CENTRE DE DROIT
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The saga unfolds

Refusal of administrative assistance to Russia

Par Maria Ludwiczak Glassey le 6 March 2025

In a judgement 2C_219/2022 of 30 January 2025, intended for publication, the Federal Supreme Court (FSC) rejected a request for administrative assistance in tax matters submitted by Russia. The proceedings before the FSC had been suspended since 2022.

Russia had sent a request for assistance to the Federal Tax Administration (FTA) in 2018 in order to identify the economic beneficiaries of dividends paid to Cypriot companies on three bank accounts opened in Switzerland and, if necessary, to reassess the amount of withholding tax owed by one of the companies involved. The FTA had issued a favourable decision, which was essentially confirmed by the Federal Administrative Court and challenged in early 2022 before the FSC. In view of the events in Ukraine and the Federal Council's press release of September 2022, the FSC suspended the proceedings, first for a period of four months, then for an indefinite period.

The FSC deals with the appeal : this is a particularly important case since 'the question of whether, in the current context, the exchange of tax information with Russia is admissible, in particular when it involves, as in the present case, the transmission of information concerning persons of Ukrainian nationality, is particularly important for practice' (c. 1.1.2).

The Court of First Instance then decides that assistance should not be granted to Russia because it would be contrary to public policy. With regard to Switzerland, this includes the minimum guarantees of the ECHR and respect for the rule of law (c. 7.3). Furthermore, there could be a breach of the principle of speciality, implying 'not only that the requesting state is obliged to keep the information it receives secret and may not use it for purposes other than tax purposes […], but also that it may not use it against persons other than those referred to in the request' (c. 7.4).

The FSC also refers to the response given in terms of mutual assistance in criminal matters, where cooperation is no longer granted (c. 8.1), without, however, aligning itself faced with the choice of whether to suspend or refuse assistance again, while the 1st Public Law Court opted for the former in 2023 (ATF 149 IV 144) and 2024 (ATF 150 IV 201), the 2nd Public Law Court opted for the latter. This is justified according to the TF since a suspension is only possible in the presence of a time-limited situation. However, 'the current situation does not suggest that the situation will change in the foreseeable future. It is therefore appropriate to draw the consequences and not to opt for a new suspension of the procedure for a period whose end cannot be assessed' (c. 8.3). The case is not comparable to ATF 149 IV 144 and ATF 150 IV

201 since ‘unlike frozen funds whose release the person concerned would request, so that to grant their request would result in an irreversible decision […], the present proceedings only concern a one-off measure concerning the transmission of banking information. The admission of the appeal and the consequent rejection of the request for assistance therefore do not amount to the termination of a long-term measure that could not be re-established at a later date’ (para. 8.3). The refusal of assistance does not prevent Russia from submitting a new request.

The ruling provides welcome clarification of the concept of public order. Furthermore, it confirms that cooperation should not be granted to Russia as it stands. With regard to the principle of speciality, the FSC decides that non-compliance with fundamental rights creates a risk of violation of the said principle, in turn rendering cooperation incompatible with Swiss public order (although the wording seems contradictory to me, as regards the cause and effect relationship : ‘However, the absence of procedural guarantees in the requesting State may lead to the conclusion that the principle of speciality will result in a situation contrary to public policy’ and “In this sense, there may therefore be a breach of both public policy and the principle of speciality”, c. 7.4). At the very least, this is a new jurisprudential construction, which astute litigants will not fail to pick up on.

Regarding the condition allowing a choice between suspension and rejection, *i.e.* the existence of concrete prospects allowing for the prediction that the situation in the requesting State will evolve in the foreseeable future, the TF decides here that it also applies in matters of mutual assistance in criminal matters (which was not apparent from ATF 150 IV 201, c. 2.2). In addition, it specifies that it must be analysed more flexibly when funds have been seized, the lifting of which, resulting from a refusal to cooperate, would be irreversible. On this point, the ruling leaves me perplexed. On the one hand, when the request does not involve any provisional measures, suspension and refusal have the same concrete effects. On the other hand, in my opinion, the analysis must be stricter when the cooperation procedure involves a restriction of fundamental rights, as is the case with a seizure. In any case, as it is a provisional measure based on Art. 18 EIMP, it can only be maintained if the main measure, *i.e.* the handover of funds, is possible, which is not the case at present when the request comes from Russia.
