Guide to international administrative and legal assistance

Schroders Wealth Management

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Our clients often have questions on how the international administrative and legal assistance functions. We therefore asked the seasoned business attorney, Dr Thomas Rihm in Zurich, to give us a brief overview on the subject.

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Overview

A look at the websites of the Swiss Federal Criminal Court and Federal Administrative Court shows that they now issue rulings practically on a weekly basis with regard to the granting of international administrative and legal assistance. This almost always concerns foreign bank clients whose assets have been frozen at the request of foreign law enforcement or administrative authorities. In addition, there are the requests under which the banks involved issue the relevant banking documents to the foreign authorities. It is regularly required that the assets deposited with the bank be collected by or transferred to the foreign law enforcement or administrative authorities.

The legal bases for granting such assistance differ depending on whether it is administrative or legal assistance that is requested. Administrative assistance encompasses the international cooperation of administrative authorities (for example, between the US Securities and Exchange Commission (SEC) and FINMA, or between the IRS in the US and the Swiss Federal Tax Administration), while legal assistance concerns the cooperation of law enforcement authorities (for example, between the FBI and the Swiss Federal Attorney's Office).

Context of applying administrative versus legal assistance

In practice, it is sometimes difficult to distinguish between administrative and legal assistance, as foreign administrative authorities (for example, the SEC) also frequently have law enforcement powers. As the granting of international administrative assistance is governed by less stringent procedural requirements (e.g. with regard to group inquiries), attempts abroad frequently target the path of administrative assistance instead of legal assistance. This legally dubious approach is all the more problematic as the Swiss authorities and courts have difficulties with the associated objections claiming a lack of jurisdiction.

International legal assistance is granted based on a number of international treaties (for example, on the basis of the 1959 European Convention on Mutual Assistance in Criminal Matters, hereinafter "EUeR", which is also applicable in Switzerland). International legal assistance is provided based on the 1981 Swiss Federal Law on International Legal Assistance in Criminal Matters ("IRSG"). In both cases, this concerns the assistance offered in criminal proceedings conducted abroad, while administrative assistance mostly applies in tax matters, i.e. based on the double taxation treaties concluded between Switzerland and other countries (in connection with the Swiss Tax Administrative Assistance Act of 2012).

Difficult defence strategies for bank clients

To prevent administrative or legal assistance requested from abroad, bank clients, most of them foreign, have a wide range of formal and material defences at their disposal. Since the IRSG entered into force in 1983, the Swiss authorities and courts have pursued a practice that tends to favour administrative and legal assistance, i.e. this is favoured in the sense of administrative and legal assistance granted at the expense of bank clients affected by such assistance. This practice of favouring administrative and legal assistance can be explained in that, among other reasons, the Swiss authorities and courts are not obligated to conduct a material advance assessment with regard to administrative and criminal proceedings conducted abroad, but instead, on the basis of international treaties and the law, must only assess the prerequisites for granting administrative or legal assistance.

In the event of requests from abroad, this practice of favouring administrative and legal assistance often means that the Swiss authorities provide advance assistance, i.e. they actually "coach" the foreign authorities, in order to improve the chances for administrative or legal assistance. This advance assistance is legally dubious because it does not have any basis in law (in contrast to spontaneous legal assistance in accordance with the IRSG). Naturally, questions of impartiality also arise if an authority that has already provided advance assistance is also responsible for assessing a request for administrative or legal assistance.

Furthermore, years of experience have shown that the Swiss authorities do not impose any extreme requirements on a request for administrative or legal assistance. This is relevant, for one thing, with regard to the recurring objection that foreign legal assistance proceedings, in particular, are of a political nature within the meaning of Art. 3 IRSG, and frequently it cannot be ruled out that a request for legal assistance may also serve to settle political scores following a change of government. According to the IRSG, international legal assistance should also be refused as a rule in cases

where the state seeking the legal assistance does not grant any reciprocal rights. It is up to the Swiss Federal Department of Justice and Police to obtain these assurances from the state seeking legal assistance, although it frequently fails to do so. Such assurances must address the future granting of reciprocal rights, although it would probably be more expedient for the Swiss authorities to assess the legal assistance granted from abroad in the past. Aggravating this situation, there is no reciprocal rights requirement according to the EUeR. The "favourability principle" (*Günstigkeitsprinzip*) proclaimed by the Swiss Federal Court, i.e. the supplementary consultation of the IRSG for the purposes of granting legal assistance, is not effective with regard to the practice towards administrative and legal assistance adopted by our authorities, as described above.

The international approach to legal assistance is also governed by the principle that such assistance is only granted if the requirement of "double criminality" is satisfied. In other words, the Swiss authorities and courts only grant legal assistance if the offence and/or crime that is investigated or examined abroad is also punishable in Switzerland. The relevant congruences are also judged generously in this context, which is generally the correct approach. However, from a law enforcement perspective, the bounds are frequently overstepped when dealing with special crimes or corporate criminal law. In other words, this concerns the question, for example, of whether an exotically incorporated company can be considered guilty of bribing officials under the criminal laws of the state making the request (it cannot). If only corporations are affected by the legal assistance, the question also arises of whether they are punishable as companies, or in other words, whether the criminal law of the state seeking legal assistance features true corporate criminal laws (frequently, this is not yet the case).

Foreign authorities seeking legal assistance must also, in their request to this effect, portray the criminally relevant facts in a plausible or at least somewhat consistent manner. This is often lacking. In connection with this, bank clients regularly complain that the authorities seeking legal assistance undertake impermissible "fishing expeditions". This accusation often goes unheard, which is why, in the final analysis, when it comes to international legal assistance there is sometimes a move towards the group inquiries that are still frowned upon here.

Powers of the Swiss Federal Administrative Court and Federal Criminal Court

In closing, it is necessary to mention the abundant powers of the Swiss federal courts of first instance. Although both courts rule in the first instance, their rulings are only subject to consideration by the Swiss Federal Supreme Court in the event of a "particularly significant case". These highly restricted possibilities for intervention were intentionally included in the legislation (dura lex sed lex), but this means that, viewed objectively, the first-instance court rulings are “de facto” final.

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