confederation may conclude **agreements** with a foreign state **on the sharing of** confiscated assets. In principle, such agreements provide for a 50/50 sharing of the assets between the states (art. 12 para. 3 PCSA). Derogations are possible, notably in view of the nature of the offence, the location of the assets, the importance of the foreign state's participation in the investigation, as well as customs between Switzerland and the foreign state, the guarantee of reciprocity, the international context or the importance of damage to the interests of the foreign state (art. 12 al. 3 CPA). It is also possible to deviate from this key if one state has incurred greater costs or suffered greater damage than the other. The amount allocated to Switzerland is then shared between the various authorities in accordance with the procedures laid down by law (art. 3 ff. of the Swiss Civil Liability Act). The *sharing of* confiscated assets between the Confederation and foreign states is referred to as external sharing. In principle, external sharing presupposes that the foreign state grants reciprocity (art. 11 para. 2 CPA).

74 According to art. *74a* para. 7, objects that devolve to Switzerland in execution of a sharing agreement based on the PCVG **are not handed over**. Thus, if part of the objects or valuables it hands over to the foreign authority could be assigned to Switzerland under a possible subsequent sharing agreement, the executing authority must make appropriate reservations in the operative part of the closing decision. Similarly, the executing authority may postpone the surrender if Switzerland intends to proceed with a division of the seized assets in accordance with the PCSA, provided that the funds for which surrender is requested have not yet been the subject of a final decision in the requesting state.

XI. LEGAL REMEDIES

75 The decision of the Swiss executing authority on the surrender of the objects or assets to the foreign authority is a **final decision** which may be **appealed to the Complaints Court of the TPF** (art. *80e* para. 1 IMAC). Anyone who is personally and directly affected by the assistance measure and who has an interest worthy of protection in its annulment or modification is entitled to appeal (art. *80h* let. b IMAC). This includes the persons mentioned in para. 4 let.

a-d, i.e. third parties who have a claim on the objects and assets to be handed over (cf. *supra* para. 50). Appeals may be lodged for violation of federal law (which in principle includes international law), including excess or abuse of discretionary powers (art. 80i para. 1 let. a IMAC) or for illegitimate or manifestly incorrect application of foreign law, in cases covered by art. 65 IMAC (art. 80i para. 1 let. b IMAC). The time limit for appeals is 30 days from written notification of the decision, subject to an appeal for denial of justice, which may be lodged at any time. An appeal against the decision to close the procedure has suspensive effect (art. *80l* para. 1 IMAC).

The IMAC system can sometimes lead to unsatisfactory situations, as it can take several years between the seizure of assets and their handover. In such circumstances, the admissibility of the appeal is exceptionally not conditional on the existence of immediate and irreparable harm, in order to allow, for example, the holder of a bank account to have the legality or proportionality of the coercive measure reviewed by a judicial authority before the decision is taken to release the assets or hand them over to the requesting state. Seizure of objects or valuables without a decision on surrender within a reasonable time also opens the way to an appeal for formal denial of justice. 76

The decision of the TPF can only be **appealed to the TF** in exceptional cases, i.e. when the conditions of art. 84 FSCA are met. The case must be particularly important (para. 1). This is particularly the case when there is reason to assume that the foreign procedure violates fundamental principles or contains other serious defects (para. 2). Such a case may also be accepted when a legal question of principle arises, when the previous instance has departed from the case law of the Federal Court, or when the case is otherwise of extraordinary importance. In particular, the Federal Supreme Court held that this was the case with regard to the application of Art. *74a* to the surrender of assets for the purpose of enforcing a compensatory claim, insofar as it had not yet ruled on the matter. In any case, the requirements for accepting such a case are high. The time limit for lodging an appeal is ten days from notification of the complete copy of the decision (art. 100 al. 2 let. b LTF). In principle, appeals have suspensive effect (art. 103 al. 2 LTF). Violations of fundamental rights under the ECHR may ultimately be brought before the ECtHR, subject to the conditions laid down in the Convention. 77

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COMMENTARY ON

Art. 80 IMAC

A commentary by Miro Dangubic / Marco Mignoli

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Art. 80 Preliminary examination

[1] The request shall be subject to preliminary examination by the cantonal or federal authority responsible for its execution.

[2] If the request cannot be granted, the executing authority shall return it to the requesting authority by the same channel through which it was received.

CONTENT

I. General 377
II. Demarcation from summary examination pursuant to Art. 78 para. 2 IMAC 377
III. Preliminary examination 378
IV. Positive preliminary examination 379
V. Negative preliminary examination 379
VI. Party rights and legal remedies 380
Bibliography 380

I. GENERAL

The procedural provision of Art. 80 IMAC applies after a request for mutual assistance has been received by the competent implementing authority directly or after summary examination by the FOJ within the meaning of Art. 78 para. 2 IMAC. Par. 1 obliges the executing authority to conduct a prima facie analysis of the request for mutual assistance. This is to ensure that all the conditions for mutual assistance are met before ordering mutual assistance measures that may interfere with the rights of the persons concerned. Par. 2 sets out the procedure to be followed in the event of inadequate requests for mutual assistance. 1

The addressee of Art. 80 IMAC is the authority that conducts the mutual assistance proceedings. In practice, these are in particular cantonal public prosecutors' offices (Art. 55 para. 1 Code of Criminal Procedure), the Office of the Attorney General of Switzerland or administrative criminal authorities (Art. 17 para. 4 and Art. 79 para. 2 IMAC) and the FOJ in cases under Art. 79a IMAC. 2

For mutual legal assistance with the USA, Art. 10 FSCA-RVUS contains a similar provision. 3

II. DEMARCATION FROM SUMMARY EXAMINATION PURSUANT TO ART. 78 PARA. 2 IMAC

The summary examination pursuant to Art. 78 para. 2 IMAC takes place before the preliminary examination pursuant to Art. 80 para. 1 IMAC and is carried out by the FOJ. In practice, the FOJ subjects all requests for mutual assistance that it receives to summary examination - even if direct communication would have been possible. The purpose of this provision is to ensure that the specialist authority separates out requests for mutual assistance that clearly cannot be complied with on the basis of the files. At the same time, the authority responsible for executing the request for mutual assistance is identified so that the request for mutual assistance can be forwarded or delegated to it - if the FOJ does not execute the request itself. The examination density of the preliminary examination pursuant to Art. 80 para. 1 IMAC is higher than that of the summary examination pursuant to Art. 78 para. 2 IMAC, although there is no clear demarcation - not least because of these fuzzy contours, the FOJ has a great deal of discretion in the summary examination. 4

III. PRELIMINARY EXAMINATION

5 The request for mutual assistance must be subjected to a formal and substantive preliminary examination. The specific requirements for mutual assistance are derived from the relevant international treaties and, subsidiarily, from the IMAC and the IMAC Ordinance (Art. 1 para. 1 IMAC), whereby, in accordance with the so-called principle of favorability, the national provisions apply even if they impose lower requirements for mutual assistance.

6 Formal aspects that must be regularly examined are, in particular, the language, the form and the completeness of the content and the enclosures of the request for mutual assistance. From a substantive point of view, it is typically examined whether the facts of the case have been presented in a legally sufficient manner, whether there are grounds for refusal and whether the execution of the request appears to be proportionate. If the execution of the request for mutual assistance requires coercive measures, double criminality must also be examined (cf. Art. 64 para. 1 IMAC).

7 Another check is whether Swiss procedural law, namely the Code of Criminal Procedure and the Criminal Procedure Act, permits the requested measure. However, a request for mutual assistance may also be granted (cf. Art. 80a para. 1 IMAC) if not all the requested assistance measures are admissible: In this case, the admissible measures will be executed and the requesting authority will be informed which implementing acts are not enforceable in Switzerland.

8 If the processing of the request requires special expertise or up-to-date scientific know-how and/or specialist knowledge concerning special matters of Swiss law, the executing authority may obtain opinions from specialist authorities - such as the Federal Tax Administration (cf. Art. 24 para. 3 IMAC) or the State Secretariat for Economic Affairs - as part of the preliminary examination. It is also permissible to consult files from other proceedings (e.g. criminal proceedings or mutual assistance proceedings), data from the commercial register or publicly accessible sources if they could be useful for the preliminary examination. Orders to the police are also possible at this stage of the proceedings.

9 The question of who has party status in the mutual assistance proceedings does not necessarily have to be answered at this stage of the proceedings, es-

pecially since the parties in the mutual assistance proceedings are in any case only established after the mutual assistance acts have been carried out.

Since the preliminary examination does not yet conclusively decide on the granting and scope of mutual assistance, Art. 80 para. 1 IMAC merely provides for a prima facie analysis of the request for mutual assistance. According to the view expressed here, the executing authority should nevertheless already carry out a careful check of the request for mutual assistance at this stage of the proceedings: On the one hand, this can avoid costly and pointless criminal procedural measures. On the other hand, in the case of inadequate requests for mutual assistance (Art. 80 para. 2 IMAC), only a careful examination will enable the requesting authority to take targeted action. 10

Within the framework of Art. 80 para. 1 IMAC, it is not necessary to examine whether mutual assistance is to be restricted or refused due to conflicting essential Swiss interests pursuant to Art. 1a IMAC. The FDJP is responsible for such a decision, which can be requested within 30 days of the final ruling (cf. Art. 17 para. 1 IMAC). 11

In the case of so-called supplementary letters rogatory, only a limited preliminary examination takes place, namely only the admissibility of the requested measures is to be checked. 12

IV. POSITIVE PRELIMINARY EXAMINATION

If the result of the preliminary examination is positive, a summarily reasoned ruling of acceptance is issued (Art. 80a para. 1 IMAC), in which the result of the preliminary examination is recorded. This is followed by the requested implementing measures, namely disclosure orders, house searches, seizures, interrogations, secret surveillance measures and account freezes (cf. Art. 63 et seq. IMAC). Subsequently, the rights of the parties (in particular the right to be heard) are granted and the mutual assistance proceedings are concluded. Even if the preliminary examination is positive, the executing authority can still refuse mutual assistance. 13

V. NEGATIVE PRELIMINARY EXAMINATION

If the request for mutual assistance does not meet the requirements, this is not recorded in a formal order. According to Art. 80 para. 2 IMAC, in this case 14

the request for mutual assistance must be returned to the requesting authority. In addition to the refusal of mutual assistance, it is also possible at this stage of the proceedings that the requesting authority is invited to supplement or improve the request for mutual assistance. The reasons for the request or refusal of mutual assistance must be given to the requesting authority.

15 If direct communication with the requesting state is possible, the executing authority may itself take action vis-à-vis the requesting authority - even if the FOJ has delegated or forwarded the request for mutual assistance to it. Otherwise, the FOJ must be involved.

VI. PARTY RIGHTS AND LEGAL REMEDIES

16 In the run-up to the preliminary examination, potential parties have no right to inspect files (Art. 80b para. 1 IMAC) and no right to make a preliminary statement (Art. 30 para. 1 APA). Furthermore, there is no duty of disclosure to the potential parties with regard to negative preliminary examinations, nor is there any right of appeal against them. If the request for judicial assistance is granted, the usual rules on party rights and appeals apply within the framework of the corresponding judicial assistance proceedings.

The legal opinion of the two authors is independent of that of their employer. Terms referring to persons apply equally to women and men.

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COMMENTARY ON

Art. 80a IMAC

A commentary by Miro Dangubic / Cyrill Purtscheller

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Art. 80*a* Consideration and execution

[1] The executing authority shall issue a summary ruling on whether to consider the case and shall order the mutual assistance measures permitted.

[2] It shall execute the mutual assistance measures in accordance with its own procedural law.

CONTENT

I. General 385
II. The decision to grant mutual legal assistance 385
A. Content and form 386
B. Combination with other orders 386
C. In the case of supplementary requests for mutual assistance 387
III. Mutual assistance measures 387
A. General 387
B. Application of criminal procedure law 387
1. Sources of mutual legal assistance 387
2. CrimPC/VStrR 388
3. Foreign procedural law 388
IV. Party rights and legal remedies 388
A. Party rights 388
B. Legal remedies 389
V. Procedural issues 389
A. Time limits 389
B. Refusal of mutual assistance 389
Bibliography 390
Materials 391

I. GENERAL

The **procedural provision** of Art. 80*a* IMAC is directed at the executing authority and applies if the preliminary examination pursuant to Art. 80 para. 1 IMAC has been positive. Art. 80*a* para. 1 IMAC provides that the result of the preliminary examination must be recorded in a decision on admissibility, summarily justified, and that the necessary mutual assistance measures must then be ordered. The applicable procedural law for these mutual assistance measures is governed by Art. 80*a* para. 2 IMAC. 1

With the very general term **legal assistance measure**, Art. 80*a* IMAC refers in particular to procedural acts in criminal proceedings within the meaning of Art. 63 ff. IMAC. 2

The **executing authority** within the meaning of Art. 80*a* IMAC is the authority that conducted the preliminary examination, i.e. in particular cantonal public prosecutors (Art. 55 para. 1 CrimPC), the Office of the Attorney General of Switzerland or administrative penal authorities (Art. 17 para. 4 and Art. 79 para. 2 IMAC) and the FOJ in cases under Art. 79*a* IMAC. 3

With regard to mutual legal assistance with the USA, **Art. 10 BG-RVUS** applies to the decision to grant mutual legal assistance and its execution. 4

II. THE DECISION TO GRANT MUTUAL LEGAL ASSISTANCE

The decision to grant mutual legal assistance is made following a positive preliminary examination in accordance with Art. 80 IMAC. It states in particular that the relevant substantive and formal requirements for granting mutual legal assistance are met. 5

Apart from the cases regulated in Art. 18 para. 2 IMAC, the decision to grant jurisdiction is in principle a **formal prerequisite** for the execution of mutual assistance measures within the framework of minor mutual assistance. Unlike the opening decision in criminal proceedings, it therefore has more than just a declaratory effect. 6

A. Content and form

7 The decision to grant jurisdiction is generally issued in writing. It must be designated as such and contain information on the right of appeal and a summary of the reasons. The summary of the reasons may include the following points in particular:

- details of the request for mutual assistance (date of the request, name of the requesting authority, case number of the foreign criminal investigation, criminal offenses that are the focus of this investigation, and the names of the accused persons);
- a summary of the facts described in the request;
- the reason for the request;
- the legal basis for the mutual assistance proceedings, in particular the relevant international treaties;
- the result of the formal and substantive preliminary examination of the conditions for mutual assistance;
- the result of the examination of double criminality if coercive measures are to be carried out;
- a dispositive provision; and
- the opening formula.

B. Combination with other orders

8 The order to enter into proceedings may be combined with other mutual assistance orders. If the conditions are met, the following orders in particular may be issued at the same time:

- Interim order in which mutual assistance measures are ordered;
- Interim order concerning the presence of persons involved in foreign proceedings (Art. 65*a* IMAC);
- Interim order authorizing the hearing by videoconference;
- Interim order concerning the conditions for so-called dynamic mutual assistance (Art. 18*b* and 80*d*^{bis} IMAC);
- Final decision in accordance with Art. 80*d* IMAC.

C. In the case of supplementary requests for mutual assistance

If the foreign law enforcement authority submits further requests for mutual assistance in the same criminal proceedings in relation to the same set of facts, these are referred to as supplementary requests for mutual assistance. For these supplementary requests for mutual assistance, the executing authority is not required to issue a new decision to enter the case, but may immediately order mutual assistance measures based on the original decision to enter the case. 9

III. MUTUAL ASSISTANCE MEASURES

A. General

Mutual legal assistance measures are procedural acts that require the granting of mutual legal assistance, namely criminal procedural acts such as: 10

- House searches (Art. 244 f. CrimPC);
- Interrogations (Art. 142 ff. CrimPC);
- Obtaining written reports (Art. 145 CrimPC);
- secret surveillance measures (Art. 269 ff. CrimPC);
- orders for surrender (Art. 265 CrimPC) and
- seizures (Art. 263 ff. CrimPC).

There is no *numerus clausus* for possible mutual legal assistance measures – the list in Art. 63 ff. IMAC is therefore not exhaustive. 11

Mutual legal assistance measures are, in the formal sense, **interim orders**. 12

B. Application of criminal procedure law

1. Sources of mutual legal assistance

Mutual assistance proceedings within the scope of the IMAC are governed primarily by the relevant international treaties and, subsidiarily, by the IMAC and the IMAC Implementing Act (Art. 1 para. 1 IMAC), whereby, in accordance with the principle of favorability, national provisions also apply if they impose less stringent requirements on mutual assistance. Since international 13

treaties do not usually contain procedural provisions and the IMAC and the IMAC do not completely regulate the procedure for minor mutual assistance, other national provisions apply subsidiarily, namely the CrimPC and the VStrR for criminal proceedings and the APA for other matters (see Art. 12 para. 1 IMAC).

2. CrimPC/VStrR

14 Art. 80*a* para. 2 IMAC states that the executing authority shall carry out mutual assistance measures in accordance with its own procedural law, thus repeating the provision of Art. 12 para. 1 IMAC, according to which the CPC and the VStrR apply mutatis mutandis to **criminal procedural acts**.

15 However, criminal procedure law only applies insofar as it regulates the **execution** or **modalities** of the mutual assistance measure. For example, Art. 244 et seq. StPO applies to house searches, Art. 266 StPO to seizures, Art. 269 et seq. StPO to telecommunications surveillance, and Art. 142 et seq. StPO to interrogations. CrimPC and Art. 142 ff. CrimPC must be observed for interrogations.

16 Criminal procedure law does not play any further role based on Art. 80*a* para. 2 IMAC. In particular, it is not applicable to questions concerning the service of orders and legal remedies.

3. Foreign procedural law

17 Certain international treaties and **Art. 65 IMAC** provide that certain rules of evidence of the requesting state may be applied when carrying out criminal procedural acts. This is generally only done at the express request of the foreign authority and if it is compatible with Swiss law. In practice, this provision is applied in particular in the case of hearings, for example by instructing the witness in accordance with foreign law.

IV. PARTY RIGHTS AND LEGAL REMEDIES

A. Party rights

18 Prior to the decision on admissibility and mutual assistance measures, potential parties have no right to inspect the files and no right to be heard in advance (Art. 80*b* para. 1 IMAC and Art. 30 para. 1 APA). Furthermore, there is

no right to immediate notification of the decision on admissibility. In principle, the right to a fair hearing is guaranteed if the rights of the parties are granted in advance of the final decision.

B. Legal remedies

The **decision to grant access** is not independently appealable. The independent appealability of interim decisions (including **mutual legal assistance measures**) is governed by Art. 80*e* para. 2 IMAC. According to this provision, interim orders may be challenged independently if they cause an immediate and irreparable disadvantage through the seizure of assets and valuables (lit. a) or through the presence of persons involved in the foreign proceedings (lit. b). Deficiencies in the mutual assistance procedure (including incorrect decisions on admissibility or interim decisions) may be challenged in an appeal against the final decision (Art. 80*e* para. 2 IMAC). 19

V. PROCEDURAL ISSUES

A. Time limits

Mutual assistance proceedings must be conducted expeditiously (Art. 17a IMAC). However, there are **no statutory time limits** for conducting the preliminary examination, issuing the decision on admissibility, or ordering criminal procedural measures. 20

In an *obiter dictum* in RR.2013.236-249, the Appeals Chamber of the Federal Criminal Court considered that the question of admissibility should generally be decided within a few days and should only take several weeks in complex cases. However, this consideration has not yet become established practice. 21

B. Refusal of mutual assistance

A request for mutual assistance may be granted even if not all of the requested acts of mutual assistance are admissible. In this case, the admissible criminal procedural acts are carried out and the requesting authority is informed of which acts cannot be carried out in Switzerland. 22

The executing authority may also **refuse** mutual assistance if it has complied with the request for mutual assistance and carried out various acts of mutual 23

assistance. In principle, this does not require a formal decision by the executing authority, but merely a notification to the requesting authority.

Note:

Terms in the text that refer to persons apply equally to women and men.

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The author is a federal prosecutor in the field of international mutual assistance in criminal matters. His legal opinion is independent of that of his employer. The co-author is an assistant federal prosecutor in the field of cybercrime. His legal opinion is independent of that of his employer.

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COMMENTARY ON

Art. 80b IMAC

A commentary by Miro Dangubic / Marta Stelzer-Wieckowska

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Art. 80*b* Participation in the proceedings and access to the files

[1] The persons entitled may participate in the proceedings and have access to the files provided this is necessary to safeguard their interests.

[2] The rights provided for in paragraph 1 may be limited only:

a. in the interest of the foreign proceedings;

b. for the protection of an important legal interest if the requesting State so requests;

c. because of the nature or urgency of the measures to be taken;

d. for the protection of important private interests;

e. in the interest of Swiss proceedings.

[3] Access to the files or participation in the proceedings may only be denied in the case of files or procedural measures for reasons of confidentiality.

CONTENT

I. General 396
II. History 396
III. The entitled parties 397
A. General 397
B. Party status 397
C. Procedural consequences of party status 399
IV. Right to inspect files 399
A. Duty to keep records as a prerequisite 399
B. Scope of the right to inspect files 401
C. Modalities of the right of access to the file 401
D. Time of granting access to the files 402
E. Appeals procedure 402
V. 'Right to participate' 402
A. Right to make representations in advance 403
B. Differentiation from Art. 65a IMAC 403
VI. Restrictions 404
A. Reasons for restriction (Art. 80b para. 2) 404
1. In the interests of the requesting state (lit. a and b) 405
2. Nature or urgency of the measure to be taken (c) 405
3. Protection of essential private interests (lit. d) 406
4. In the interests of Swiss proceedings (let. e) 406
5. Significant public interests of the Confederation or the cantons (Art. 27 para. 1 let. a APA) 406
B. Limits to the refusal of access 407
C. Procedural issues 407
Bibliography 407
Materials 409

I. GENERAL

1 The parties to the proceedings concerning accessory legal assistance shall have the right to a **hearing in court**, in particular to the issuing of rulings, to inspect files, to express their views in advance and to the grounds for the rulings. These party rights are typical of administrative proceedings under special legislation. In addition to the IMAC and IMACO, they are enshrined in the APA, which applies as subsidiary procedural law (Art. 12 para. 1 IMAC), although a large part of current practice has developed on a caseby-case basis.

2 Art. 80*b* para. 1 IMAC regulates one aspect of the right to a fair hearing, namely the **right of access to documents** and the **right to participate**. Art. 80*b* paras. 2 and 3 IMAC contain provisions restricting the right of access to documents. Art. 80*b* IMAC is supplemented and specified by Art. 26, 27, 28 and 30 APA.

3 With regard to the 'right to participate' stipulated in Art. 80*b* para. 1 IMAC, it should be noted that case law essentially derives the **right to make a statement** from this and thus does not mean the right to participate in the foreign criminal investigation.

4 The procedural provisions of Art. 80*b* IMAC are directed at the executing authorities – in particular the cantonal public prosecutors (Art. 55 para. 1 CrimPC), the Office of the Attorney General of Switzerland or administrative penal authorities (Art. 17 para. 4 and Art. 79 para. 2 IMAC) and the Federal Office of Justice in the cases under Art. 79*a* IMAC. These are responsible for granting the right to be heard. The holder of the rights, however, is the party to the mutual assistance proceedings ("**the entitled party**").

5 Art. 9 BG-RVUS contains an identical provision for mutual assistance with the USA. Art. 52 and 55 para. 1 IMAC apply to extradition proceedings within the scope of the IMAC.

II. HISTORY

6 Article 80*b* IMAC was included in the Act as part of the revision of the IMAC of 4 October 1996 (which came into force on 1 February 1997) and its wording has remained unchanged since then.

The right to participate was not explicitly regulated in the version of the IMAC that came into force on January 1, 1983. The right to inspect files, on the other hand, was enshrined in Art. 79 para. 3 IMAC. With regard to the right to inspect files, the former Art. 76 para. 3 IMAC stipulated that Art. 6, 26 and 27 APA also apply to its exercise in cantonal proceedings and that the request for legal assistance and the associated documents may be inspected by the person entitled to do so insofar as this is necessary to safeguard his interests. The accused, who was not personally affected by the legal assistance measure, should only be entitled to inspect the files if he was habitually resident in Switzerland, and then 'only in the interest of safeguarding his rights of defense in foreign criminal proceedings' (Art. 79 para. 3 p. 2 and 3 IMAC in the version in force until February 1, 1997). 7

III. THE ENTITLED PARTIES

A. GENERAL

The right to inspect files and the right to participate within the meaning of Art. 80*b* para. 1 IMAC are granted to the **entitled parties**. According to established practice, the entitled party under Art. 80*b* para. 1 IMAC is the party to the mutual assistance proceedings. Unlike the APA and the CrimPC, however, neither the IMAC nor the IMACO define who is a party in mutual assistance proceedings. According to the practice of the Federal Supreme Court, a party is someone who is personally and directly affected by a mutual assistance measure and has a legitimate interest in its revocation or amendment. Consequently, party status is based on the right of appeal within the meaning of Art. 80*h* let. b IMAC. This is no different in the scope of application of the APA: the definition of a party in Art. 6 APA refers to the right to appeal under Art. 48 APA. 8

B. PARTY STATUS

Unlike in a criminal investigation, the focus of the proceedings in a case of minor legal assistance is not on the accused, but on evidence and assets. Accordingly, party status depends on the relationship to the evidence or asset. Generally speaking, the party in the legal assistance proceedings is the person against whom a **criminal procedural measure** has been ordered or carried 9

out. Consequently, the question of party status in mutual assistance proceedings must be examined separately for each mutual assistance measure. Due to the restrictive standard, only one person can have party status per mutual assistance measure.

10 The requesting state does not have party status in the mutual assistance proceedings.

11 The following are examples of the persons who are considered to be parties – and thus entitled parties within the meaning of Art. 80*b* para. 1 IMAC – in the case of specific legal assistance measures:

- In the case of measures concerning a **bank account**, in principle only the account holder, or in the alternative, the so-called "beneficial owner" and, in exceptional cases, the bank managing the account.
- In the case of **house searches** (Art. 244 CrimPC), the person who has the actual power of disposal over the searched premises. This can be either the tenant or the owner.
- In the case of measures concerning **motor vehicles**, the vehicle owner.
- In the case of **disclosure orders** (Art. 265 CrimPC), the person obliged to disclose.
- In the case of the **search of** persons (Art. 249 f. CrimPC), the searched person.
- In the case of the **surrender for forfeiture or restitution**, in addition the bona fide third party (Art. 74*a* para. 4 let. c IMAC).
- In the case of **interrogations** under mutual assistance (Art. 142 ff. CrimPC), a distinction is made depending on the function of the person to be interrogated: the accused and the person providing information in accordance with Art. 178 let. d CrimPC are always granted party status. By contrast, witnesses only have the status of a party if their own statements also concern them or to the extent that they can invoke a right to refuse to testify.

12 The above also have the status of a party in principle if they had to submit to the corresponding criminal procedural measure in the context of Swiss criminal proceedings and the evidence collected in this regard is included in the legal assistance proceedings.

C. PROCEDURAL CONSEQUENCES OF PARTY STATUS

If a person is a party to the legal assistance proceedings, this means that they are entitled to inspect the files and have the right to participate in the proceedings in accordance with Art. 80*b* para. 1 IMAC. 13

In principle, granting party status and party rights does not require a **formal decision**, but refusal does. The decision by which the executing authority denies the party status of a litigant and thus refuses the right of access to the case-file and the right to participate is to be treated procedurally as a final decree with regard to that person, which can be challenged by means of an appeal to the Appeals Board of the Federal Criminal Court. 14

In assessing the party status, the executing authority has a **discretionary scope**. In particular, it may also grant the rights of a party in the event of a questionable party status and is not necessarily obliged to order the exclusion of the party seeking justice. 15

The right to inspect files and to express oneself is subject to the requirement of having one's **domicile/registered office** or **address for service** in Switzerland. 16

IV. RIGHT TO INSPECT FILES

The right to inspect files under Art. 80*b* para. 1 IMAC should enable the party to the mutual assistance proceedings to inform themselves about the case files at the latest before the formal conclusion of the mutual assistance proceedings (final ruling under Art. 80*d* IMAC or simplified execution under Art. 80*c* IMAC), in particular to enable them to exercise their right to be heard in a manner that is relevant to the case. 17

A. DUTY TO KEEP RECORDS AS A PREREQUISITE

The right to inspect records implies the duty of the legal assistance authorities to keep records. The legal assistance authorities are specifically obliged to include in the records everything that is relevant to the case and may be **decisive for the decision**. Typical records in a legal assistance case include: 18

- the (translated) request for legal assistance incl. enclosures;
- any requests for additional information;

- the mutual assistance rulings issued;
- the delegation ruling from the Federal Office of Justice;
- the evidence intended for disclosure;
- party submissions; and
- the correspondence with the requesting authority relevant to the decision.

19 The following are not to be considered relevant: **internal administrative files** created in connection with the execution of the legal assistance proceedings, in particular notes in the executing authority's files, copies of e-mails between authorities or notes of telephone conversations.

20 In the context of international cooperation between law enforcement authorities, so-called **coordination meetings** are held time and again in advance of or in the course of executing a request for mutual assistance. Within the scope of the CrimPC, the Federal Supreme Court has ruled that international meetings between law enforcement authorities that are limited to purely coordinating matters are not covered by the obligation to keep minutes and thus do not find their way into the criminal files. This principle also applies to mutual assistance proceedings without further ado.

21 The question of whether or not a so-called spontaneous transmission under **Art. 67*a* IMAC** that forms the basis of a later request for mutual assistance should be included in the procedural files of a mutual assistance procedure was essentially answered in the negative in the case law of the Federal Supreme Court. If the report under Art. 67*a* IMAC is not or never added to the mutual assistance files, however, there is – in effect – no legal protection in connection with the unsolicited transmission. This contradicts the older supreme court case law, according to which possible violations of Art. 67*a* IMAC can in principle be challenged in the final decree. According to the view presented here, spontaneous transmissions under Art. 67*a* IMAC are only rarely essential to the legal assistance proceedings. This is because they regularly do not contain any information for the legal assistance proceedings that goes beyond the request for legal assistance. Due to the unclear legal situation described above, the executing authorities should nevertheless include reports in accordance with Art. 67*a* IMAC in the legal assistance files in case of doubt. A restriction of the inspection of files in this regard can still be examined based on Art. 80*b* para. 2 IMAC.

In practice, the executing authorities usually open one mutual assistance procedure per mutual assistance request and create the files accordingly. Alternatively, it is possible to open one mutual assistance procedure per **piece of evidence/asset**. This makes particular sense if a large number of criminal procedural measures are carried out in the context of a mutual assistance request, affecting different parties. 22

B. SCOPE OF THE RIGHT TO INSPECT FILES

The right of a party to mutual assistance proceedings to inspect files is by no means all-encompassing. In particular, it is limited in **personal terms** to those procedural files that are relevant to the party in question. Consequently, there is no right of access to investigative actions or evidence collected for which the person seeking justice does not have party status. The corresponding information in this regard can also be made unrecognizable by the executing authority in the request for legal assistance. The same applies to facts that are not relevant for this party. 23

C. MODALITIES OF THE RIGHT OF ACCESS TO THE FILE

The executing authority is **responsible for** maintaining the records and granting access to the records. It decides what belongs in the case file and the extent to which the party may inspect the records. Those seeking justice can be confident that only those parts that are not subject to the right of access to records have actually been removed or redacted. 24

Access to the files is granted upon **request** and usually takes place at the offices of the executing authority. There is no right to the disclosure or delivery of original files or copies. Nevertheless, many public prosecutor's offices provide the parties or their legal representatives with the procedural files in digital form. In certain cases, original files may be disclosed to an authorized attorney. If the party agrees, the legal assistance authority may send the files electronically for inspection in accordance with Art. 26 para. 1bis APA. However, there is no general right to electronic delivery. 25

D. TIME OF GRANTING ACCESS TO THE FILES

26 Access to the files must be granted at the latest before the conclusion of the mutual assistance proceedings (final ruling under Art. 80d IMAC or simplified execution under Art. 80c IMAC).

27 The right to access to the files under Art. 80b para. 1 IMAC exists as long as it is necessary to safeguard the interests of the party to the mutual assistance proceedings. Accordingly, the party no longer has the right to inspect the files if the mutual assistance proceedings have been legally concluded (see also Art. 80*m* para. 2 and 80*n* para. 2 IMAC).

E. APPEALS PROCEDURE

28 For the purposes of conducting the **appeal proceedings**, the Appeals Court of the Federal Criminal Court may request the executing authority to submit the case file on the basis of Art. 57 para. 1 APA. The submission of the case file is an official duty in the context of administrative assistance.

29 However, the executing authority's obligation to hand over the files to the Complaints Board of the Federal Criminal Court applies only to those documents on which the contested decision is based, i.e. those files for which the party has a right of access. According to practice, only these files are to be made available to the Complaints Board of the Federal Criminal Court in the corresponding form (i.e. with any covers removed). Consequently, the court of appeal does not carry out any triage (e.g. by party).

30 If procedural documents that are essential for the decision are missing, the Complaints Board of the Federal Criminal Court will, as a matter of practice, contact the executing authority. If the executing authority again fails to provide the relevant documents to the court, this constitutes a violation of the right to be heard, according to the case law of the Federal Criminal Court.

V. 'RIGHT TO PARTICIPATE'

31 The case law essentially derives the **right to make representations in advance** from the 'right to participate' mentioned in Art. 80*b* para. 1 IMAC.

32 Further '**participation rights**' in mutual assistance proceedings also arise in particular from the provisions of the IMAC and the CrimPC.

A. RIGHT TO MAKE REPRESENTATIONS IN ADVANCE

The right to make a statement in advance (Art. 80*b* para. 1 IMAC in conjunction with Art. 30 APA) is the core element of the right to be heard. In the case of minor legal assistance, this right exists only with regard to the final ruling (Art. 80*d* IMAC). It is safeguarded if the party is invited to submit a **written statement** before the conclusion of the legal assistance proceedings, listing the evidence/assets intended for handover. This gives the party the opportunity to comment on the legal assistance proceedings, to submit requests and, if necessary, to submit evidence. In practice, the executing authority sets a deadline for the party to submit its statement and at the same time asks whether it irrevocably agrees to the simplified procedure under Art. 80*c* IMAC. The deadline for the statement should not be shorter than 10 days. When setting the deadline, the complexity of the legal assistance proceedings and the volume of the case file must be taken into account. In certain circumstances, the executing authority can extend the deadline. However, there is no right to an oral hearing. 33

The following party rights in legal assistance proceedings correlate with the right to make a statement in advance or have an **auxiliary function** in this regard: 34

- the right to be informed of rulings (Art. 80*m* IMAC and Art. 34 para. 1 APA);
- the right to inspect files (Art. 80*b* para. 1 IMAC and Art. 26 et seq. APA);
- the right to the grounds for the ruling (Art. 80*a* and 80*d* IMAC and Art. 35 para. 1 APA);
- right to representation and free legal aid (Art. 21 IMAC and Art. 29 para. 3 FC).

B. DIFFERENTIATION FROM ART. 65A IMAC

The rights of the parties in the mutual assistance proceedings must be distinguished from the rights to participate in the gathering of evidence in the foreign criminal investigation on which the mutual assistance proceedings are based. 35

36 If the requesting state requests, based on its procedural law, that the accused, a co-accused or the private claimant or their legal counsel, for example, be present in Switzerland during the taking of evidence, the executing authority may grant this request on the basis of Art. 65*a IMAC* or analogous treaty provisions. In terms of the subject matter, the right to participate primarily concerns interrogations (Art. 142 et seq. CrimPC). It would also be conceivable to participate in inspections (Art. 193 CrimPC) and in the collection of expert opinions (cf. Art. 185 CrimPC). However, the parties to the foreign criminal investigation do not have the status of parties to the legal assistance proceedings.

VI. RESTRICTIONS

37 The right to be heard is not absolute. It is limited in particular by overriding public interests or the legitimate interests of third parties. With regard to the right to inspect files, Art. 80*b* para. 2 IMAC governs the grounds that justify a restriction, and Art. 80*b* para. 3 IMAC specifies the principle of proportionality in this context.

38 With regard to the **right to make prior representations**, it is not clear to what extent the provisions of Art. 80*b* paras. 2 and 3 IMAC could be relevant.

39 The provisions of Art. 80*b* paras. 2 and 3 regarding restrictions only apply if there is a right of access to the file: i.e. the specific piece of file material is in the case file (and is therefore particularly crucial) and it is of relevance to the person requesting access to the file. In addition, the claim must also exist in terms of time, which means that the legal assistance proceedings must in principle be nearing their formal conclusion.

A. REASONS FOR RESTRICTION (ART. 80*B* PARA. 2)

40 The alternative grounds for restriction of the right of access to files are set out in Art. 80*b* para. 2 let. a–e IMAC. However, this very **generally formulated list** is not exhaustive: in particular, according to case law, the right of access to files can also be restricted on the basis of Art. 27 APA.

1. In the interests of the requesting state (lit. a and b)

The right to inspect files can be restricted in the interests of the requesting state, namely "in the interests of foreign criminal proceedings" (Art. 80*b* para. 2 let. a IMAC) or "to protect an essential legal interest, provided that the requesting state requests it" (Art. 80*b* para. 2 let. b IMAC). 41

As Heimgartner has already correctly recognized, both alternatives require at least an implicit **request by** the requesting authority to restrict the right to inspect files. In the case of these alternatives, which cannot be clearly distinguished, the restriction can ultimately only relate to certain sections of the request for mutual assistance or its enclosures. Reasons for a request by the requesting authority to limit the right to inspect files could include, in particular: 42

- risk of collusion in the foreign criminal investigation;
- internal and external security of the requesting state;
- security of persons involved in the foreign criminal investigation (witnesses, informants, suspects, experts, translators and members of law enforcement authorities or their relatives);
- private interests such as medical files or manufacturing, business and patent secrets in the requesting state.

When considering the restriction of the right to inspect files, particular account must be taken of the fact that the **principle of trust** applies under international law, i.e. that in principle the accuracy of statements made by the requesting authority can be trusted. Thus, the requested authority is not required in principle to check whether, for example, there is actually a risk of collusion in the foreign criminal investigation. 43

2. Nature or urgency of the measure to be taken (c)

Art. 80*b* para. 2 let. c IMAC states that the right to inspect files may be restricted due to the nature or urgency of the measures to be taken. According to the message, this variant should in particular make it possible to restrict a party's access to the file in the run-up to seizure (Art. 263 et seq. CrimPC) and confiscation (Art. 69 et seq. SCC). In contrast, legal doctrine associates the provision with secret surveillance measures (Art. 269 et seq. CrimPC). 44

45 According to the view presented here, Art. 80*b* para. 2 let. c IMAC is a dead letter, since no constellations can be identified in which the scope of application could take effect: on the one hand, in the run-up to criminal procedural measures such as seizure, observation and the surveillance of postal and telecommunications traffic, there is no right to inspect files anyway. On the other hand, the rights of the parties must be granted in advance of the final decree. It is no coincidence that there is no relevant case law on the provision.

3. Protection of essential private interests (lit. d)

46 The right of access to files may also be restricted in order to protect important private interests (Art. 80*b* para. 2 let. d IMAC). The protection of private confidentiality interests is concerned with safeguarding the private and secret spheres. This may include medical files or manufacturing, business and patent secrets.

4. In the interests of Swiss proceedings (let. e)

47 If criminal investigations are being conducted in Switzerland and in the requesting state that are factually connected, the inspection of files in the legal assistance proceedings may be restricted in the interests of the Swiss criminal investigation (Art. 80*b* para. 2 let. e IMAC). In this context, particular consideration should be given to the risk of collusion in the Swiss criminal proceedings or the safety of persons involved in the Swiss criminal investigation (witnesses, respondents, experts, translators and members of the prosecuting authorities or their relatives).

5. Significant public interests of the Confederation or the cantons (Art. 27 para. 1 let. a APA)

48 The implementing authority may also refuse access to the file if significant public interests of the Confederation or the cantons, in particular the internal or external security of the Confederation, require confidentiality (Art. 27 para. 1 let. a APA). According to the Federal Criminal Court, there is a particular interest in ensuring the safety of informants and contacts and in not disclosing the manner in which the Swiss authorities and their missions abroad obtain information. In practice, this has mainly involved statements by the Federal

Department of Foreign Affairs for the attention of the Federal Office of Justice regarding the institutions of the requesting state.

B. LIMITS TO THE REFUSAL OF ACCESS

Access may only be refused for specific items for which there are reasons of secrecy (Art. 80*b* para. 3 IMAC). Consequently, the refusal is to be limited to the **strict minimum** required, and the remaining and thus non-secret content of the files or the relevant file piece is to be made accessible in a suitable form (by singling out, covering the passages to be kept secret, the names and identifying information of authors and contact persons, etc.). 49

C. PROCEDURAL ISSUES

Art. 80 para. 2 IMAC is a so-called **discretionary provision**. The executing authority thus has a margin of discretion in deciding whether – under the given conditions – a restriction of the access to the records should be made. 50

According to case law, the executing authority may not base its final ruling on secret parts of the records that are inaccessible to the parties. If it wishes to rely on a secret document to the detriment of a party, it must give that party oral or written notice of the essential content of the secret document and the opportunity to comment on it. 51

A restriction of access to the file under Art. 80*b* para. 2 IMAC can only be challenged in the context of the final ruling. 52

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Art. 80*c* Simplified execution

[1] The persons entitled, and in particular the holders of documents, information or assets may consent to handing them over without formality at any time prior to the conclusion of the proceedings. Consent is irrevocable.

[2] If all the persons entitled give their consent, the competent authority shall make a written record thereof and conclude the proceedings.

[3] If only some of the documents, information or assets required are handed over, the ordinary proceedings shall be followed for the remaining part.

CONTENT

I. General 413
II. History and purpose 413
III. Interpretation of Art. 80c IMAC 414
A. Paragraph 1: Scope of entitlement and consent 414
1. Entitled persons 414
2. Scope of party rights 414
3. Form and timing of consent 415
B. Paragraph 2: Procedure in the event of full consent (conclusion of proceedings) 416
C. Paragraph 3: Partial consent 417
Bibliography 418
Materials 419

I. GENERAL

Art. 80c IMAC applies when an entitled person expressly consents to mutual legal assistance being provided to a requesting state. In this respect, the provision in the minor mutual legal assistance law is sometimes understood as a counterpart to simplified extradition under Art. 54 IMAC, which aims to conclude mutual legal assistance proceedings efficiently and by mutual agreement. Almost identical provisions on "simplified execution" can also be found in mutual legal assistance agreements with Italy (Art. XX EUeR CH-I) and the USA (Art. 12a BG-RVUS). 1

Since no special formalities are required and no legal remedies are available, the procedure is much faster than in ordinary mutual assistance proceedings. The provision thus serves to **simplify and accelerate proceedings** in accordance with the principle of acceleration enshrined in Art. 17a IMAC. 2

II. HISTORY AND PURPOSE

Art. 80c IMAC was incorporated into the law as part of the revision of the Mutual Assistance Act of October 4, 1996 (in force since February 1, 1997), and the wording has remained unchanged since then. The background to this revision was the political will to accelerate and simplify mutual legal assistance proceedings, as repeated appeals against interim orders had previously caused considerable delays. In particular, the practice of lodging appeals at every stage of the proceedings sometimes meant that it was possible to wait for the statute of limitations to expire on the offenses being prosecuted abroad. 3

Since this revision, it has been possible, under certain conditions, to transmit objects of mutual legal assistance already during the course of the proceedings. If mutual legal assistance proceedings involve different objects of mutual legal assistance, such as several interrogation reports or various files, the proceedings can be **split up**. For those parts to which the entitled parties have expressly and irrevocably consented, simplified execution is possible in accordance with Art. 80c IMAC. With regard to the remaining, still disputed objects, the proceedings are continued in the ordinary course and concluded with (partial) final decisions in accordance with Art. 80d IMAC (cf. Art. 80c para. 3). The transmission of individual objects of mutual legal assistance 4

therefore no longer necessarily requires the conclusion of the entire mutual legal assistance proceedings.

5 The **benefits of simplified execution** are obvious: mutual legal assistance proceedings can be significantly accelerated, as time-consuming and costly steps (justification of a final decision, appeal proceedings) are no longer necessary. An analysis by the Federal Office of Justice from 2020 shows that, particularly in the case of economic crimes, the median average duration of proceedings is reduced by around four months as a result of simplified execution.

III. INTERPRETATION OF ART. 80C IMAC

A. Paragraph 1: Scope of entitlement and consent

1. Entitled persons

6 **Entitled persons** within the meaning of the IMAC are those persons who have party status in the mutual assistance proceedings. Neither the IMAC nor the Mutual Assistance Ordinance (IRSV) expressly define who is a party; therefore, the relevant authority is the case law of the Federal Supreme Court, according to which a party is anyone who is personally and directly affected by a mutual assistance measure and has an interest worthy of protection in its revocation or amendment. Consequently, party status is based on the right to appeal pursuant to Art. 80*h* lit. b IMAC.

7 The decisive factor here is the person's relationship to the evidence or asset concerned. In mutual legal assistance proceedings, for example, the person against whom the coercive measure is directed or on whom it has been carried out is generally entitled to appeal. For example, in the case of the disclosure of bank documents, the account holder (but not, as a rule, the bank itself) is entitled to lodge an appeal. For a more detailed description of the entitled parties and party status, please refer to the commentary by Dangubic Miro and Stelzer-Wieckowska Marta on Art. 80b above.

2. Scope of party rights

8 Authorized parties have comprehensive **party rights** in mutual assistance proceedings, in particular the right to a fair hearing, access to files, and notification of decisions (see, for example, Art. 80b IMAC).

In mutual legal assistance proceedings, they may either raise objections (whereupon the authority issues a final decision subject to appeal pursuant to Art. 80d IMAC) or consent to the surrender (Art. 80c IMAC). The rights of the parties are laid down in Art. 80b IMAC, which was newly introduced in the same 1997 revision. According to this, the executing authority must inform the entitled parties about the request for mutual legal assistance and the files at the latest before the conclusion of the proceedings, so that they can comment appropriately. 9

According to the opinion expressed here, consent to simplified execution does not entail a complete waiver of the **right to be heard** by the entitled parties, especially since party rights can in principle be exercised until the proceedings are legally concluded. For example, it is possible that the person concerned may consent to the transmission of the interrogation transcript to the foreign authority during an interrogation and at the same time request and obtain access to the case files. 10

What can the consent refer to? According to Art. 80c para. 1 IMAC, the entitled parties may "*consent to the disclosure of the same until the conclusion of the proceedings*," whereby "*the same*" refers to "*documents, information, or assets*." This refers to the classic **objects of mutual legal assistance** that are transmitted within the framework of so-called minor mutual legal assistance. This primarily covers potential evidence that has been obtained by means of evidence-gathering or coercive measures. In addition to edited or seized data carriers and documents, "*information*" is also regularly understood to mean the transmission of interrogation transcripts. 11

3. Form and timing of consent

Article 80c(1) itself does not prescribe any particular form – it merely states that the entitled parties "*may ... consent*." Consent can therefore be given verbally or in writing. However, for reasons of legal certainty and preservation of evidence, the **written form** is strongly recommended. The mutual legal assistance judge must formally record the premature conclusion of the mutual legal assistance proceedings – although the conclusion does not require justification, it must at least record the consent of the parties involved. 12

Furthermore, particularly in the case of persons not represented by a lawyer, the wording of Art. 80c IMAC and the fact that the corresponding declaration 13

is irrevocable and therefore entails a **waiver of legal remedies** should be explained.

14 Consent may be given "*until the conclusion of the proceedings*." It follows from this that, in principle, consent may be given **at any time** until the conclusion of the specific mutual assistance proceedings in Switzerland to the competent Swiss executing authority. This conclusion is reached either by a final decision in accordance with Art. 80d IMAC or – in the case of consent – by an informal final decision in accordance with Art. 80c para. 2 IMAC following transmission abroad.

15 A further prerequisite for the **effectiveness** of the consent is that the objects of mutual legal assistance concerned are specifically identified. A blanket or precautionary consent – for example, at the beginning of the proceedings – is therefore excluded. A lack of detailed information on the scope and content of the seized documents at the time of the declaration of consent does not affect its validity, provided that the documents concerned are sufficiently identifiable. Finally, once all entitled parties have given their consent, the documents can be transmitted immediately.

B. Paragraph 2: Procedure in the event of full consent (conclusion of proceedings)

16 Paragraph 2 regulates the procedure to be followed when all entitled parties have given their consent. In this case, "*the competent authority shall record the consent in writing and conclude the proceedings*." The legislature therefore requires a formal act of termination of proceedings, but without examining the substance of the conditions for mutual legal assistance. In practice, the authority issues a signed confirmation stating that all necessary consents have been obtained. In this **transfer order**, it also specifies the documents to be handed over and declares the proceedings to be closed. The principle of speciality under Art. 67 IMAC applies here as in ordinary mutual assistance proceedings and is brought to the attention of the requesting authority or the Federal Office of Justice by the executing authority.

17 In the absence of a complaint, there is **no legal remedy** against the transfer (order). This prevents the transfer of evidence, information, or assets to the foreign authority from being subsequently questioned, in the interests of legal certainty.

However, the right of appeal is open if the validity of the consent is contested by analogy with Art. 23 ff. CO due to **defects of consent** and the error was not the fault of the person concerned. In this case, all circumstances of the case must be examined, in particular whether the executing authority caused the error or otherwise violated good faith. In accordance with a relevant Federal Supreme Court decision, this is not the case if the authority simultaneously requests the person concerned to confirm receipt of certain documents and to consent to simplified execution. In this case, the executing authority was entitled to assume that the person concerned's signed confirmation constituted valid consent to simplified execution. 18

C. Paragraph 3: Partial consent

Paragraph 3 takes into account the possibility that consent may not be obtained for the entire scope of the request for legal assistance. This regulates the case of **partial consent** or division of the proceedings. In practical terms, this means that the authority may divide the legal assistance proceedings. For those parts to which the entitled parties have consented, the procedure is concluded in a simplified manner (immediate disclosure of these documents in accordance with para. 2). With regard to the remaining parts of the request for which no consent has been given, the authority continues with the regular procedure and ultimately issues a reasoned final decision in accordance with Art. 80d IMAC. 19

In **practice**, this provision is of great importance. It is not uncommon for the entitled parties to initially give their consent only for part of the evidence collected in order to first consult with any legal representatives or other authorities regarding the rest. For the authorities, this means additional work due to parallel proceedings, but it also allows for the rapid transmission of undisputed evidence. This approach theoretically carries the risk of contradictory decisions: this could occur if the entitled party consents to the simplified transmission of only part of the evidence collected, appeals against the final decision concerning the remaining evidence, and the Appeals Chamber considers that the conditions for mutual legal assistance have not been met. Given that appeals in mutual legal assistance matters are statistically rarely successful, with very few of these favorable decisions having any material effect, this risk is considered to be low and must be accepted by the executing authority. 20

Comments:

The legal opinion of the two authors is independent of that of their employer. Terms referring to persons apply equally to women and men.

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COMMENTARY ON

Art. 80d IMAC

A commentary by Krisztina Balogh / Dominik Reichle

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Art. 80*d* Conclusion of the mutual assistance proceedings

When the executing authority determines that the request is completely or partially executed, it shall issue a ruling giving reasons on whether mutual assistance is granted and to what extent.

CONTENT

I. General 423
II. Procedure for issuing the final decision 423
III. Structure and content of the final decision 425
IV. Legal protection and enforcement 426
V. Costs 427
Bibliography 427
Materials 428

I. GENERAL

Art. 80d IMAC requires the executing authority to settle a request for legal assistance in whole or in part by means of a formal **final decision** after completion of the execution. Since the revision of the Mutual Assistance Act of October 4, 1996 (in force since February 1, 1997), this final decision has formed the cornerstone of the procedure: it constitutes the final decision by which the authority determines the admissibility and scope of mutual assistance. 1

Before a final decision is issued, **no information or evidence** may be disclosed to the requesting state. Exceptions apply in particular to unsolicited transmission pursuant to Art. 67a IMAC, the transmission of electronic traffic data pursuant to Art. 18b IMAC, early transmission pursuant to Art. 80d^{bis} IMAC, and simplified transmission pursuant to Art. 80c IMAC. 2

Depending on the **enforcement authority**, the final decision is issued either by the authority responsible for enforcement (such as a cantonal public prosecutor's office or the Office of the Attorney General of Switzerland, cf. Art. 78 f. IMAC) or, less frequently, by the Federal Office of Justice (FOJ), provided that it itself decides on the granting and scope of mutual legal assistance (cf. Art. 79a IMAC; Art. 28 ff. BG-RVUS). 3

Finally, mutual legal assistance proceedings are concluded by means of a final decision in cases where no other type of settlement is appropriate, namely non-acceptance (Art. 78 para. 2 IMAC), non-admissibility (Art. 80 para. 2 IMAC) or informal settlement in a simplified procedure (Art. 80c IMAC). In this regard, settlement by means of a final decision is also understood in legal doctrine as **subsidiary**. 4

II. PROCEDURE FOR ISSUING THE FINAL DECISION

The issuance of a final decision requires that the executing authority consider the foreign request to be "*settled*". This is the case when all admissible mutual assistance measures have been carried out and the results are ready for transmission – i.e., a formal or substantive decision can be made on the requests made in the request. Accordingly, the (partial) conclusion of the mutual assistance proceedings by means of a final decision is also a prerequisite for transmission abroad. 5

6 In many cases, mutual assistance is completed in full; but the law expressly provides that a final decision may also constitute the **conclusion of part** of the request. The authority may therefore – in the exercise of its discretionary powers – conclude a mutual legal assistance case in several stages, provided that this is justified by objective reasons (e.g., if certain documents are already available but others are not yet available). Separate (final) orders must be issued later for any parts of the request that are still pending, as soon as they can be executed and the relevant conditions are met.

7 If a mutual legal assistance decision does not require a prior interim order, orders to proceed, interim orders, and final orders can be **combined**. This concentrated approach aims to speed up the proceedings. Direct orders for initial and final decisions are possible and appropriate wherever the final decision is not preceded by separate procedural steps in which the right to be heard must be granted. This may be the case, for example, when existing files are consulted, court documents are served, or criminal record extracts are issued.

8 Once a request for legal assistance has been executed, i.e., when the executing authority considers the request to have been fulfilled in whole or in part, the persons entitled must be given the opportunity to exercise their **right to be heard** in accordance with Art. 30 para. 1 of the APA. For this purpose, a notice of the impending final decision shall be issued. This right to prior comment applies exclusively to the final decision (and not to the preliminary or interim decision) and is deemed to have been upheld if the party concerned is expressly informed of the evidence to be disclosed before the decision is issued and is given an adequate period of time to comment. In the case of the disclosure of bank documents, the bank has the right to inform its customers about the request for legal assistance after any prohibition on disclosure has been lifted (Art. 80n para. 1 IMAC).

In this case, and in particular if the customer is resident or domiciled abroad, the executing authority must wait for a reasonable period of time between lifting the prohibition on disclosure and issuing the final decision so that the bank customer can take note of the proceedings and, if necessary, participate in them or designate a domicile for service in Switzerland.

9 The executing authority must, in principle, expedite the mutual assistance proceedings in accordance with the **requirement of prompt execution** under Art. 17a IMAC. In this regard, the Federal Supreme Court has ruled that a

period of seven and a half years between the receipt of the request and the final decision of the FOJ, as well as periods of inactivity of one and a half and three years, respectively, constitute a violation of the requirement of expeditiousness, but that such delays must not be to the detriment of the requesting state.

III. STRUCTURE AND CONTENT OF THE FINAL DECISION

A typical final decision in mutual legal assistance usually contains the following elements: (a) **description of the facts** or a summary of the request and the essential course of the proceedings (including submissions by the parties involved); (b) a **legal assessment** with an examination of the admissibility requirements (including double criminality, guarantees of specialty, possible grounds for exclusion under Art. 2 ff. IMAC, etc.) and the question of scope; and (c) the **dispositive**, which describes the substantive decision and, if applicable, the order for surrender. Also listed are (d) the **information on legal remedies** (with deadline and jurisdiction) and (e) the **costs regulation**, if relevant (as a rule, no procedural costs are charged). The **signature** of the competent person (e.g., the public prosecutor conducting the proceedings or the case officer at the FOJ) concludes the order. 10

In addition, the final decision specifies **the extent to which** mutual legal assistance is granted. Specifically, it must indicate what information may be transmitted to the requesting state, and the documents to be surrendered must be precisely identified. 11

The final decision must be **justified in writing** (Art. 80d IMAC requires a *"reasoned decision"*). This formal requirement to state reasons gives concrete form to the constitutional right to a fair hearing (Art. 29 para. 2 of the FC) in mutual assistance proceedings. 12

The reasons for a decision must be formulated in such a way that the person concerned can, if necessary, challenge it in an appropriate manner. This is only possible if both the person concerned and the appellate authority can form an opinion on the scope of the decision. In this sense, the deciding authority must at least briefly set out the **essential considerations** underlying its decision and address the central arguments of the parties. However, this does not mean that it must explicitly address every factual assertion and every legal objection. It is sufficient to limit oneself to the aspects that are essential 13

to the decision. Whether these considerations are accurate and support the decision in terms of content is ultimately not a question of the right to a fair hearing, but concerns the substantive content of the decision.

14 In **substantive terms**, the final decision may take the form of a complete granting of legal assistance, a partial granting, a granting subject to (accepted) conditions, a granting subject to an express reservation of specialty, or even a complete rejection of the request for legal assistance. A final decision is also made if a person seeking legal assistance is denied party status in the mutual assistance proceedings or if the coercive measures court denies someone the right to apply for sealing.

IV. LEGAL PROTECTION AND ENFORCEMENT

15 The final decision must be **served on** the party concerned at their place of residence or domicile for service in Switzerland (Art. 80m para. 1 IMAC) and on the FOJ (Art. 5 IRSV). Decisions are not generally served abroad on parties concerned who are resident abroad and have not designated an address for service in Switzerland. The right to service expires as soon as the decision concluding the mutual assistance proceedings becomes enforceable (Art. 80m para. 2 IMAC).

16 The entitled parties have the right to appeal against the final decision. Art. 80e to 80l IMAC describe the possibility of appealing against the final decision (together with the preceding interim decisions, unless these can be appealed against independently) by **lodging an appeal with the Appeals Chamber of the Federal Criminal Court**.

17 If an appeal is lodged against a final order, this generally prevents its **enforceability**, especially since the appeal has suspensive effect with regard to the transmission of information from the secret domain or the surrender of objects or assets (Art. 21 para. 4 IMAC). The final order becomes formally legally binding if the parties entitled to appeal expressly waive their right to appeal. Otherwise, the 30-day appeal period under Art. 80k IMAC must be waited out. If a decision has been issued by the Federal Criminal Court on the basis of an appeal, this decision may be challenged within 10 days by means of an appeal in public law matters to the Federal Supreme Court (Art. 100 para. 2 lit. b BGG).

Once the final decision has become legally binding, the evidence or information collected may be **transmitted to** the requesting authority. This is usually done by means of an informal letter of transmission. 18

V. COSTS

In principle, requests for legal assistance are executed free of charge in accordance with Art. 31 IMAC, so that **no procedural costs** are imposed on the requesting state (see, however, Art. 80q IMAC and Art. 12 IRSV and the relevant provisions contained in international treaties) . 19

However, in **appeal proceedings**, it is permissible to impose the costs of the proceedings on the appellants if their appeal is dismissed in whole or in part (cf. Art. 39 para. 2 lit. b StBOG in conjunction with Art. 63 para. 1 APA). 20

The same applies in cases of vexatious and abusive conduct. The mere exercise of legal remedies or the refusal to give consent does not constitute an abuse of rights. The person concerned may therefore not be required to bear any costs. 21

Comments:

The legal opinion of the two authors is independent of that of their employer. Terms referring to persons apply equally to women and men.

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COMMENTARY ON

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Art. 80h Right of appeal

The following shall be entitled to appeal:

a. the Federal Office;

b. any person who is personally and directly affected by a mutual assistance measure and has a legitimate interest in that measure being annulled or modified.

CONTENT

I. Introduction 431
II. History of art. 80h EIMP 431
III. Standing to appeal 432
A. Federal Office (letter a) 432
B. Legal standing of other persons (letter b) 433
C. Cases covered by art. 9a OEIMP 435
1. In the case of information on a bank account (art. 9a let. a OEIMP) 435
a. The account holder 435
b. The bank 436
c. Beneficial owner 437
d. Third parties 440
2. Searches and sequestration (art. 9a let. b OEIMP) 440
3. Measures concerning a motor vehicle (art. 9a let. c OEIMP) 442
D. Other cases 443
1. Hearings 443
a. The accused 443
b. The witness 443
c. The person called to give information 443
d. Third parties 444
e. Legal entities 444
2. Submission of documents from Swiss proceedings 444
3. Documents held by other authorities 446
4. Persons who have been subject to secret surveillance measures 447
IV. Conclusions 448
Bibliography 448

I. INTRODUCTION

Art. 80h EIMP, contained in the third part of the EIMP (art. 63 et seq. EIMP), governs the right to appeal against other acts of mutual assistance. 1

Art. 80h EIMP applies to the examination of admissibility by the Complaints Court of the Federal Criminal Court. In the event of an appeal to the Federal Supreme Court, art. 89 FSCA will apply, although this difference has no practical impact. 2

Insofar as international mutual assistance in criminal matters is an administrative procedure, the AP applies by analogy (art. 12 para. 1 EIMP), unless otherwise stipulated. However, as the right to appeal is already governed by art. 80h EIMP, the latter provision takes precedence over art. 48 AP as lex specialis. 3

In the case of mutual assistance in criminal matters with the USA, art. 17a LTEJUS applies as lex specialis to art. 80h EIMP. However, these two provisions are identically worded and therefore have the same scope. 4

The present contribution will begin with a brief presentation of the historical background to art. 80h EIMP (ch. II), before examining in greater detail its conditions of application (ch. III.A and B), followed by the related rules set out in art. 9a OEIMP, the provision which gives concrete form to these conditions (ch. III.C). It concludes with a review of case law on standing to appeal in the event of the transmission of (i) minutes (section III.D.1), (ii) documents from Swiss proceedings (section III.D.2), (iii) documents held by Swiss authorities other than criminal authorities (section III.D.3), and finally (iv) evidence obtained by means of secret surveillance measures (section III.D.4). 5

II. HISTORY OF ART. 80H EIMP

Art. 80h EIMP was introduced on February 1, 1997 as part of a major revision of the law. 6

The legislator had identified weaknesses in the system in place at the time, considering in particular the excessive length of enforcement procedures, which was attributable to the multiplicity of means of appeal that prevailed as a result of Switzerland's federalist structure. He also noted the abusive use of 7

legal remedies for dilatory purposes by people often falsely claiming to be rightful claimants.

8 The aim of this revision was to simplify and accelerate mutual assistance procedures, by limiting the right to appeal to those directly and personally affected by a mutual assistance measure.

9 The previous alternative condition, whereby the person whose rights of defense could be affected in the foreign criminal proceedings was also entitled to appeal, has been abolished. The legislator considered that the defendant should not be more protected than other parties, especially as he could still act in criminal proceedings in the requesting state.

10 Proposals to abolish the right of appeal altogether were rejected as insufficiently respectful of fundamental rights.

11 The revised text of the EIMP contains numerous redundancies. This is illustrated, for example, by art. 21 para. 3 EIMP, which governs the accused's right to appeal, and art. 80h let. b EIMP, which reiterates exactly the same principles both for the person concerned and for all persons affected by other acts of mutual assistance (in particular, the administration and handing over of evidence and the seizure of objects or valuables with a view to confiscation - cf. art. 63 EIMP). The legislator voluntarily adopted this style, considering that repetition was preferable to incessant cross-referencing in a law as complex as the EIMP.

12 This being the case, the right to appeal against other acts of mutual assistance will be examined exclusively from the angle of art. 80h EIMP, the scope of which is identical to that of art. 21 para. 3 EIMP.

III. STANDING TO APPEAL

A. Federal Office (letter a)

13 Art. 80h let. a EIMP confers the right to appeal on "the Federal Office", by which is meant the Federal Office of Justice.

14 This Office is thus free to appeal against closure decisions by cantonal and federal enforcement authorities, without any other conditions having to be met. The purpose of this system is to enable it to exercise its role as supervisory authority in matters of mutual assistance in criminal matters.

The intervention of this authority may, where appropriate, serve the interests of third parties where this is necessary for the correct application of the EIMP and international conventions. In practice, however, the Federal Office of Justice will tend to promote broad cooperation with foreign countries, and may act in the interests of the requesting state, which is not in principle a party to the enforcement proceedings. 15

B. Legal standing of other persons (letter b)

Strictly speaking, art. 80h let. b EIMP requires the double condition (i) of being personally and directly affected by a mutual assistance measure, and (ii) of having an interest worthy of protection in the annulment or modification of that measure. 16

The term "mutual assistance measure" covers all measures taken by the Swiss authorities in execution of a letter rogatory, i.e. primarily the obtaining of evidence (if necessary by means of coercive measures) and its delivery to the requesting state. 17

The person prosecuted abroad may appeal under the same conditions (cf. also art. 21 para. 3 EIMP). The mere fact that the transmission of information could have prejudicial consequences for the accused is therefore not sufficient to confer standing to appeal. 18

Standing to appeal is examined ex officio by the Federal Criminal Court, which is not bound by any more favorable position that may have been granted by the executing authority. 19

The interest on which standing is based may be legal or factual. However, the appellant must be affected more than anyone else, or than the general public, by an important interest resulting from his situation in relation to the disputed object. 20

An interest worthy of protection exists when the appellant's de facto or de jure situation can be influenced by the outcome of the case. The admission of the appeal must provide the appellant with an economic, material or ideal advantage. In the absence of an own interest worthy of protection, there is no need to consider appeals lodged in place of a third party. 21

22 The phrase "and" which links the two conditions of art. 80h let. b EIMP could imply that they are cumulative. However, the interpretation of this provision in case law is not so clear-cut.

23 In fact, the Federal Court considers that anyone who is directly and personally affected by a mutual assistance measure already has standing to bring an action, particularly in the case of a coercive measure - in which case the condition of an interest worthy of protection has no additional independent scope. Despite this jurisprudence, a worthy interest will still be required in certain cases, notably with regard to the witness and the delivery of his minutes.

24 On the other hand, there are certain constellations in which the condition of an interest worthy of protection will be the only decisive one according to case law, the fact of being affected by a mutual assistance measure having in these cases no significance whatsoever.

25 These diverse and sometimes discordant solutions - which make the matter difficult to grasp - have their origin primarily in the concretization of art. 80h let. b EIMP by art. 9a OEIMP. This provision specifies who is entitled to appeal in the event of information on a bank account (let. a), a search (let. b) or measures concerning a motor vehicle (let. c). As these are the most frequent constellations, the importance of this provision is considerable in practice.

26 Secondly, the jurisprudence in application of art. 80h let. b EIMP is the result of an arbitration intended by the legislator between the imperatives linked, on the one hand, to the rapid execution of requests for mutual assistance (which must not be complicated by over-extensive means of appeal) and, on the other hand, the need for sufficient legal protection of those who find themselves in a close relationship with the mutual assistance measure.

27 Sometimes, too strict an interpretation of art. 80h let. b EIMP can lead to the inadmissible consequence that no person has, even theoretically, standing to appeal. To remedy this situation and guarantee the existence of an effective legal remedy, jurisprudence has established exceptions, depending on the circumstances of the case, which may sometimes deviate from the wording of art. 80h let. b EIMP.

28 As this contribution is primarily intended to be practical, we will not dwell on the general scope of art. 80h let. b EIMP, as this may vary from case to case. Instead, we will set out below the concrete solutions developed by case law in

the many constellations that have arisen in recent years. We will begin by examining the rules set out in art. 9a OEIMP - the most frequent cases in practice - followed by those which are not covered by this provision and which emerge from the practice of the courts.

C. Cases covered by art. 9a OEIMP

1. In the case of information on a bank account (art. 9a let. a OEIMP)

According to art. 9a let. a OEIMP, the holder of a bank account is deemed to be personally and directly affected when information about the account is administered. 29

Art. 9a let. a OEIMP applies above all to information obtained from banks. 30

On the other hand, when documentation is obtained from other agents, such as a trustee or a lawyer, the Federal Court excludes the application of art. 9a let. a OEIMP, preferring that of art. 9a let. b OEIMP, according to which the person who has immediate possession of the thing seized is entitled to appeal. In such cases, the account holder concerned no longer enjoys the right to appeal that would have been available if the measure had been taken against a bank. This position is unconvincing, particularly when the documents seized involve a genuine transmission of banking documentation within the meaning of art. 9a let. a OEIMP (see below for further details, n. 60). 31

The following comments apply both when the appellant contests the handing over of banking information and when the related accounts are blocked. 32

a. The account holder

Art. 9a let. a OEIMP grants the right to appeal first and foremost to the account holder when information on a bank account is administered. 33

The term "account holder" refers to the person identified as such in the bank documentation issued. A person who opens an account under a false name or pseudonym, in particular by presenting false identity documents to the bank, cannot claim to be the concealed account holder. However, the Federal Supreme Court has made an exception for those who provide proof that they are in fact the account holder, and has clarified the reasons for concealing their true identity. 34

35 Where several people are joint account holders, standing to appeal should be conferred on each of them individually.

36 In the event of the account holder's death, the right of recourse must be exercised on behalf of all the heirs forming the community of heirs, if necessary by a common representative, an executor or an administrator of the estate. The community of heirs as such has no legal standing. However, there are two exceptions to this rule, based on civil law jurisprudence. An heir may take recourse alone (i) in an emergency to temporarily safeguard the interests of the hereditary community, or (ii) when the heirship is in the grip of an internal dispute involving all its members.

37 Where the account is held by a trustee in the name of a trust (e.g. by the formula "X as trustee of the Trust Y"), standing to bring an action is conferred on the trustee, as the trust as such has no legal standing. The appellant must therefore ensure that his appeal is lodged in the name of the trustee and not of the trust, on pain of inadmissibility. A draft bill to introduce the institution of the trust into the Code of Obligations is currently being examined by the legislator, but should not, a priori, impact current case law insofar as, under the new legislation, the trust will continue to be represented in court by the trustee (art. 529g para. 2 AP-CO).

b. The bank

38 The question arises as to whether the bank should not also be entitled to appeal on the basis of the general principles developed by case law, insofar as it submits, in concrete terms, to a measure of constraint.

39 This was the case before art. 80h let. b EIMP and 9a let. a OEIMP came into force on February 1, 1997. In the meantime, the Swiss Federal Court has analyzed these two provisions and found that the legislator deliberately intended to exclude the bank from the circle of appellants in favor of the account holder. Consequently, the bank cannot intervene in the mutual assistance procedure when it merely provides information on its customers, even if its employees are heard to provide additional explanations.

40 On the other hand, if the measure affects the bank in the conduct of its own internal affairs, in particular when it is itself the holder of the account concerned (e.g. a transit account), it will be granted standing to appeal on this basis. Particularly decisive is the fact that the bank is seeking to protect its own

business secrets and not the mere banking secrecy of its customer. In this context, jurisprudence holds that the bank is not entitled to make a claim when the documents to be transmitted are those relating to the opening of the customer's account, account statements, debit and credit advices, correspondence between the bank and its customer, or the customer's telephone or visit notes, insofar as they mainly concern the latter's business. On the other hand, when the documents to be transmitted enable verification of compliance with the bank's legal obligations, such as clarification of the origin of funds or the customer profile in connection with KYC, the bank must be granted standing to appeal.

c. Beneficial owner

According to established case law, the beneficial owner of the account in question does not have standing within the meaning of art. 80h let. b EIMP. 41

Nevertheless, the Federal Court has ruled that when the company holding the account is dissolved, sufficient legal protection requires that, exceptionally, the beneficial owner be granted standing to bring an action, provided that he can prove the dissolution and that he is the beneficiary of the liquidation proceeds. This exception also applies to the dissolution of a foundation or trust. 42

Insofar as dissolution entails the end of the legal entity's legal personality and capacity to sue and be sued, its beneficial owner must act in a personal capacity and not on behalf of the legal entity, failing which his or her action will be declared (manifestly) inadmissible. 43

In order to ensure that the dissolution of a company does indeed result in the definitive termination of its legal personality, the court may need to examine the foreign law applicable to the company under art. 154 of the LDIP. 44

The condition that the company has been liquidated in favor of the beneficiary is essential in determining the admissibility of the appeal. The proceeds of liquidation are understood as the balance of the company's dissolution, after all its assets and liabilities have been set off against each other. 45

This condition means that, in certain situations - notably when the entitled party is not the beneficiary of the liquidation proceeds, or is unable to prove it - no one will be able to defend the rights of the dissolved company. In the Federal Court's view, this consequence is not sufficient to overturn its case 46

law, which it considers to have the merit of establishing continuity between the liquidated company and its beneficiary.

47 The fact that the proceeds of the liquidation were not transferred to the beneficial owner himself, but to another company that he also owns, does not prevent him from acting personally under this exception, provided that he can show that he is the beneficial owner of this second company. The decisive factor is not precisely who received the liquidation proceeds, but rather who ultimately benefited from them.

48 Demonstrating that the beneficial owner is indeed the beneficiary of the liquidation proceeds can prove complicated in practice. Ideally, it should be done by means of official documents, in particular the deed of dissolution mentioning the identity of the beneficiary of the liquidation. However, jurisprudence accepts that this can be demonstrated by means of other documents.

49 Such other documents may include payment orders or transfer notices issued at the time of the company's liquidation, demonstrating that the company's accounts have been settled in favor of the beneficial owner. Nevertheless, it is essential to demonstrate that the assets deposited in the balanced accounts are the sole assets of the dissolved company, on pain of inadmissibility. The Federal Court sees no excessive formalism in requiring such (negative) proof from the appellant. In any event, the transfer and closure of the account must take place as part of the dissolution of the company, failing which the assets transferred cannot be considered as liquidation proceeds within the meaning of the case law.

50 The following documents have been deemed insufficient by case law to provide such proof:

- Form A: while this document is sufficient to demonstrate who is the beneficial owner of the account, it is silent on the identity of the beneficiary of the liquidation proceeds of the dissolved company, two notions which must imperatively be distinguished from each other.
- An attestation from the directors, the joint beneficial owners, the representative of the liquidated company or even the appellant himself, establishing the identity of the beneficiary of the liquidation: the courts consider

that the probative value of such documents is insufficient, as they only constitute allegations.

- Documents intended to demonstrate that the company had no assets: the Federal Court seems to require the production of a document attesting to the identity of the beneficiary of the liquidation, even if the company holds no assets. In our view, this approach is excessively formalistic, insofar as the non-existence of assets (insofar as it can be demonstrated) means that there is, in fact, no beneficiary of the liquidation. In its earlier case law, however, the Federal Criminal Court seemed to accept a hypothetical reasoning aimed at determining to whom the proceeds of the liquidation would probably have been paid if there had been any.
- An extract from a foreign commercial register stating that the company had been struck off due to unpaid fees.
- Various documents demonstrating that the transactions carried out during the company's existence were always in favor of and/or on behalf of its beneficial owner: while these documents may attest to who ultimately benefited from the transactions carried out during the company's lifetime, they do not demonstrate that the proceeds of the liquidation benefited this same person.

Lastly, the beneficial owner cannot rely on this exception when it constitutes an abuse of rights. This would be the case of a liquidation whose purpose is to hinder the mutual assistance procedure. Case law has already recognized an abuse in a situation where five companies prosecuted abroad were all suddenly dissolved less than a year after the criminal proceedings were instituted, for no apparent economic reason, or in the case of a foundation dissolved in the course of proceedings, whose assets were immediately used to create a second, identical foundation. 51

In addition to the exception for the liquidation of the company, it may be asked whether another exception should be established in favour of the beneficial owner when the company has not been dissolved but is objectively unable to act for reasons beyond its control. Case law does not seem to rule this out (in this case, the Federal Criminal Court had examined the existence of a state measure objectively paralyzing the organs of a trustee, which it nevertheless considered insufficiently proven). 52

53 In any event, the mere fact that the company is inactive does not open the way to recourse for its beneficial owner.

d. Third parties

54 Third parties are in principle excluded from the circle of appellants. The mere fact that the published documentation contains the name of a third party, the number of an account held by the latter, or even extracts from the said account or other information concerning him or her, is not sufficient to confer the right to lodge an appeal, as he or she is not directly affected by the assistance measure. This rule also applies to a person who only has power of attorney over the account concerned. However, it is often the case that the person entitled to appeal, in defending his own interests, finds himself simultaneously protecting those of third parties excluded from the procedure.

2. Searches and sequestration (art. 9a let. b OEIMP)

55 Under art. 9a let. b OEIMP, the owner or tenant is deemed to be personally and directly affected in the event of a search.

56 In this sense, the person - natural or legal - who must personally submit to the search, or to a sequestration of objects or values on this occasion, has the right to appeal. This provision is thus linked to immediate possession (de facto power of disposition). In other words, only those whose possession is directly disturbed during the search or seizure are entitled to appeal.

57 The right of recourse is not limited solely to the owner or tenant of the premises housing the objects seized, but may extend to the sub-tenant, usufructuary or beneficiary of any other similar right of habitation.

58 These developments apply not only to seized paper documents, but also to electronic data. Thus, only the person who has immediate possession of the premises is entitled to appeal against the sequestration of a hard disk, a server, an e-mail account, a laptop or a USB key.

59 The appellant will also be entitled to challenge the transmission of documents drawn up during the search, such as the search report or photos taken during the search.

60 As indicated above (cf. n. 31), in the event of seizure of bank documents from an agent other than a bank (trustee, lawyer, asset manager), in principle only

the latter has standing to appeal, to the exclusion of the account holder. This difference in treatment compared to a deposit order addressed to a bank is allegedly linked to the fact that the bank does not necessarily intervene in the management of its customer's account, unlike other agents. This presumption does not seem convincing to us, as it is not uncommon for a bank to also have a management mandate. It is therefore difficult to see why the account holder should be entitled to appeal when the documentation is seized from his bank with a management mandate, but not when it is seized from his asset manager - the two situations being very similar. In our opinion, the account holder's right to appeal should be recognized when the documentation seized involves a genuine transmission of bank documents within the meaning of art. 9a let. a OEIMP, as in the case law on hearings concerning bank accounts (see below, n. 72). In the past, a decision of the Federal Criminal Court adopted this position, considering that art. 9a let. a OEIMP is a lex specialis in relation to art. 9a let. b OEIMP.

On the basis of the principle of immediate possession, case law has denied standing to the following persons: 61

- The person concerned by documents seized from third parties, even if they contain information about him or her or could reveal his or her identity.
- The author of documents seized from a third party.
- The owner of the sequestered object as defined in civil law. For example, the companion of the owner of a searched apartment containing electronic data belonging to her is not entitled to make a claim, even if he has been staying there a few days a month for the past fifteen years. Similarly, a person who temporarily leaves a suitcase in his friend's apartment, which is subsequently searched, will be denied the right to appeal. The existence of a possible mandate between the third party who has had to submit to the measure and the principal does not change this principle, even if this contractual relationship allows the latter to have access at all times to the objects targeted by the measure. Similarly, only the carrier or warehouseman

is entitled to take action against the receiver of goods held with them, to the exclusion of the depositor.

- A "letter-box" company, i.e. a company whose registered office is with a third party to whom it is bound by a contract of agency rather than a lease, insofar as it does not have effective control of the premises.
- To the sole shareholder or director of the company whose premises have been searched, since only the latter is entitled to take legal action.
- An employee whose e-mail account has been seized by his or her employer, who alone is entitled to take legal action. The same applies if the employer records and stores the employee's telephone calls, provided that the employee has been informed and has consented to this as part of the employment relationship.
- A remote user of electronic data stored on a server located on premises belonging to a third-party company, even if he or she has exclusive access. According to case law, electronic data is not autonomous in its own right, and exists only because it is stored on a physical medium. This means that only those who have effective control over the medium in question are entitled to use it.
- A company that provides its customers with fixed offices as co-working space. In this case, only the customer - considered as a sub-tenant of the office allocated to him on a fixed basis - is entitled to appeal.

62 If the sequestration of objects takes place without a search (e.g. during a search or an arrest), the holder who has immediate possession of the object is entitled to appeal on the basis of art. 9a let. b OEIMP.

63 In the case of a request to publish, case law considers this measure to be equivalent to a search, so that standing to appeal is conferred on the person who hands over the documentation to the enforcement authority.

3. Measures concerning a motor vehicle (art. 9a let. c OEIMP)

64 According to art. 9a let. c OEIMP, in the case of measures concerning a motor vehicle, in particular a car or an aircraft, the holder is entitled to appeal.

65 The status of holder is not the same as that of possessor or owner. It is determined by the circumstances of the case. In particular, a keeper is someone

who effectively and durably possesses the power to dispose of the vehicle, and who uses it or has it used at his own expense or in his own interest. Thus, the driver of the vehicle at the time of the search, even if he is not the owner, is entitled to make a claim. The status of owner is thus not a legal status as such, but a factual circumstance.

This definition corresponds to art. 78 al. 1 OAC. 66

D. Other cases

1. Hearings

In the case of the transmission of a hearing report, standing to appeal will depend on the status of the person heard in the foreign proceedings. This will apply not only to the transmission of the minutes as such, but also to any audiovisual recordings of the hearing, the police report summarizing the hearing, or the documents handed over by the person heard in his or her capacity as holder of these documents. 67

a. The accused

If the person interviewed is the accused, he or she is entitled to appeal against the transmission of his or her report without restriction. 68

b. The witness

When a person is questioned as a witness, he or she may only object to the use of his or her testimony for the benefit of a foreign criminal authority if he or she has revealed information concerning himself or herself (in particular education, family situation, financial situation, professional activities, relations with the persons involved, acts performed on behalf of the accused) or if he or she can invoke a right to refuse to testify under Swiss law. 69

c. The person called to give information

When a person is heard as a person called to provide information insofar as he or she could, without being himself or herself warned at this stage, potentially be warned at a later date, this person is entitled to appeal against the transmission of his or her minutes without restriction, as is the case for the accused. On the other hand, if she is heard as a person called to give informa- 70

tion for other reasons, it will be necessary to examine whether her status is more akin to that of a potential defendant or witness in order to judge her standing to appeal.

d. Third parties

71 A third party, i.e. a person who is not himself heard, is not entitled to appeal, even if he is personally affected by the statements recorded in the minutes, even if he is the person being prosecuted in the requesting state.

72 An exception to this principle exists when the statements transcribed in the official report can be assimilated to a transmission of banking documents for which the holder would ordinarily have been entitled to appeal under Art. 9a let. a OEIMP. In such cases, the cardholder may lodge an appeal against the delivery of the aforementioned minutes, even though he or she is not the author of the statements transcribed therein. On the other hand, if the minutes contain no information on the accounts in question, or only information already contained in the request for mutual assistance, the third party in question, as the account holder, has no right of appeal.

e. Legal entities

73 Difficulties may arise when a legal entity's standing to appeal against the delivery of the minutes of the hearing of one of its organs or employees has to be judged. In principle, only the person who has been heard is entitled to lodge an appeal against the delivery of the minutes, which is why the company concerned is not entitled to intervene, even if its director or employee makes statements about its business affairs or organization. However, when a legal entity is itself accused abroad and its body is questioned as such about the facts concerning it, it is appropriate, in our view, to assume that it has formally been questioned itself, so that it must be recognized as having the same right to appeal as a natural person. A decision of the Federal Criminal Court, albeit an isolated one, has already gone in this direction.

2. Submission of documents from Swiss proceedings

74 Sometimes, the information requested by the requesting State has already been obtained by the requested State in the course of its own national criminal proceedings. In such cases, the requested state need only include these

documents in the mutual assistance procedure in order to execute the letter rogatory.

In this eventuality, case law in principle holds that the person concerned is only indirectly affected by the mutual assistance measure and therefore has no standing to appeal. 75

However, this approach leads to the unacceptable solution that no one is entitled to challenge the mutual assistance. For this reason, this principle has been tempered by case law. 76

One of the exceptions enshrined in case law is where the executing authority intends to transmit bank documentation or records containing information on bank accounts. In both of these cases, the account holder concerned, even if not heard, will be entitled to appeal insofar as the transmission of such evidence entails the transmission of banking information within the meaning of art. 9a let. a OEIMP. This primarily concerns documents obtained from a bank, but also MROS communications or analysis reports on banking documentation drawn up by the prosecuting authority. 77

A further exception is made when the appellant has been heard in separate Swiss proceedings, but the facts about which he is being questioned are closely related to the request for mutual assistance. This "close link" allows the person concerned to be admitted as a party to the proceedings, even if the coercive measure was ordered solely as part of the domestic criminal proceedings. In particular, jurisprudence accepted the existence of a close link between domestic proceedings and mutual assistance proceedings when the former was triggered by the exploitation of information obtained from the letter rogatory. With this in mind, the courts used to attach decisive importance to the temporal criterion, denying the interested party standing to appeal when the gathering of evidence in the domestic proceedings had taken place prior to the request for mutual assistance. However, this criterion has recently been abandoned. The concept of a close link is now based solely on the similarity of the acts prosecuted in Switzerland and in the requesting state. 78

This being the case, in order for the right to appeal to be recognized in the case of the transmission of minutes, the witness, the defendant or the person called upon to provide information must also have given an account of their own situation (personal, family, financial and professional). In such a situation, although the minutes are already in the hands of the executing authority and 79

do not involve any coercive measures for the execution of the request for mutual assistance, the appellant may object to their transmission in the same way as the person questioned in the course of the mutual assistance procedure, in accordance with the developments set out above (cf. above N. 67 ff).

80 Although the concept of "close link" has been developed mainly in the context of the transmission of records of hearings, it also applies to the transmission of other evidence initially administered in domestic criminal proceedings.

81 Thus, the owner or lessee within the meaning of art. 9a let. b OEIMP will be entitled to appeal against the handing over of documentation seized during a search of his premises, even if this took place in domestic criminal proceedings. The latter will also be entitled to challenge the handing over of documents drawn up by the prosecuting authority in connection with the search, such as reports of seized items or photographs taken during the search.

82 The same applies to anyone whose telephone conversations have been monitored as part of internal criminal proceedings. He will thus have the right to appeal against the handing over of the report transcribing his conversations, which is placed in the mutual assistance file.

3. Documents held by other authorities

83 In some cases, the accused has already been convicted of other offences by the Swiss authorities. In such cases, he is not entitled to appeal against the surrender of the judgment concerning him to the requesting state, as he is only indirectly affected by this measure (insofar as the document has not been seized from him, in which case art. 9a let. b OEIMP would apply).

84 The personal details contained in the judgment to be forwarded, the tactical interest in the foreign state not being aware of the judgment, or the fact that the conviction dates back several years, so that it no longer appears in the criminal record of the person concerned, are not sufficient to grant the latter standing to appeal.

85 The same applies to documents issued by authorities such as the tax authorities, the commercial register, the debt enforcement and bankruptcy office or the land register.

86 In the case of documents issued by FINMA, the former case law of the Swiss Federal Supreme Court (issued at the time of the Swiss Federal Banking Com-

mission) accepted that the bank concerned had standing to appeal insofar as its internal affairs were directly affected.

In our view, this should also be the case today. The opposite position would lead to the unacceptable situation that no one, even theoretically, would have the possibility of opposing mutual assistance, whereas jurisprudence strives precisely to systematically guarantee an effective legal remedy. This is all the more important in this constellation as FINMA files contain particularly confidential information on the internal workings of the financial intermediary concerned, obtained as a rule under threat of sanctions in the event of non-cooperation. In any event, in our opinion, the financial intermediary should be granted standing to appeal when the proceedings conducted by FINMA relate to the same complex of facts as those which are the subject of the mutual assistance proceedings, following the example of the case law handed down in connection with the transmission of evidence administered upstream in internal criminal proceedings (see above N 77). 87

4. Persons who have been subject to secret surveillance measures

Sometimes, the execution of a letter rogatory requires the implementation of secret surveillance measures. 88

In the case of interception of telecommunications, only persons whose correspondence has been subject to surveillance without their knowledge, and whose transcript of the contents has been transmitted to the requesting state, are entitled to appeal. This means that the owner of the telephone connection (e.g. a legal entity) as well as the actual user of the connection (e.g. an employee) are entitled to lodge a complaint. The same applies to the monitoring of e-mail correspondence. In any case, the appellant will only be entitled to appeal against the transcript of his own communications, not those of third parties. 89

On the other hand, a person who uses a telephone connection registered under a false name (unless he can explain why) or who misuses a third party's connection in order to conceal his identity will not be entitled to appeal. 90

In the case of undercover agents, the right to appeal is conferred on the person who has been directly exposed to the said agents, even if the surveillance report mentions this only marginally. 91

IV. CONCLUSIONS

92 While the right to appeal is formally governed by art. 80h EIMP, its scope has been largely shaped by art. 9a OEIMP and case law. The latter, in particular, has developed tailor-made solutions year after year to ensure that individuals have an effective means of appeal.

93 The two conditions laid down in the aforementioned provision, i.e. (i) being personally and directly affected by a mutual assistance measure, and (ii) having an interest worthy of protection in having the measure annulled or modified, sometimes lose their meaning, with the result that this is an area of law that is difficult to grasp.

94 The developments set out in this contribution are intended to clarify this area. There can be no doubt, however, that the ever-increasing and evolving body of case law will provide further clarification in this area.

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COMMENTARY ON

Art. 80k IMAC

A commentary by Francesca Bonzanigo

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Art. 80*k* Deadline for appeal

The deadline for appeal against the final ruling shall be 30 days, or ten days in the case of an interim ruling, from the written communication of the ruling.

CONTENT

I. Background of Art. 80k of the IMAC Act 453
II. The Starting Point of the Time Limit Under Art. 80k IMAC 453
III. The 30-day period 455
IV. The 10-day time limit 456
Bibliography 456

I. BACKGROUND OF ART. 80K OF THE IMAC ACT

Art. 80*k* of the IMAC Act was introduced during the 1995 revision of the Act and entered into force in 1997. It arose from lengthy discussions aimed at determining how appeal procedures should be structured in the context of mutual legal assistance. During the legislative process, two main approaches were at odds: on the one hand, the so-called Zurich method, under which an appeal would have been possible only at the time of the decision to proceed, and, on the other hand, the so-called Geneva method, under which an appeal was available only at the time of the final decision, except in exceptional situations allowing for a limited appeal against interim decisions. The Geneva method gained greater support, so that today an appeal is in principle only available against the decision to close the case, with the law permitting a limited appeal under strict conditions and, for certain decisions, only against interim decisions (Art. 80*e* IMAC). 1

II. THE STARTING POINT OF THE TIME LIMIT UNDER ART. 80K IMAC

According to Art. 80*k* IMAC, the appeal period begins to run upon written notification of the decision. In the banking sector, which is particularly sensitive due to "dual notification" to both the bank and the entitled party resulting from the bank's obligations under the contract binding it to the entitled party and Art. 80*n* of the IMAC Act, case law has developed three principles for determining the moment at which notification to the entitled party occurs, thereby triggering the appeal period. 2

First, the written notification required by Art. 80*k* of the IMAC Act must be interpreted in light of Art. 80*m* of the IMAC Act, which concerns the notification of decisions. According to this provision, the executing authority must notify its decisions to the person domiciled in Switzerland (Art. 80*m* para. 1 let. a IMAC), or to the person who has elected a domicile for service in Switzerland (Art. 80*m* para. 1 let. b IMAC *cum* Art. 9 OEIMP). Thus, written notification to the entitled party is necessary for the commencement of the time limit under Art. 80k IMAC only when the executing authority is subject to a notification obligation pursuant to Art. 80m IMAC. In such a case, the time limit under Art. 80*k* IMAC begins to run on the day following notification 3

of the decision (Art. 80*m* IMAC), in accordance with the ordinary rules applicable to administrative proceedings (Art. 20(1) *cum* Art. 50(1) PA). Where the person is domiciled abroad, the executing authority is not required to notify the person of the decision (Art. 9 OEIMP). It is then incumbent upon the bank that receives the decisions from the executing authority (in particular those relating to the initiation of the mutual assistance procedure or any orders for deposit or seizure) to inform the entitled party in a timely manner, prior to the conclusion of the mutual assistance procedure, so that the entitled party may, if necessary, elect a domicile in Switzerland.

4 Second, if the entitled person has not elected domicile in Switzerland, the decision to close the proceedings is served on the bank holding the requested banking documentation or the seized assets. Service on the bank does not constitute service on the entitled person, so the appeal period under Art. 80*k* IMAC has not yet begun to run. The time limit begins to run once the bank communicates the decision to the entitled party. However, notification to the bank triggers a 30-day period, at the end of which the decision becomes enforceable. When the decision is notified to the bank, the entitled party may therefore, in principle, still appeal within 30 days from the date on which they actually became aware of the decision to close the case. Conversely, if the entitled party comes forward after the decision has been enforced, they no longer have the right to appeal (Art. 80*N* para. 2 IMAC). In short, the absence of an election of domicile in Switzerland, even if voluntary, does not allow the entitled party to be subject to a 30-day appeal period starting from the notification of the decision to the bank, but does expose them to the risk of late intervention. According to case law, this approach is necessary not only due to the principle of expediency (Art. 17*a* IMAC), but also due to the principles of good faith and legal certainty. It is, however, fraught with some uncertainties. In particular, the question arises as to what steps the entitled party must take to preserve their right of appeal and suspend the enforceability of the decision notified to the bank. Since the legislature did not intend to create a "fictitious notification" when a decision is communicated to the bank, it must be held that a simple communication from the entitled party to the enforcement authority—for example, through a request for access to the mutual assistance proceedings file—is sufficient to suspend the enforceability of the decision, without it being necessary to file an appeal within 30 days of the decision's notification to the bank.

Third, the time of the entitled party's actual knowledge does not apply when the entitled party has entered into a "bank deposit" agreement with the bank. In this case, the decision is deemed to have been served on the entitled party when it is filed by the bank in the "bank deposit" file. The appeal period therefore does not begin to run at the time the decision was actually communicated to the account holder, but rather on the day following the decision's filing in the file. The time at which the bank communicates with its client or the time at which the client actually becomes aware of the decision is not decisive. 5

When an account has been closed, the bank-holding agreement concluded prior to the account's closure is no longer enforceable against the entitled party. Notification to the bank therefore does not constitute notification to the entitled party. The appeal period begins to run only upon the entitled party's actual knowledge of the decision, in accordance with the principles set forth *supra* N. 4. 6

III. THE 30-DAY PERIOD

The 30-day period applies to the decision to close the case (Art. 80*k*, para. 1, IMAC). A decision to close the case is one that terminates the mutual legal assistance proceedings and by which the executing authority rules on the granting and scope of assistance (Art. 80*d*, IMAC). 7

The seizure of assets (or the continuation of the measure), a decision of an incidental nature, may, in certain specific circumstances, be subject to a 30-day appeal period. This is the case when the transmission of banking documentation to the requesting State took place through a simplified procedure (Art. 80*c* IMAC) and was not the subject of a final decision. The same applies when the appeal is directed against a decision to refuse the lifting of the seizure, whereas the seizure has already been in place for a "relatively long" period of time. 8

The 30-day time limit for appealing the closure decision under Art. 80*k* IMAC applies only at the first instance, before the Complaints Chamber of the Federal Criminal Court (Art. 25(1) IMAC). In the second instance, before the Federal Supreme Court, the time limit for appealing a decision to close the proceedings is 10 days (Art. 100(2)(b) LTF). 9

10 There are no court recesses in mutual legal assistance proceedings (Art. 12(2) IMAC and Art. 46(2)(d) LTF).

IV. THE 10-DAY TIME LIMIT

11 The 10-day time limit applies to interim decisions (Art. 80*k*, para. 2 of the IMAC), which may be appealed (as court recesses do not apply to mutual legal assistance proceedings; *supra* N. 10). This is the case for the seizure of objects or assets (Art. 80e para. 2 let. a IMAC) or the presence of persons participating in the proceedings abroad (Art. 80e para. 2 let. b IMAC). The same applies to decisions not expressly mentioned in Art. 80e(2) IMAC but which may exceptionally be the subject of an independent appeal because they involve the transmission of information to the foreign authority prior to the issuance of the final decision.

12 The 10-day deadline applies only if the interim decision is challenged independently. If the appellant challenges the interim decision together with the final decision, the 30-day deadline from the written notification of the final decision applies (Art. 80*k*, para. 1, IMAC). In the second instance, before the Federal Supreme Court, the time limit for appealing the interim decision is also 10 days (Art. 100(2)(b) LTF).

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