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EUROPEAN COMMITTEE ON CRIME PROBLEMS

COMITÉ EUROPÉEN POUR LES PROBLÈMES CRIMINELS

(CDPC)

COMMITTEE OF EXPERTS

ON THE OPERATION OF EUROPEAN CONVENTIONS

ON CO-OPERATION IN CRIMINAL MATTERS

COMITÉ D'EXPERTS

SUR LE FONCTIONNEMENT DES CONVENTIONS EUROPÉENNES SUR LA

COOPÉRATION DANS LE DOMAINE PÉNAL

(PC-OC)

Survey on MLA for the purpose of proceedings against legal entities

Enquête sur l'entraide judiciaire aux fins d'action contre des personnes morales

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Request / Demande

Further to the decision taken during the 72nd meeting of the PC-OC to prepare a survey on MLA regarding legal entities, I would be grateful if you could report on your experience with incoming and outgoing requests for MLA regarding legal entities.

Suite à la décision prise lors de la 72^{me} réunion du PC-OC de préparer une vue générale de l'entraide judiciaire concernant les personnes morales, je vous saurais gré de bien vouloir témoigner de votre expérience sur les demandes d'entraide judiciaire reçues et envoyées concernant les personnes morales.

Bosnia and Herzegovina / Bosnie et Herzegovine

Related to your question about a report on our experience with incoming and outgoing requests for MLA regarding legal entities, we would like to inform you that claims, from Bosnia and Herzegovina and to Bosnia and Herzegovina, for legal assistance in criminal matters pertaining to legal entities mainly relate to misdemeanor punishments. The exact number of outgoing and incoming requests we are unable to deliver because of technical issue.

Croatia / Croatie

In the Republic of Croatia, provisions on legal entities are contained in the Act on the Responsibility of Legal Persons for Criminal Offences, which proscribes the liability of legal persons for criminal offences under the conditions prescribed by the Act.

Considering our practice, we have both sent and received requests seeking mutual legal assistance in cases where the defendant (or some other party in the proceedings) was a legal entity. So far there were no issues in MLA proceedings in this regard.

Czech Republic / République Tchèque

Execution of MLA requests for the purpose of proceedings against legal entities

The criminal liability of legal entities was introduced into Czech law on 1 January 2012, when the Act no. 418/2011 Coll., on Criminal Liability of Legal Entities and Proceedings against Them, entered into force.

According to the Article 42(1) of the Act no. 418/2011 Coll., on Criminal Liability of Legal Entities and Proceedings against Them, any legal entity with registered office in the territory of the Czech Republic shall be regarded as a citizen of the Czech Republic or as a person with permanent residence in the territory of the Czech Republic:

PART FIVE SPECIAL PROVISIONS ON PROCEEDINGS CONCERNING INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Section 42

Request

(1) For the purpose of the Act on International Judicial Cooperation in Criminal Matters, a legal entity with registered office in the territory of the Czech Republic shall be regarded as a citizen of the Czech Republic or as a person with permanent residence in the territory of the Czech Republic.

(2) Part five Chapter six Sub-chapter one of the Act on International Judicial Cooperation in Criminal Matters concerning recognition and execution of decisions of another Member State imposing financial penalty or other financial obligation shall apply to decision of another Member State, if the legal entity, against which such decision is aimed, has registered office or property in the territory of the Czech Republic. Final decision of the court of the Czech Republic which imposes a financial penalty or other financial obligation can be, if the conditions of Chapter six Sub-chapter two of the Act on International Judicial Cooperation in Criminal Matters are met, sent to another Member State, if it can be reasonably expected that the legal entity has its registered office or property in the territory of such state.

(3) Part five Chapter nine of the Act on International Judicial Cooperation in Criminal Matters shall not apply.

Relevant provisions of the Act no. 104/2013 Coll., on International Judicial Cooperation in Criminal Matters, governing execution of MLA request, do not set for different manner of execution of MLA requests concerning legal entities than requests concerning natural persons; therefore, there is no distinction between natural and legal persons in connection with a mutual legal assistance procedure.

However, neither the Ministry of Justice nor the Supreme Public Prosecutor's Office disposes with any statistics to be able to provide information about the successfulness of these requests. In general it can be asserted that there are no specific difficulties different to those linked with natural persons.

Denmark / Danemark

With reference to the request concerning legal entities, please be informed that in Denmark, MLA requests concerning legal entities are executed in the same manner as requests concerning physical persons. The Danish Administration of Justice Act, on the basis of which MLA requests are executed, does not differ between legal entities and physical persons.

Finland / Finlande

We have none.

France

The French law provides for possibilities to grant MLA with regard to legal entities. We never experienced any problem related to a status of legal entity either for incoming or outgoing requests. We do not have any statistics available on this specific issue. Nevertheless, it can be said that the MLAs regarding legal entities mainly concern investigations into complex economic and financial crimes.

Germany / Allemagne

In Germany there are no specific experiences as regards the execution of MLA requests for the purpose of proceedings against legal entities, in particular as a requesting state.

Concerning the German experiences with incoming and outgoing requests for MLA regarding legal entities, it can primarily be said that there is no difference in comparison to other requests. In Germany, no states exist, so it is not possible to provide you with any information about the successfulness of these requests. In general it can be asserted that there are no specific difficulties. Above all these requests are mostly linked with natural persons.

Republic of Moldova / République de Moldova

According to art. 21 paragraph (3) from the Criminal Code of the Republic of Moldova:

A legal entity, except for public authorities, shall be subject to criminal liability for an act set forth in criminal law provided that one of the following conditions is applicable:

- a) the legal entity is guilty of failure to comply or improper compliance with direct legal provisions defining obligations or prohibitions to perform a certain activity;
- b) the legal entity is guilty of carrying out an activity that does not comply with its founding documents or its declared goals;
- c) the act causes or threatens to cause considerable damage to a person to society, or to the state and was committed for the benefit of this legal entity or was allowed, sanctioned, approved, or used by the body or the person empowered with the legal entity's administrative functions.

Netherlands / Pays-Bas

Our experience with incoming MLA's and legal entities: The Netherlands law provides for possibilities to grant MLA with regard to legal entities. We do not experience any problems in this regard. Usually these MLA's concern criminal investigations into fraud and tax evasion. Both from EU and from non-EU countries. With regard to fiscal offences we do have a treaty-requirement.

Our experience with outgoing MLA's: generally speaking our experience with outgoing MLA's with regard to legal entities is good, MLA request are carried out.

Montenegro / Monténégro

Mutual legal assistance is provided in accordance with an international treaty. If there is no international treaty or certain issues are not regulated by an international treaty, mutual legal assistance is provided in accordance with the Law on Mutual Legal Assistance in Criminal Matters, provided that there is reciprocity or can be expected that a foreign State will execute a request for mutual legal assistance from a domestic judicial body.

From the aspect of Montenegro for incoming and outgoing requests for provision of mutual legal assistance in cases related to legal entities, the practice has demonstrated that there were no problems in these cases, referring to relevant conventions.

It should be noted that in January 2007, the Parliament of Montenegro adopted the Law on the Liability of Legal Persons for Criminal Offenses, while the last amendments to the mentioned Law were in June 2016.

This Law regulates the conditions of liability of legal entities for criminal offenses, criminal sanctions applicable to legal entities, as well as the criminal proceedings in which these sanctions are imposed.

Romania / Roumanie

According to the Romanian legal system (art. 135 of the Romanian Criminal Code), legal entities, except for state and public authorities, have criminal liability for offenses committed in the performance of the object of activity of legal entities or in their interest or behalf. Public institutions are not held criminally liable for offenses committed in the performance of activities that cannot be the object of the private domain. Criminal liability of legal entities does not exclude the criminal liability of the individual participating in the commission of the same act.

As for the execution of MLA requests for the purpose of criminal proceedings against legal entities, both as requesting and requested state, the experience is a positive one, and no difficulties have been encountered. Experience is related mainly to states parties to both EU and Council of Europe (e.g. for 2017, within cases related to serious offences, including organized crime, the outgoing requests have been addressed 21 to EU/CoE states – Netherlands, Czech Republic, Austria, UK, Germany, Bulgaria, Cyprus, Belgium, France, Hungary, Portugal, Estonia, Malta, and only 2 to third states, US and Thailand. As for the incoming requests, 3 have been issued by EU/CoE states and 4 by third states.)

Slovak Republic / République Slovaque

In the Slovak Republic we don't experience any particular problems regarding MLA requests concerning legal entities.

Slovenia / Slovénie

Regarding the question on our experiences with incoming and outgoing requests for MLA regarding legal entities, I would like to inform you that competent Slovenian judicial authorities send and execute requests for MLA regarding legal entities.

Sweden / Suède

I would like to inform you that Sweden will not be sending a report on our experience with requests for MLA regarding legal entities, for the simple reason that our experience is very limited or even non-existent.

Switzerland / Suisse (translation)

1) Situation of legal entities in Switzerland from the criminal law viewpoint

Swiss Criminal Code of 21 December 1937 (CP, RS 311.0)

Title 7 Corporate liability

Art. 102: Liability under criminal law

1 If a crime or misdemeanour is committed in an enterprise in the exercise of commercial activities in accordance with its aims and if it is not possible to attribute this act to any specific natural person as a result of the inadequate organisation of the enterprise, then the crime or misdemeanour shall be attributed to the enterprise. In such cases, the enterprise is liable to a fine not exceeding 5 million francs.

2 If the offence committed falls under Articles 260ter, 260quinquies, 305bis, 322ter, 322quinquies, 322septies paragraph 1 or 322octies and where it must be concluded that the enterprise has failed to take all the reasonable organisational measures required to prevent such an offence, the enterprise shall be penalised irrespective of the criminal liability of any natural persons.

3 The court shall assess the fine in particular in accordance with the seriousness of the offence, of the organisational inadequacies and of the loss or damage caused, and based on the financial capability of the enterprise.

4 Enterprises within the meaning of this title are:

- a. legal entities under private law;*
- b. legal entities under public law, with the exception of local authority corporations;*
- c. companies;*
- d. sole proprietorships.*

The criminal liability of legal entities was introduced into Swiss law on 1 October 2003, when Article 102 of the Criminal Code entered into force. This article institutes two regimes of criminal liability:

- 1) Art. 102 para. 1 of the Criminal Code provides for subsidiary corporate liability when the individual perpetrator cannot be identified owing to organisational shortcomings of the enterprise. A norm relating to corporate liability was created to remedy a loophole in cases where, owing to organisational failings in the enterprise, a given physical person cannot be linked to the committing of an offence, this organisational failing making it impossible to attribute the offence committed to a physical person as the individual perpetrator.
- 2) Art. 102 para. 2 provides for parallel liability of the enterprise (for a few restrictively listed offences) in cases where it may be blamed for not having taken all reasonable and necessary steps to prevent one of the following offences taking place: corruption of Swiss or foreign public officials, granting of an advantage, money laundering, corruption in the private sector and criminal organisation and financing of terrorism. In this case, the organisational shortcomings in the enterprise have resulted in the possibility of one of the listed offences being committed. The legal provision stipulates a duty to prevent the committing of an offence.

Article 102 of the Criminal Code distinguishes between subsidiary liability (para. 1) and liability that is cumulative or concurrent (para. 2) on the part of the enterprise for organisational failings.

Furthermore, the liability of legal entities does not rule out the possibility of prosecutions of physical persons. The two scenarios presented in Article 102 of the Criminal Code suppose that an offence has been committed within the enterprise in the exercise of commercial activities pursuing its aims.

2) Legal entities in the mutual assistance procedure

a) Principle

Swiss law draws no distinction between physical and legal persons in connection with a mutual legal assistance procedure. Neither the Code of Criminal Procedure of 5 October 2007 (RS 312.0) nor the Federal Law on international mutual assistance in criminal law matters of 20 March 1981 (EIMP, RS 351.1) rules out the prosecution of a legal entity. Consequently, Switzerland does not refuse to address a request for mutual assistance for reasons based on the sole fact that the person concerned by the request is a legal person (and not a natural person) whatever the nature of the legal person. One of Switzerland's guiding principles with regard to mutual assistance is that this should be afforded in the widest sense possible. Under these conditions, the existing instruments of the Council of Europe with regard to mutual assistance provide the Swiss authorities with a sufficient basis for the good execution of requests for mutual assistance regarding legal persons.

From a practical viewpoint, and because it deals with legal persons in the same way as with natural persons, Switzerland has not encountered any problems in dealing with requests for mutual assistance linked to the nature of legal persons, neither as a requesting nor as a requested state. The restrictions attached to legal persons which are listed below are in practice facilitating mutual assistance.

Second Additional Protocol to the European Convention on mutual assistance in criminal matters of 21 July 2016 (RS 0.351.12)

Art. 1 para. 4:

⁴ Mutual assistance shall not be refused solely on the grounds that it relates to acts for which a legal person may be held liable in the requesting Party.

This means that the requested State cannot refuse mutual assistance on the grounds that it makes no provision itself for the possibility of holding legal entities liable¹.

b) Exceptions

Under Art. 80h lett. b of the EIMP, eligibility to appeal in a case of mutual assistance is granted to anyone personally and directly affected by a mutual assistance measure and having an interest worthy of protection through the annulment or modification of that measure. Accordingly, eligibility to appeal is also granted to the legal entity directly affected by the act of mutual assistance.

Nevertheless, certain complaints cannot be asserted by a legal entity, in the light of that entity's actual nature.

i) Art. 2 of the EIMP

¹ ZIMMERMANN, n° 561.

Art. 2 of the EIMP is intended to avoid a situation where Switzerland would provide assistance, through mutual legal assistance or extradition, for procedures that did not guarantee for the person concerned a minimum standard of protection corresponding to that afforded in the law of democratic States, defined in particular by the European Convention on Human Rights (RS 0.101) or the International Covenant on civil and political rights (RS 0.103.2), or that would clash with standards recognised as forming part of public international law². This provision is very frequently relied on as an argument in appeals.

It is settled case-law that only physical persons may avail themselves of Art. 2 of the EIMP, which makes it possible to rule out mutual assistance in a case where the foreign procedure failed to meet a minimum level of protection³. There are no grounds for recognising eligibility to appeal under this article for companies that cannot lay claim to any interest worthy of protection, linked to their specific situation, in order to enjoy protection from a standard intended above all to protect a person indicted in a procedure taking place in another country⁴. Such circumstances do not make them eligible to appeal under Art. 80h of the EIMP, in conjunction with Art. 81 lett. b of the Law on Federal courts of 17 June 2005 (RS 173.110)⁵. Accordingly, a legal entity is not entitled to rely on Art. 2 of the EIMP for the purpose of contesting the transmission of evidence gathered in Switzerland to a foreign State⁶.

ii) Legal entity in a state of liquidation

In general, the beneficiary of an account opened in the name of a third party is not entitled to appeal⁷. Similarly, a person holding power of attorney over the account is only indirectly affected and, consequently, has no entitlement to appeal⁸.

Exceptionally, eligibility to appeal in a mutual assistance process is now granted, since around fifteen years ago, to the sole beneficial owner of a legal entity holding an account where that entity has been dissolved and is no longer capable of acting in its own right, on condition that the law is not infringed⁹. It should be further specified that a beneficiary exceptionally recognised as having the capacity to appeal in the place of the dissolved company, must act in their own name and not on behalf of the dissolved company, and must provide official documents proving that the liquidation has officially taken place¹⁰. Furthermore, the beneficiary may appeal only insofar as the legal entity would have been able to do so had it not been dissolved. In addition, the act of dissolution must also clearly indicate that person as being the beneficiary. These principles apply by analogy to trusts and foundations¹¹.

² CR Entraide, art. 2 EIMP n° 40.

³ ATF 125 II 356 consid. 3b/bb, 115 Ib 68 consid. 6; Federal criminal court (TPF) judgment RR.2013.213 of 2 October 2013, consid. 1.4. See also BSK-ISTR, SUMMERS SARAH, n° 5; ZIMMERMANN, n° 531.

⁴ CR Entraide, art. 2 EIMP n° 40.

⁵ ATF 125 II 356 consid. 3b/bb

⁶ SJ 2000 I 556 consid. 2d/aa.

⁷ ATF 139 II 404 consid. 2.1.1 p. 411s.; ZIMMERMANN, n° 529.

⁸ ATF 1A.217/2004 du 18 October 2004; ZIMMERMANN, n° 529.

⁹ Including the dissolving of the company immediately after criminal proceedings have been lodged in the requesting State.

¹⁰ Tribunal Federal court judgments 1A.10/2000 of 18 May 2000, consid. 1; 1A.131/1999 of 26 August 1999; ZIMMERMANN, n° 529.

¹¹ ZIMMERMANN, n° 529.

iii) Capacity to appeal of legal entities having an organ which is interviewed as a witness

Legal entities are not entitled to appeal in a case where one of their organs is interviewed as a witness in a procedure, even if the latter produces company documents during that interview¹².

¹² ATF 137 IV 134 consid. 6 and 7.

3) Conclusion

The Swiss Federal Office of Justice believes that if a legal entity can be directly involved in national criminal proceedings, it is perfectly reasonable and logical that it can also be the subject of a request for mutual assistance. This point is well illustrated by several examples of cases where legal entities have had primary involvement in a case of mutual assistance in a criminal law matter in Switzerland:

- Odebrecht case (South America)
- Alstom case

The Federal Office for Justice also considers that the existing instruments of the Council of Europe with regard to mutual assistance provide the Swiss authorities with a sufficient basis for the good execution of requests for mutual assistance regarding legal persons.

List of abbreviations

ATF	Official Compendium of Federal court judgments, Lausanne
RS	Classified compilation
SJ	Semaine judiciaire review, Geneva

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Switzerland / Suisse (original version)

1) Situation des personnes morales en Suisse sous l'angle du droit pénal

Code pénale suisse du 21 décembre 1937 (CP, RS 311.0)

Titre 7 Responsabilité de l'entreprise

Art. 102 : Punissabilité

¹Un crime ou un délit qui est commis au sein d'une entreprise dans l'exercice d'activités commerciales conformes à ses buts est imputé à l'entreprise s'il ne peut être imputé à aucune personne physique déterminée en raison du manque d'organisation de l'entreprise. Dans ce cas, l'entreprise est punie d'une amende de cinq millions de francs au plus.

²En cas d'infraction prévue aux art. 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies}, al. 1, ou 322^{octies}, l'entreprise est punie indépendamment de la punissabilité des personnes physiques s'il doit lui être reproché de ne pas avoir pris toutes les mesures d'organisation raisonnables et nécessaires pour empêcher une telle infraction.

³Le juge fixe l'amende en particulier d'après la gravité de l'infraction, du manque d'organisation et du dommage causé, et d'après la capacité économique de l'entreprise.

⁴Sont des entreprises au sens du présent titre :

- e. les personnes morales de droit privé ;
- f. les personnes morales de droit public, à l'exception des corporations territoriales ;
- g. les sociétés ;
- h. les entreprises en raison individuelle.

La responsabilité pénale des personnes morales a été introduite en droit suisse le 1^{er} octobre 2003, date d'entrée en vigueur de l'art. 102 CP. Cet article instaure deux régimes de responsabilité pénale :

- 3) L'art. 102 al. 1 CP prévoit une responsabilité subsidaire de l'entreprise lorsque l'auteur individuel ne peut pas être identifié en raison d'un manque d'organisation de l'entreprise. La création d'une norme relative à la responsabilité de l'entreprise découle de la nécessité de combler une lacune dans la punissabilité dans les cas où, en raison de défauts organisationnels dans l'entreprise, il n'est pas possible de relier une personne physique déterminée à la commission d'une infraction. Ce déficit organisationnel représente la cause de l'impossibilité d'attribuer l'infraction commise à une personne physique comme auteur individuel.
- 4) L'art. 102 al. 2 prévoit, quant à lui, une responsabilité parallèle de l'entreprise (pour quelques infractions limitativement énumérées) dans les cas où on peut lui reprocher de n'avoir pas pris toutes les mesures raisonnables et nécessaires afin d'empêcher l'infraction de se produire. Il s'agit des infractions suivantes : corruption d'agents publics suisses ou étrangers, octroi d'un avantage, blanchiment d'argent, corruption dans le secteur privé ainsi qu'organisation criminelle et financement du terrorisme. Dans ce cas de figure, les carences d'organisation de l'entreprise ont eu pour effet que l'une des infractions énumérées dans le catalogue a pu être commise. La disposition légale prévoit un devoir d'empêcher la commission d'une infraction.

Ainsi, l'art. 102 CP distingue une responsabilité subsidaire (al. 1) et une responsabilité cumulative, respectivement concurrente (al. 2) de l'entreprise pour des défauts dans l'organisation.

En outre, la responsabilité des personnes morales n'exclut pas la possibilité de poursuites judiciaires à l'encontre de personnes physiques. Les deux cas de figures présentés par l'art. 102 CP supposent qu'une infraction ait été commise au sein de l'entreprise dans l'exercice d'activités commerciales conformes à ses buts.

2) La personne morale dans la procédure d'entraide

a) Principe

Le droit suisse ne fait pas de distinction entre les personnes physiques et les personnes morales dans le cadre d'une procédure d'entraide judiciaire. En effet, ni le code de procédure pénale du 5 octobre 2007 (RS 312.0) ni la loi fédérale sur l'entraide internationale en matière pénale du 20 mars 1981 (EIMP, RS 351.1) n'excluent la poursuite d'une personne morale. Il s'ensuit que la Suisse n'a pas refusé d'entrer en matière sur une demande d'entraide pour des motifs qui seraient fondés sur le seul fait que la personne concernée par un acte d'entraide est une personne morale (et non une personne physique), cela quelle que soit la forme de la personne morale. L'un des principes directeurs de la Suisse en matière d'entraide est que celle-ci est accordée de la manière la plus large possible. Dans ces conditions, les instruments du Conseil de l'Europe existants en matière d'entraide judiciaire constituent pour les autorités suisses une base suffisante pour la bonne exécution de demandes d'entraide concernant les personnes morales.

Du point de vue pratique, la Suisse n'a, du fait qu'elle traite les personnes morales à l'égal des personnes physiques, pas rencontré de problèmes liés au caractère de personne morale, que ce soit dans le traitement de demandes d'entraide actives ou passives. Les restrictions attachées aux personnes morales qui sont énumérées ci-dessous sont en fait en faveur de l'entraide.

Deuxième Protocole additionnel à la Convention européenne d'entraide judiciaire en matière pénale du 21 juillet 2016 (RS 0.351.12)

Art. 1 par. 4 :

⁴L'entraide judiciaire ne sera pas refusée au seul motif que les faits dont il s'agit peuvent engager la responsabilité d'une personne morale dans la Partie requérante.

Dès lors, l'Etat requis ne peut refuser l'entraide pour le motif qu'il ne prévoit pas lui-même la possibilité de punir les personnes morales¹³.

b) Exceptions

Aux termes de l'art. 80h let. b EIMP, la qualité pour recourir en matière d'entraide est accordée à quiconque est personnellement et directement touché par une mesure d'entraide et possède un intérêt digne de protection à ce qu'elle soit annulée ou modifiée. Par conséquent, la qualité pour recourir est également reconnue à la personne morale directement touchée par l'acte d'entraide.

Néanmoins, certains griefs ne peuvent être invoqués par une personne morale, au vu de la nature même de ladite personne.

¹³ ZIMMERMANN, n° 561.

iv) Art. 2 EIMP

L'art. 2 EIMP a pour but d'éviter que la Suisse ne prête son concours, par le biais de l'entraide judiciaire ou de l'extradition, à des procédures qui ne garantiraient pas à la personne poursuivie un standard de protection minimal correspondant à celui offert par le droit des Etats démocratiques, défini en particulier par la Convention européenne des droits de l'homme (RS 0.101) ou le Pacte international relatif aux droits civils et politiques (RS 0.103.2), ou qui heurteraient des normes reconnues comme appartenant à l'ordre public international¹⁴. Cette disposition est très souvent invoquée comme argument lors d'un recours.

Il est de jurisprudence constante que seule une personne physique peut se prévaloir de l'art. 2 EIMP qui permet d'exclure l'entraide lorsque la procédure étrangère ne respecte pas un niveau de protection minimal¹⁵. Rien ne justifie qu'on reconnaisse la qualité pour agir sous l'angle de cet article à des sociétés qui ne peuvent alléguer aucun intérêt digne de protection, lié à leur situation concrète, pour se prévaloir d'une norme destinée avant toute chose à protéger l'accusé dans une procédure se déroulant à l'étranger¹⁶. Ce cas de figure ne fonde ainsi pas leur qualité pour agir au regard de l'art. 80h EIMP, mis en relation avec l'art. 81 let. b de la loi sur le Tribunal fédéral du 17 juin 2005 (RS 173.110)¹⁷. Ainsi, une personne morale n'a pas qualité pour invoquer l'art. 2 EIMP aux fins de s'opposer à la transmission à un Etat étranger de moyens de preuve recueillis en Suisse¹⁸.

v) Personne morale en liquidation

En règle générale, l'ayant droit économique d'un compte ouvert au nom d'un tiers n'a pas qualité pour agir¹⁹. De même, celui qui détient une simple procuration sur le compte n'est touché que de manière indirecte et n'a, par conséquent, pas la qualité pour agir²⁰.

Exceptionnellement, la qualité pour recourir en matière d'entraide judiciaire est reconnue, depuis une quinzaine d'années, à l'ayant droit exclusivement économique d'une personne morale titulaire de compte lorsque celle-ci a été dissoute et qu'elle n'est dès lors plus capable d'agir par elle-même, sous réserve de l'abus de droit²¹. Précisons encore que l'ayant droit qui se voit exceptionnellement reconnaître la qualité pour agir en lieu et place de la société dissoute, doit agir en son propre nom, et non pour le compte de la société dissoute et que ce dernier doit prouver la liquidation officielle à l'aide de documents officiels²². L'ayant droit ne peut en outre recourir que dans la même mesure que la personne morale aurait pu le faire, si elle n'avait été dissoute. Il faut en outre que l'acte de dissolution indique clairement l'ayant droit comme son bénéficiaire. Ces principes s'appliquent par analogie au trust ainsi qu'à la fondation²³.

¹⁴ CR Entraide, art. 2 EIMP n° 40.

¹⁵ ATF 125 II 356 consid. 3b/bb, 115 Ib 68 consid. 6; arrêt du Tribunal pénal fédéral (TPF) RR.2013.213 du 2 octobre 2013, consid. 1.4. Cf. également BSK-ISTR, SUMMERS SARAH, n° 5 ; ZIMMERMANN, n° 531.

¹⁶ CR Entraide, art. 2 EIMP n° 40.

¹⁷ ATF 125 II 356 consid. 3b/bb

¹⁸ SJ 2000 I 556 consid. 2d/aa.

¹⁹ ATF 139 II 404 consid. 2.1.1 p. 411s. ; ZIMMERMANN, n° 529.

²⁰ ATF 1A.217/2004 du 18 octobre 2004 ; ZIMMERMANN, n° 529.

²¹ Notamment le fait de dissoudre la société immédiatement après l'ouverture de l'action pénale dans l'Etat requérant.

²² Arrêts du Tribunal fédéral 1A.10/2000 du 18 mai 2000, consid. 1 ; 1A.131/1999 du 26 août 1999 ; ZIMMERMANN, n° 529.

²³ ZIMMERMANN, n° 529.

vi) Qualité pour recourir des personnes morales dont l'organe est entendu à titre de témoin

La personne morale n'a pas qualité pour recourir, dans le cas où son organe est interrogé en tant que témoin dans le cadre d'une procédure, même lorsque ce dernier produit des documents de la société à l'occasion de l'interrogatoire²⁴.

²⁴ ATF 137 IV 134 consid. 6 et 7.

3) Conclusion

L'Office fédéral de la justice suisse est d'avis que si une personne morale peut directement être impliquée dans une procédure pénale nationale, il paraît tout à fait sensé et logique que cette dernière puisse également faire l'objet d'une demande d'entraide judiciaire. Pour illustrer ces propos, quelques exemples d'affaires où des personnes morales ont été impliquées à titre principal dans une affaire d'entraide judiciaire en matière pénale en Suisse :

- Complexe de faits Odebrecht (Amérique du Sud)
- Complexe de faits Alstom

L'OFJ considère également que les instruments du Conseil de l'Europe existants en matière d'entraide judiciaire constituent pour les autorités suisses une base suffisante pour la bonne exécution de demandes d'entraide concernant les personnes morales.

Liste des abréviations

ATF	Recueil officiel des arrêts du Tribunal fédéral, Lausanne
RS	Recueil Systématique
SJ	Semaine judiciaire, Genève

Littérature

Laurent Moreillon (édit.), *Commentaire Romand – Entraide internationale en matière pénale – EIMP, TEJUS, LTEJUS, TEXUS*, Bâle/Genève/Munich 2004 [cité CR Entraide].

Marcel Alexander Niggli/Hans Wiprächtiger (édit.), *Basler Kommentar – Internationales Strafrecht: IRSG, GwÜ*, 1^{ère} éd., Bâle: 2015 [cité BSK ISTR-AUTEURE].

ZIMMERMANN, R., *La coopération judiciaire internationale en matière pénale*, 4^{ème} éd., Berne: 2014.

Turkey / Turquie

The Second Additional Protocol to European Agreement on Mutual Assistance in Criminal Matters (ETS 182) entered into force in Turkey on 1 November 2016. According to paragraph 4 of article 1 of the Protocol that " Mutual assistance shall not be refused solely on the grounds that it relates to acts for which a legal person may be held liable in the requesting Party", the requests for legal assistance shall not be rejected on the grounds that the legal personality in the requesting party would be damaged. It is considered that this regulation was enacted because of economical developments. The headquarters of the legal person might be in the requesting party and the branches might be in the requested party or vice versa.

The regulations and practices in our domestic law comply with the mentioned article of the Protocol. The request concerning taking the statement of the real persons who are under the body of the legal person or related with the real person or the requests for information and documents related with legal person are executed. The charged offence is not required to be an offence under our laws for the execution of these request.

In addition, for the execution of the requests requiring dual criminality such as the requests for search / seizure, the act is required to be an offence under our laws.