

Annual Activity Report 2018

Mutual Legal Assistance



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Confederation

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Very diverse in terms of content: the field of activity of the Federal Office
of Justice's Division for International Legal Assistance (DILA)

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Editorial



It's not always the really major cases having the potential to shake entire societies, states or organisations to their foundations that the Federal Office of Justice's Division for International Legal Assistance (DILA) is faced with. Not every case is so explosive and wide-ranging as the interwoven complexities of the Petrobras case. There are a whole range of areas in which we need to work with

other states in cases of cross-border crime, in order better to combat, prosecute and punish the criminal acts in question. They may affect the widest variety of legal assets. Alongside the issues that regularly hit the headlines, such as corruption in business and politics, or offences committed in the orbit of organised crime, are many others. Some seem unspectacular; others are attention-grabbing one-offs, such as the case of an alleged master fraudster from the UK, or the speeding motorist engaged in

a high-speed chase through the Gotthard tunnel. Others still are rather more unusual in nature, as illustrated by a case involving ivory-smuggling from Tanzania. What all of these cases have in common, however, is that none of them could have been dealt with successfully without the untiring daily work of the criminal prosecution and mutual legal assistance authorities concerned. Constituting Switzerland's central authority for international mutual legal assistance in criminal matters, the staff of the DILA – alongside their counterparts in partner authorities at home and abroad – face an enormous task.

Reliance on a strong foundation is the only means by which this joint effort can meet present-day challenges. That is why it is so important for applicable law to be revised in line with new needs both at national level, and by active participation in international organisations and bodies, thus continuing to provide the international legal assistance authorities with the efficient tools they need. This work also forms part of the DILA's remit.

This year's Activity Report aims to shed greater light on these different facets of the DILA's work, as well as on other issues which repeatedly occupy us.

I wish you an interesting read!

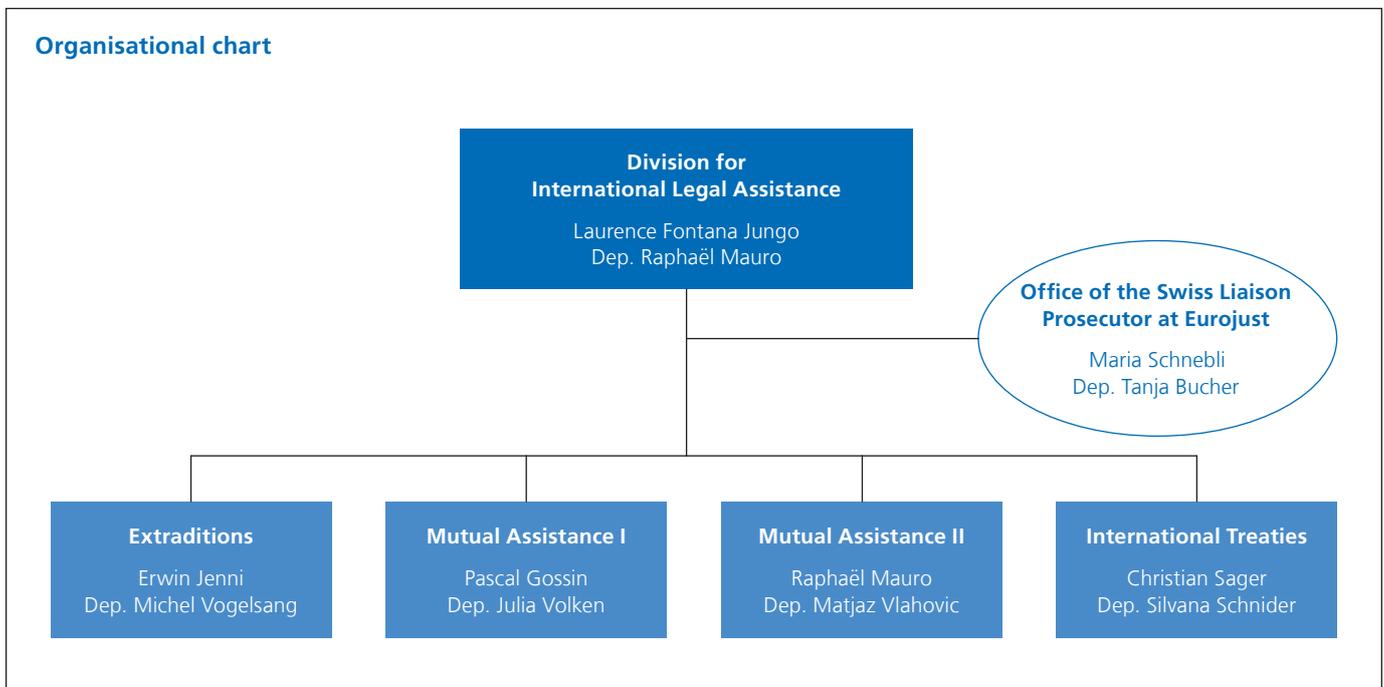
*Laurence Fontana Jungo
Vice-Director FOJ, Head of the Division for International Legal Assistance*

1

The Division for International Legal Assistance and its Units

1.1 The Division

The Division for International Legal Assistance (DILA) forms part of the Federal Office of Justice (FOJ). It is structured into four Units and the office of Switzerland's liaison prosecutor at Eurojust. It employs 45 permanent staff, spread across 37.5 full-time equivalents. The 31 women and 14 men are drawn from all parts of Switzerland.



Overview of principal tasks

- Ensuring the rapid provision of international legal assistance in criminal matters as Switzerland's central authority in the field.
- Submitting and receiving Swiss and foreign requests for cooperation, unless the authorities concerned are permitted to contact each other directly.
- Making certain decisions with regard to legal assistance requests, extraditions, transfers of sentenced persons, and criminal prosecution and sentence enforcement on behalf of another state.
- Performing a supervisory role in the fulfilment of requests for legal assistance.
- Enhancing the legal foundations for legal assistance in criminal matters.
- Performing various operational duties, including those connected with legal assistance in civil and administrative matters.



Management team DILA: from left to right Erwin Jenni (Extraditions), Pascal Gossin (Mutual Assistance I), Laurence Fontana Jungo (Head of the DILA), Raphaël Mauro (Mutual Assistance II), Christian Sager (International Treaties)

1.2 The Units and their remits

Extraditions

- Extradition: decisions on search requests. Orders the arrest of a person wanted by another country so that they can be handed over to that country. Decides on the person's extradition in the first instance. Right of appeal against any ruling by the Federal Criminal Court. Arranges for extradition to be carried out. At the request of Swiss public prosecutors or enforcement authorities, submits search requests and formal extradition requests to foreign governments.
- Criminal prosecution on behalf of another state: handles Swiss and foreign requests to assume criminal proceedings in cases in which extradition is not possible or appropriate. Reviews the conditions for and decides on requests to foreign governments. Receives, reviews and forwards foreign requests to the competent Swiss criminal prosecution authority, and may also decide whether or not to accept the foreign request in consultation with that authority.
- Sentence enforcement on behalf of another state: receiving and submitting requests.

- Transfer of sentenced persons to their country of origin to serve the remainder of their sentence: decision in collaboration with the competent cantonal authorities.
- Transfer of persons wanted by an international tribunal, or of witnesses in custody.
- Provision of a 24/7 on-call service for the operational units, in collaboration with the Federal Office of Police fedpol (SIRENE/ Operations Centre).

Mutual Assistance I: seizure and handover of assets

- Legal assistance proceedings in cases involving politically exposed persons (PEP): may also conduct the corresponding domestic proceedings independently.
- Forwards Swiss requests for legal assistance to foreign authorities and, following a preliminary review, delegates foreign requests for assistance in connection with the seizure and handover of assets (asset recovery) to the competent cantonal or federal executing authorities, unless the authorities concerned are permitted to communicate directly. Supervises the

- execution of the request, incl. right of appeal against the decision of the legal assistance authorities and the Federal Criminal Court.
- Precautionary measures, e.g. account freezes, may be ordered in urgent cases.
- Decides on the further use of evidence (doctrine of speciality).
- Collaborates on asset recovery-related issues within national and international bodies and working groups.
- Negotiates with other states or cantonal and federal authorities about sharing arrangements for confiscated assets at national and international level.
- Provides legal assistance to the International Criminal Court and other international criminal tribunals.
- Handles cases involving the unsolicited provision of evidence and information to foreign criminal prosecution authorities.

Mutual Assistance II: obtaining evidence and service of documents

- Forwards Swiss requests for legal assistance to foreign authorities and, following a preliminary review, delegates foreign requests for assistance in connection with the collection of evidence to the competent cantonal or federal executing authorities, unless the authorities concerned are permitted to communicate directly. Supervises the execution of the request, incl. right of appeal against the decision of the legal assistance authorities and the Federal Criminal Court.
- Precautionary measures, e.g. account freezes, may be ordered in urgent cases.
- Central offices for cooperation with the USA and Italy: independently conducts legal assistance proceedings, including asset recovery (generally in the case of the USA; in the case of Italy in complex or particularly important cases concerning organised crime, corruption or other serious offences).
- Decides on the further use of evidence (doctrine of speciality).
- Gives consent for findings transmitted via administrative assistance channels to be forwarded to a foreign prosecuting authority.
- Forwards information to other states for the purposes of criminal prosecution.
- Processes requests for legal assistance concerning cultural property.
- Processes and forwards requests for service in criminal matters.
- Handles requests for legal assistance to gather evidence and serve documents in civil and administrative cases.

International Treaties

- Negotiates bilateral treaties and other instruments concerning mutual legal assistance in criminal matters (extradition, accessory legal assistance, transfers of sentenced persons), and participates in negotiations on multilateral conventions in this field. Supports these initiatives as they pass through the political process.
- Drafts and supports legislative projects in the field of legal assistance in criminal matters.
- Provides input into other legislative instruments and projects relating to legal assistance in criminal matters.

- Supports the Division's management as it draws up strategies relating to policy and law-making in all of the DILA's fields of activity.
- Represents the Division on steering committees active in the field of legal assistance in criminal matters, specifically those of the Council of Europe and the UN.

Office the Swiss Liaison Prosecutor at Eurojust

- Gathers information, coordinates and establishes direct contact where there are enquiries from Swiss prosecuting authorities or from Eurojust concerning international criminal investigations.
- Organises and participates in coordination and strategic meetings at Eurojust.
- Provides information and advice to the Swiss criminal prosecution and executing legal assistance authorities at cantonal and federal level about the services and support available from Eurojust and/or the Office of the Swiss Liaison Prosecutor.
- Reports to the Eurojust advisory group, which is chaired by the DILA and comprises representatives of the Swiss Conference of Public Prosecutors (i.e. the cantonal public prosecutors' offices and the Office of the Attorney General of Switzerland).

1.3 Management changes at the DILA

Effective 1 June 2018, Laurence Fontana Jungo succeeded Susanne Kuster as new Head of the DILA. She was also appointed Vice-Director of the FOJ. Effective 1 October 2018, Christian Sager was appointed new Head of International Treaties. He was joined by Silvana Schnider, as his deputy, with effect from 1 November 2018.

2 Operations in 2018 – selected cases and issues

This section does not provide a complete overview of the operations of the DILA in 2018. Rather, individual cases and issues have been chosen to illustrate the diversity of the DILA's activities and remit.

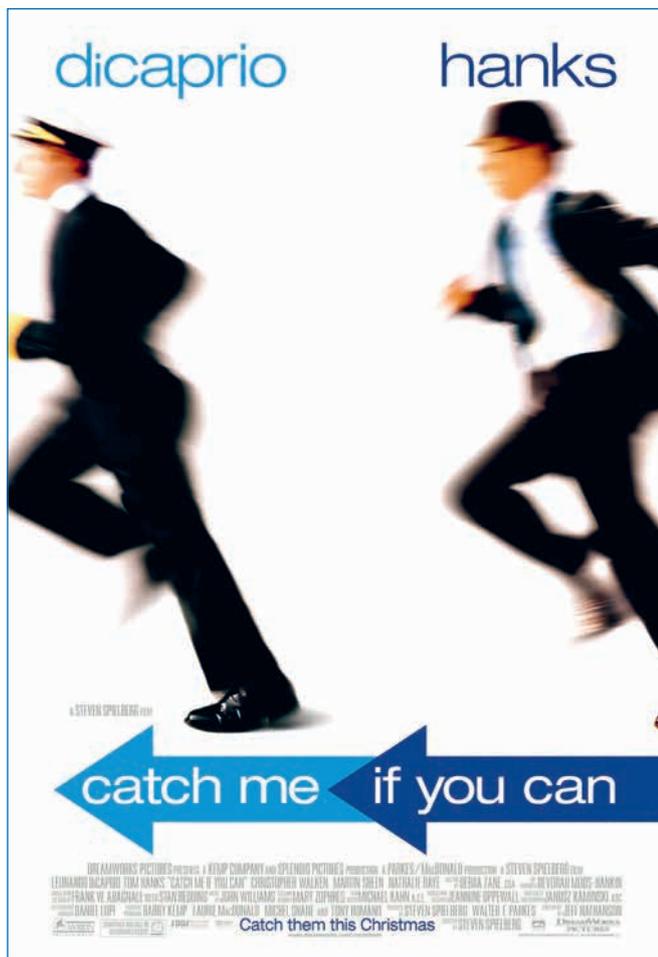
2.1 Cases

The case of A., or 'Catch Me if You Can'

Some readers are sure to remember the 2002 film 'Catch Me if You Can', starring Leonardo di Caprio. Behind the Blockbuster was a true story – that of Frank William Abagnale Junior, the youngest con man and check forger in history. Having spent years playing a whole variety of 'roles', such as doctor, pilot and lawyer, he was finally arrested in

France and extradited to the USA. There, he was sentenced to twelve years in prison. Shortly afterwards, however, he was offered the chance of staying out of jail if he agreed to help the FBI investigate check fraud.

Whether or not another con man will enjoy the same fate remains to be seen. Briton Mark A. was one of the UK's most wanted fraudsters. He is accused, among other things, of tricking, in 2012, a total of 850,000 pounds out of his British partner, with which he was conducting a sham relationship. He said initially that he was a rich Swiss banker, then later a member of the British secret service. Following the victim's complaint, he fled via Spain to Switzerland, where he held a residence permit under a false name since 2014. The UK put out a warrant for his arrest in 2016. After months of targeted search in Switzerland, conducted in close cooperation with the British authorities and several cantonal police forces, at the end of June 2018 Mark A. was arrested by the Swiss police in Wädenswil, where he had been living with his wife and two children. The DILA then placed him in custody pending extradition. A few days later, a further victim made a complaint to the Geneva authorities, to which Mark A. was subsequently transferred. The Geneva authorities ordered that he be held on remand. The DILA is now conducting continuing extradition proceedings in parallel with the Swiss criminal proceedings. Mark A. was released from remand by the Geneva public prosecutor's office in early November 2018, but remains in custody pending extradition. That same month, the DILA ordered his extradition to the UK. Mark A. appealed against this decision to the Federal Criminal Court and, having been unsuccessful, to the Federal Supreme Court, which refused to consider the case. Mark A. was ultimately extradited to the UK on 22 February 2019.



Movie material: the career of alleged con man Mark A.
Image: Keystone

The ivory case – legal assistance in the service of species protection

Poaching is the greatest threat to the African elephant. According to estimates, the number of these animals in the wild is declining by eight per cent per year. Despite a coordinated international effort to combat poaching – including the criminalisation of trading in hunting trophies – exorbitant prices are still being paid for ivory on the black market. They continue to drive the illegal trade, and thus poaching.

In July 2015, 260 kilogrammes of ivory were seized at Zurich airport. The tusks were found in the luggage of three Chinese citizens who were in transit from Tanzania to China.

Based on the legislation enacting the 1973 Washington Convention on international trade in endangered species, the tusks were confiscated by customs officers, and the three passengers interviewed. The Federal Food Safety and Veterinary Office (FSVO), which is responsible for prosecutions in this area, commences criminal proceedings. However, since the greatest potential penalty in this case is a fine, the passengers have to be released on bail. This means that the only way to continue criminal proceedings against them is via legal assistance channels with China. The absence of any mutual legal assistance agreement between Switzerland and China nonetheless casts uncertainty over the outcome.

Then, at the end of 2017 the office of the attorney general of Tanzania itself submitted a legal assistance request to Switzerland – because a number of staff from Dar es Salaam airport are now facing court in Tanzania in the same case, accused of being accessories to a smuggling operation. It marked the first application of the memorandum of understanding on legal assistance in criminal matters that had been concluded with

Tanzania only a short time before. The attorney general's office requested access to the Swiss files on the case, for the Swiss officers involved in the seizure to be interviewed, and for the ivory to be returned.

The DILA delegated the request to the FSVO for execution, the first step being for the executing authority to send the Swiss records of the case to the Tanzanian attorney general's office. The FSVO then conducted the aforementioned interviews in the presence of Tanzanian officials. Finally, a decision had to be made on the difficult question of whether or not the ivory could be handed over to Tanzania, even though it might still be required as evidence in the Swiss criminal proceedings. An agreement was reached with the requesting authority that only samples of the tusks that had been seized would be released. The transportation to Tanzania required a special permit under the Washington Agreement, because carrying ivory across any border is fundamentally forbidden. Legal assistance proceedings could thus be concluded to the satisfaction of all concerned in August 2018.



Ivory-smuggling is a highly lucrative business. Image: Keystone, D. Willetts



In the Eurofighter case, permission was given for documents handed over to Austria as part of international legal assistance in criminal proceedings to be used additionally in the related proceedings conducted by an Austrian parliamentary investigative committee. The DILA approved secondary legal assistance in this case. Image: Keystone, Helmut Fohringer

Secondary legal assistance in the Eurofighter case

The public prosecutor's office in Vienna submitted a number of requests for legal assistance to Switzerland from 2012 to 2015. They were based on investigation proceedings on suspicion of bribery in connection with the purchase of Eurofighter Typhoon fighter jets by the Republic of Austria. Since the alleged kickbacks had been routed through Swiss bank accounts, the Vienna public prosecutor's office requested that Switzerland hand over the corresponding evidence. The Office of the Attorney General (OAG) was charged with fulfilling the request, sending Austria the evidence collected in Switzerland in several instalments. As is customary, the transmission of evidence was subject to the reservation of speciality, which means that the evidence can be used only in those criminal proceedings which formed the subject of the legal assistance request. The DILA's prior consent is required for this evidence to be used in any other way, for example in administrative proceedings.

In March 2017, the Austrian National Council instructed a parliamentary investigative committee to investigate the political responsibility for procedures leading up to the purchase of the Eurofighter Typhoon fighter jet. Under a resolution passed by this investigative committee, the Austrian authorities are obliged to disclose in full any and all investigatory records relating to the subject of the investigation. On 7 April 2017, the Austrian authorities requested the DILA's permission to use the evidence handed over by Switzerland to the Vienna public prosecutor's office in legal assistance proceedings also in par-

liamentary investigations. Handling of the request was nonetheless suspended initially, in view of the imminent elections in Austria. Following the elections in 2018, the reconstituted investigatory committee recommenced work, and renewed its April 2017 application. This was examined by the DILA upon receipt in May 2018.

As a general rule, evidence handed over to a foreign state in the context of international legal assistance may be used only in the specific criminal proceedings concerned. However, the DILA has the exclusive authority to permit its use in other proceedings, under the terms of Article 67 (2) of the Federal Act on International Mutual Assistance in Criminal Matters (IMAC, SR 351.1). This is referred to as extending speciality, or secondary legal assistance. According to Federal Supreme Court precedent, an application from a foreign state to use evidence in the proceedings of a parliamentary investigative committee, as in the present case, may be approved under the following conditions:

- The application for further use describes the political objective of the parliamentary investigative proceedings with sufficient clarity, and there is a sufficient connection between these proceedings and the criminal proceedings.
- The application does not exclusively concern offences that are exempt from international legal assistance (political and military offences or tax offences).

The subject of the parliamentary investigation in Austria was the purchase of the Eurofighter Typhoon fighter jet. The investigation was intended to clarify all of the circumstances connected with the procurement of this fighter jet system. Influence exerted by possible illegal payments to and by a series of individuals was a particular point of focus. These individuals included former decision-makers and top representatives of governing parties.

Authorisation for the further use of evidence had to be issued by the DILA in proceedings in which those individuals affected by previous legal assistance proceedings were able to participate. The DILA thus granted these individuals a legal hearing, in which they objected to the further use of the evidence concerned. The DILA nonetheless concluded that the conditions for approving further use had been met. On 20 July 2018, it therefore ruled that the evidence that had been handed over in legal assistance proceedings could also be used in the proceedings of the parliamentary investigative committee of the Austrian National Council. The Federal Criminal Court rejected an appeal against the ruling in November 2018. Its decision was not challenged further, and in December 2018 the DILA issued authorisation for the aforementioned parliamentary committee to use the evidence in its investigations in the Eurofighter case.

Sentence enforcement request to Germany – the success story of the 'Gotthard speeder' case

German citizen C.M. R. was caught racing through Switzerland at high speed on 14 July 2014. His irresponsible driving – and especially his risky overtaking – put human lives at risk on the A2 motorway. Most notably, he drove through the Gotthard tunnel at an average speed of 135 km/h, instead of the permitted maximum of 80 km/h. In doing so, he overtook a total of 15 other vehicles. He overtook five more times on the Piottino viaduct, thereby factoring in the possibility of colliding with oncoming cars. Finally, he drove at speeds of up to 200 km/h on the stretch of the A2 between Göschenen and Monteceneri as he tried to shake off a police patrol car.

Just two days earlier he had been spotted driving the same vehicle along the A13 motorway, considerably exceeding the speed limit between Hinterrhein and San Bernardino, and passing through the San Bernardino tunnel at 154 km/h instead of the permitted 80 km/h.

On 20 February 2017, the competent court in the Canton of Ticino sentenced him to 30 months in prison (18 months suspended) for the offences of which he was accused.

At this point, C.M. R. had already returned to Germany, thus ruling out extradition. Like Switzerland and many other states, Germany reserves the right not to extradite its own



Speeding through the Gotthard tunnel: the irresponsible driving of the 'Gotthard speeder' endangered life and limb.
Image: Keystone, Gaëtan Bally

citizens. However, in such cases Switzerland has the option – further to the International Mutual Assistance Act (Art. 100 et. seqq. IMAC) to request that the foreign state in question execute the Swiss sentence on its behalf. Switzerland, Germany and Austria, in particular, are permitted by their individual national systems of law to execute criminal sentences on behalf of other states in certain cases. The key condition is that the criminal offences concerned are punishable in both of the states in question.

On the same day as the Ticino verdict had become final and absolute on 16 June 2017, the DILA carried out the Ticino authorities' request and submitted an application to the Baden-Württemberg ministry of justice to execute the sentence on Switzerland's behalf.

In March 2018, the Landgericht (regional court) of Stuttgart issued its first ruling, that the sentence handed down in Switzerland could not be executed within its jurisdiction. The Stuttgart public prosecutor's office appealed successfully against this ruling before the Stuttgart Oberlandesgericht, or higher regional court. At the end of April 2018, the latter issued a ruling declaring the execution of the non-suspended 12-month part of the sentence handed down by the competent court of the Canton of Ticino admissible. This court ruling was final and absolute, and the 'Gotthard speeder' has been in prison in Germany since October 2018.

When a concerted effort bears fruit: a case of voice phishing

The OAG was conducting criminal proceedings on suspicion of the fraudulent misuse of a data processing system by means of voice phishing. It suspected that an international criminal gang was harvesting e-banking data through spam e-mails and phone calls, and that it had used that information unlawfully. As part of these criminal proceedings, the OAG had submitted requests for legal assistance to the Dutch prosecuting authorities, which were conducting their own proceedings in connection with the same case.

The Swiss Liaison Prosecutor at Eurojust organised a number of coordination meetings at Eurojust in The Hague which allowed the prosecutors from Switzerland and the Netherlands to share information and prepare a joint action day. In the summer of 2018, several raids were conducted in a coordinated operation in the Netherlands, resulting in the arrest of alleged phishing fraudsters.

At the request of the OAG, the DILA subsequently applied to the Dutch authorities for the extradition of one of the individuals who had been arrested, as well as for the Dutch authorities to assume the prosecution of a further two suspects.

2.2 Topics

2.2.1 Unsolicited transfer of information and evidence

Switzerland has always been a pioneer in the proactive transfer of information and evidence to foreign judicial authorities in the interests of the tougher prosecution of cross-border crime. The Swiss authorities are extremely active in this field, transmitting more than 100 times a year information in this way. Unsolicited information-sharing often also results in major legal assistance cases. Detailed regulations for this form of information-sharing prevent the official legal assistance channels being circumvented. The DILA plays an important role here as supervisory – and, in some cases – approving authority.

What is the issue?

As described in Article 67a IMAC, this instrument may be defined as the proactive transmission of information or evidence intended to enable another state to permit the opening of criminal proceedings or to facilitate an ongoing criminal investigation.

By definition, the unsolicited transmission of information thus conflicts with the central principle of international legal assistance in criminal matters, which is that legal assistance is offered only if a state expresses an interest in that assistance and also requests it. Specifically, the instrument described in Article 67a IMAC is deployed spontaneously, in other words without the need for a prior request from the foreign state.

The unsolicited transmission of information was incorporated into the IMAC as long ago as 1997, when it was seen as a ground-breaking innovation. Previously, only the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (SR 0.311.53) provided for such an instrument. Over time, however, it began to be included in a number of other international conventions, such as the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, the UN Convention against Corruption and the UN Convention against Transnational Organized Crime. A provision to the same effect is often also found in more recent bilateral legal assistance treaties which Switzerland has concluded with other states.

Conditions

The primary requirement for the unsolicited transmission of information is Swiss jurisdiction over the matter. Criminal proceedings do not necessarily have to be commenced here, but the Swiss authorities must have the geographical and material authority to pursue such proceedings.

The aim of transmitting information must be to permit the foreign state to open criminal proceedings, or to facilitate ongoing criminal proceedings in that state. Before information or evidence is transmitted, there must also be a review to establish whether or not it is already the subject of a legal assistance request from the state in question. If this is the case, the regular legal assistance channels must be respected.

Subject

Under the law, unsolicited transmission may essentially cover information and evidence (Art. 67a para. 1 IMAC). Two distinctions must be drawn here, however. Depending on category, the instrument described in Article 67a IMAC may be subject to different requirements, or it may not be possible to apply it at all.

Firstly, a distinction must be made in each individual case between information and evidence. Evidence is generally deemed to be written documentation and correspondence with a bank, including further relevant documentation – in other words any original document or copy thereof. By contrast, information is regarded as the disclosures set out in the summary prepared by the Swiss criminal prosecution authorities, which may cover indications of bank accounts, account holders, beneficial owners or authorised agents, or transactions to and from specific accounts, for example.

Secondly, a distinction must be made between whether the information and evidence is technically confidential or not. Legal precedent has not yet established any explicit rules in this regard. However, in the view of the DILA, 'confidential' applies to all information and evidence containing data protected as confidential by a provision in law. This refers primarily to information and evidence protected by banking confidentiality regulations, in addition to that covered for example by telecommunications confidentiality.

These distinctions are important in that they permit the following principles to be derived:

- a) Transmission is not permitted if it concerns evidence covered by confidentiality provisions (Art. 67a para. 4 IMAC). This prohibits Switzerland proactively handing over a copy of bank statements, for example.
- b. Information that is subject to confidentiality regulations may not be used by the recipient state as evidence unless, based on this information, it has submitted a request for legal assistance to Switzerland that has then been approved (Art. 67a para. 5 IMAC). In such cases it is important that the Swiss authorities notify the recipient state of the restrictions that apply to the use of the information that they have transmitted without being requested to do so (see <https://www.rhf.admin.ch/dam/data/rhf/strafrecht/wegleitungen/wegleitung-straftsachen-e.pdf>, p. 88).

As a general rule, information and evidence can be transmitted on an unsolicited basis only to those states which are essentially eligible for legal assistance from Switzerland. The principles laid down in Article 2 IMAC must be observed *mutatis mutandis*.

If a Swiss authority intends to provide all of the files relating to ongoing criminal proceedings, in order to hand it over to a foreign authority, even if those files contain only non-confidential evidence, the process is treated not as the unsolicited transmission of evidence pursuant to Article 67a IMAC, but as a request for transfer of proceedings. As a result, other rules apply (Art. 85–93 IMAC). These are not described further here.

Procedure

The investigating authority sends a letter to the authority in the recipient state. This summarises the matter that is being investigated in Switzerland, and sets out the information that may be of interest to that authority. The DILA must always be sent a copy of this letter – even in cases in which the Swiss and foreign authorities are permitted to communicate directly. Prior authorisation from the DILA is required to use this channel to transmit actual evidence to a state with which Switzerland does not have an international agreement (Art. 67a para. 3 IMAC). The Swiss authority must file a copy of the documentation that has been provided on an unsolicited basis in its own national records.

The unsolicited transmission of information and evidence is not subject to appeal and does not affect the underlying national proceedings in Switzerland. It can be challenged only indirectly, in the form of an appeal against the final ruling on any request for legal assistance that the foreign state might submit after receiving the information.

This instrument is currently used in Switzerland not only by public prosecutors' offices, but also by the Money Laundering Reporting Office Switzerland (MROS). Under Article 30 para. 2 of the Anti-Money Laundering Act (AMLA, SR 955.0), the latter office may pass on information provided to it in a financial intermediary's report to its foreign partners, known as financial intelligence units. This option makes cooperation much easier. That said, it is not used systematically, but rather only in particularly important cases.

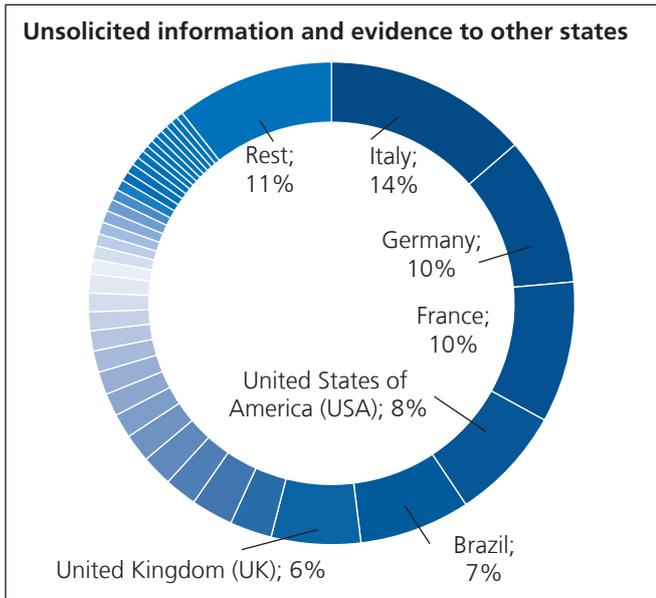
Unsolicited transmission of information by the OAG in the Lava Jato case

The Petrobras investigation, better known in Brazil by the name Lava Jato, is a good example of a case in which the unsolicited transmission of information has facilitated – and to some extent accelerated – cooperation between Switzerland and the states concerned, especially Brazil. According to the OAG, more than a thousand bank accounts were discovered in Switzerland which are thought to be linked to transactions and securities accounts associated with bribes paid in the Lava Jato case. On more than 70 occasions, the OAG spontaneously provided information on the existence of some of these accounts, their holders and beneficial owners, as well as other data about account balances and about suspicious transactions. The great majority of these items of information prompted the foreign states in question to submit corresponding requests for legal assistance.

Some data

Today, a variety of conventions and bilateral agreements on international legal assistance in criminal matters provide for the unsolicited transmission of information and evidence. Switzerland nonetheless provides unsolicited information to foreign states much more often than it receives such information.

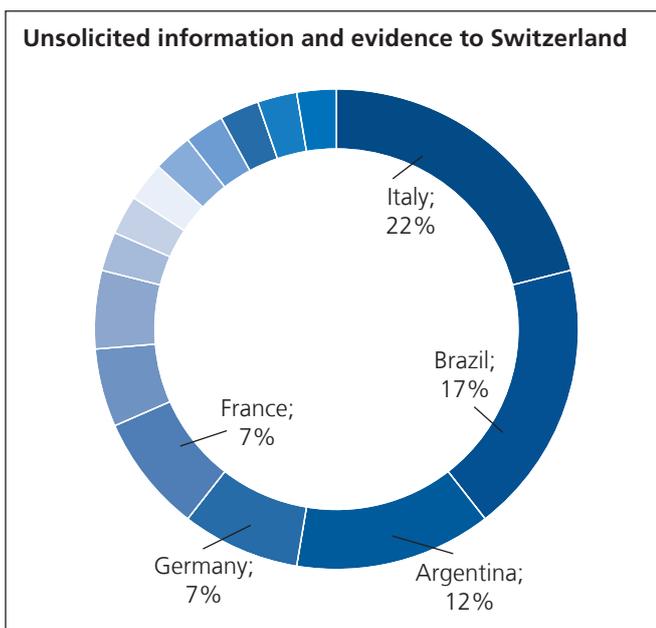
All in all, however, there has been a steady increase in the number of unsolicited transmissions – both from the Swiss authorities to their foreign counterparts, and from foreign authorities to Switzerland. Over the last years, most of the information provided by the Swiss authorities has been transmitted to neighbouring countries, the USA, Brazil and the UK.



Number of unsolicited transmissions of information and evidence by Switzerland to foreign authorities between 2009 and 2018

Switzerland → other states	Anzahl = 1105
Italy	151
Germany	111
France	105
United States of America (USA)	85
Brazil	82
United Kingdom (UK)	66
Russia	31
Spain	31
Austria	24

Belgium	23
Greece	21
Canada	18
Portugal	17
Venezuela	17
The Netherlands	16
Romania	15
Israel	14
Liechtenstein	14
Ukraine	14
Angola	11
Argentina	10
Bosnia-Herzegovina	9
Colombia	9
Mexico	9
Turkey	9
Poland	8
Serbia	8
Sweden	7
Croatia	6
Norway	6
Australia	5
Ivory Coast	5
Japan	5
Kazakhstan	5
Kosovo	5
Nigeria	5
Peru	5
Hungary	5
Rest	118



Number of unsolicited transmissions of information and evidence by foreign authorities to Switzerland between 2009 and 2018

Other states → Switzerland	Anzahl = 41
Italy	9
Brazil	7
Argentina	5
Germany	3
France	3
Belgium	2
Romania	2
United Kingdom (UK)	1
Kazakhstan	1
Latvia	1
Liechtenstein	1
The Netherlands	1
Serbia	1
Spain	1
Supranational	1
Czech Republic	1
Hungary	1

Around 35 per cent of the unsolicited transmissions of information from Switzerland were made by the OAG. At cantonal level, the most active public prosecutors' offices were those of the Cantons of Zurich and Geneva.

Used with ever-increasing frequency, the unsolicited transmission of information is a very useful tool that permits a more dynamic form of cooperation with other authorities. Its effectiveness means that it is likely to be used to an even greater degree in the future. In view of the benefits of this instrument, it would be helpful if it would be used more by Switzerland's foreign partner authorities in the interests of stepping up the fight against crime in the cross-border context.

2.2.2 Deciding on foreign search requests

International search requests are often the first, vital step towards a subsequent extradition. The DILA checks whether or not the foreign search request satisfies the conditions for an arrest warrant to be issued in Switzerland with a view to such an outcome.

The fundamental requirement for a person to be sought in Switzerland is that they are subject to a national arrest warrant, i.e. an arrest order or a final and absolute criminal judgment. There is also a clearly defined legal framework. Specifically, the person must have committed an extraditable offence, in other words one subject to a sufficiently severe potential penalty (generally a prison term of at least one year), or they must have been given a minimum sentence (generally four months) for that offence. Observing the principle of proportionality, searches do not usually make sense unless these minimum requirements are clearly met, and the case is one in which extradition proceedings are justified. Searches on the grounds of military or political offences are not permitted. A search will also be rejected if it would jeopardise the fundamental rights of the person who is being sought in another state.

Review by the DILA

The DILA is responsible for reviewing international search requests from foreign states that are submitted to Switzerland, possibly as one of a number of states. The main focus of this review is to establish whether or not the conduct of which the person being sought is accused would also be punishable under Swiss law (the dual criminality requirement). The other requirements, as mentioned above, are also reviewed in at least summary form.

Three possible transmission channels

Under Swiss law, there are three ways in which a search request may be transmitted internationally. The choice of channel depends on a variety of considerations, most of which are tactical. One option is to promulgate the request via the international police organisation Interpol, which operates a search database that functions in parallel as a means of communication. It can be used to send out around the world all of the international search requests submitted by its 194 member states. Depending on the case in question, a search request may be addressed only to certain zones, or to individual countries. The DILA examines whether warrants for foreign searches in Switzerland can be issued for arrest, or only to establish a person's whereabouts. It instructs fedpol to enter the request in the federal government's automated search database, RIPOL. Fedpol forwards certain requests to the DILA for further investigation. If the person who is being sought might be on their way to Switzerland, or already living here, the DILA may send any specific questions concerning unclear or incomplete requests back to the requesting state. Based on this supplementary information (such as further details of malicious intent in the case of fraud), the DILA may either order detention pending extradition, or otherwise refuse the foreign request.

Secondly, search requests may be submitted via ministerial channels. This option is particularly appropriate if the location of the person being sought is known. Foreign states have the option of

routing their request via the competent judicial authority (generally the ministry of justice) to the DILA. It may be sent directly or through diplomatic channels. In fact, these are the only permissible means of transmission in dealings with certain states, such as the USA.

Thirdly, the search may be promulgated by entering it in the Schengen Information System (SIS). The 30 member states, including Switzerland, can enter searches in this database with a view to the arrest of a suspect and their subsequent extradition. As is the case with Interpol, entries can be made very quickly. However, unlike Interpol this channel cannot be used to transmit requests to specific individual states. In addition, alerts with a view to arrest cannot simply be refused if it seems not possible to extradite a suspect to a certain member state. Rather, in such cases the request will be modified to an alert with a view to establish the whereabouts of a suspect within the territory of the state in question. This is known as a flag. In this way, the requesting state always retains control over the execution by the other member states of its own search request. Applying certain criteria, the Swiss SIRENE Bureau, which is part of fedpol, forwards foreign requests for assistance via the SIS to the DILA for a decision. The DILA examines these requests according to the same criteria as apply to other search requests and, where justified, orders that such electronic requests be flagged.

Search requests in figures

A total of 34,356 foreign search requests were received in 2018. Of these, 13,497 were transmitted via Interpol and 205 directly by foreign judicial authorities to the DILA. 20,654 search requests were promulgated via the SIS. The DILA decided specifically on the admissibility of around 10 % of the search requests submitted via Interpol or the SIS, i.e. in cases with a recognisable link to Switzerland. Around 300, or 1 %, of searches ultimately resulted in an actual arrest, with the great majority then leading to extradition.

Further action to support searches

In isolated cases, further action may be ordered to support specific searches. These are known as targeted searches. Some cantons, as well as fedpol, deploy specially trained staff or teams in such cases. For example, further to a request from a foreign state a telephone might be monitored, thus possibly allowing a target person's location to be identified (see also page 9). Such action may be ordered only by the DILA, whereby particular attention must be paid to the principle of proportionality.

2.2.3 Collection of electronic data in the USA

An area which takes up increasing amounts of the DILA's time is the collection of electronic data in the USA. The trend is unlikely to reverse any time soon.

Perpetrators are increasingly mining the internet in order to commit not only white-collar crime, but also offences such as sextortion, phishing, and CEO fraud. Nowadays, the collection of electronic data has become an essential resource in any related criminal investigation.

Spotlight on the USA

Since the world's most important internet service providers (ISPs) such as Facebook, Google, Microsoft, Apple and Twitter are based in the USA, international mutual legal assistance between Switzerland and the USA is of considerable practical importance in securing that data and ensuring its handover. Recent court rulings in the USA, as well as the CLOUD ('Clarifying Lawful Overseas Use of Data') Act that was passed by the US Congress in record time and signed into law by the President on 23 March 2018, have raised the question for prosecutors of whether or not there have been changes to the procedure for collecting such evidence. In 2018 as in the past, the DILA received regular enquiries in this regard from Swiss prosecuting authorities, and advised them on securing and collecting data from American ISPs.

Under US law, US-based ISPs may hand over registration data on the owner in question, as well as login data, on a voluntary basis direct to foreign criminal prosecution authorities. The US Department of Justice (DOJ) thus also permits foreign criminal justice authorities to make direct enquiries to the US-based ISPs themselves. In practice, however, these providers will generally demand to see a disclosure order from a competent US authority. Therefore, in many cases, the only option open to the foreign authority is to obtain the data by means of a formal request for legal assistance. This is exactly the same way that they obtain content data, for which formal legal assistance channels must be used in any event.

Since the USA does not have any statutory regulations on telecommunications data retention, in view of the risk that evidence may be lost, it is advisable in many cases to take the precaution of securing the data for 90 days with a preservation request direct to the ISP. Such requests may be made under the terms of the Budapest Convention on Cybercrime (SR 0.311.43). This will then give the investigating authority sufficient time to request the handover of the data in question via legal assistance channels.

Where should the legal assistance request be sent?

Once electronic data has been secured, the question is to which country should the formal legal assistance request for its handover be sent? Controversy about this issue has been raging for several years. The ISPs – specifically Microsoft – take the view that requests should be sent to those countries in which the servers are located, and consequently where the data in question is stored. In a 4 July 2016 ruling which attracted a great deal of attention, the US Court of Appeals for the Second Circuit overturned a lower court judgment that contradicted this view, ruling in favour of Microsoft that the server location must be the key criterion in the question of competent jurisdiction.

However, since electronic data nowadays is constantly being moved between various servers around the world, and it is impossible reliably to identify where data is actually stored, this criterion would seem at odds with the current technological reality. In the interests of legal certainty, the DOJ referred the matter to the US Supreme Court and also instigated a programme of legislative work which ultimately resulted in the CLOUD Act.

The Act permits the USA to enter into 'Executive Agreements' with selected 'qualifying foreign countries'. These agreements are intended to allow US judges to issue data disclosure orders directly to ISPs in third countries. In return, foreign criminal prosecution authorities should be able to collect electronic data directly from ISPs in the USA – irrespective of whether or not the server concerned is located outside of the USA. The CLOUD Act is not uncontroversial in the USA. Critics fear that the Fourth Amendment to the US Constitution (protection of privacy and prohibition of unreasonable search and seizure) may be undermined. They point out that the Act does not place any obligation on the ISPs to notify the individuals concerned, does not provide for any appeal against disclosure requests, and the fact that disclosure can be ordered directly means that international legal assistance procedures no longer need be followed. All of this, the critics allege, would result in those affected losing access to legal remedy.

It is too early to say what specific effects the CLOUD Act will have on international cooperation in criminal matters with the USA in the future, as no such 'Executive Agreement' has yet been concluded with any third country. Preparations are still ongoing for the first treaty of this nature, between the USA and the United Kingdom.

Procedures unchanged for the time being

In response to an enquiry from the DILA, the competent USA authorities stated that, until further notice, there will be no changes to the procedure for collecting electronic data from ISPs in the USA. The approach outlined by the DOJ in September 2016 continues to apply: US-based ISPs should first be asked directly where data is located, as well as about the "country in which the provider will accept service of process ordering the production of the data". As in the past, on the basis of this information the Swiss prosecuting authority must then send a formal request for legal assistance to the third country in question.



The collection of electronic data from foreign internet service providers (ISPs) poses enormous challenges for the authorities concerned. Image: Keystone, Paul Sakuma

3 Follow-up: ... whatever happened to ...?

Lava Jato / Petrobras and co. – from Brazil to the whole of South America

In 2014, the first indications of a kickback system were discovered at a small filling station in Brasilia. Since then, the criminal prosecution authorities have disentangled the various strands of the system one by one, gradually uncovering the largest corruption scandal in the history of South America. Indeed, judging by the number of countries affected and individuals involved it is quite possible the biggest case world-wide. More than 2,400 proceedings have been instigated in Brazil alone in connection with the Petrobras case, better known on the other side of the Atlantic by the name Lava Jato. The Brazilian investigating authorities formally charged over 300 individuals, primarily on the grounds of corruption, membership of a criminal organisation, and money laundering. Around 180 cooperation agreements have been signed by those affected by the investigations and the Brazilian authorities. The claims made by those authorities, including fines, amount to a total of around 40 billion Brazilian real (around CHF 10 bn), while the bribes that were paid are estimated at 6.4 billion Brazilian real (around CHF 1.5 bn).

Brazil worked with more than 50 countries on these extensive and complex investigations. Over the past four years, Brazil's central agency handling international mutual legal assistance in criminal matters processed 548 legal assistance requests, 269 of which were sent to 45 countries, and 279 of which were received from 36 countries (all figures according to the Brazilian Attorney General's Office).

The discovery of the Petrobras scandal also had a significant impact on Switzerland. The Brazilian authorities sent their Swiss counterparts more than 100 requests for legal assistance and corresponding supplements, some of which have already been carried out. In the great majority of these requests, the Brazilian authorities were seeking documentation and information about bank accounts in Switzerland which are thought to have been used to move or deposit considerable sums of bribes in connection with corrupt conduct in the various interlinked Petrobras cases. The DILA and the OAG, which is responsible for carrying out the requests, are continually confronted with the investigations into the Petrobras affair. This prompted the OAG to set up a dedicated task force as a central managing body for the criminal prosecution authorities' activities in this complex international case.

The Brazilian authorities are very appreciative of the enormous amount of work contributed by the Swiss authorities, because the handover of important documents has resulted in the convictions of a number of key figures.

However, Brazil is not the only country affected by this incident – so too are many other nations in South America. In addition to the interwoven aspects of the Petrobras case, the focus here is on the construction sector.

The Odebrecht cases

Brazilian construction firm Odebrecht, which also benefited from orders from Petrobras, is accused of corruption in connection with the award of government orders in the construction sector. It is alleged that public-sector officials and high-ranking politicians, such as former Peruvian President Pedro Pablo Kuczynski, serving Venezuelan President Nicolás Maduro, and former Ecuadorian Vice-President Jorge Glas were bribed so that Odebrecht would be awarded profitable contracts for public-sector construction projects. Via a system which extended around the world, some of this money is said to have been laundered via, or deposited in, Swiss bank accounts.

The FOJ has received over 60 requests for legal assistance and corresponding supplements from 12 different, mainly South American, countries since 2015. As in the Petrobras case, these requests primarily sought the handover of banking documents and, in some cases, the freezing of bank accounts. Since the legal assistance requests did not always meet the formal legal requirements, in some cases the DILA had to obtain additional information from the requesting authority. In the interim, it has nonetheless been possible to carry out around 20 of these requests. As in the Petrobras case, in Switzerland it is the OAG that is responsible for executing these requests in these cases. It is also conducting its own criminal proceedings in the various aspects of the Odebrecht case, itself submitting around 30 requests for legal assistance, and transmitting information unsolicited to more than 20 different countries via DILA channels.

Further developments

The large number of legal assistance requests from a great number of states indicates that, alongside Brazil, the Petrobras and Odebrecht cases affect many more South American countries. There has also been a more recent development: the corruption scandal engulfing Venezuela's largest oil company, PDVSA (Petróleos de Venezuela S.A.) has now reached Switzerland. In this, similar, case, former officers of the oil company are alleged to have secured lucrative orders for their accomplices in return for bribes. Switzerland has already received around 30 legal assistance requests from various countries in connection with this case, and has itself submitted four such requests to other countries. It also provided information proactively in eight cases. Since assets were allegedly laundered via the Swiss financial centre, Switzerland is under particular scrutiny both nationally and internationally as these cases progress through the legal system.

Switzerland expects to receive further legal assistance requests from a variety of states in the future. The Petrobras, Odebrecht and PDVSA cases will thus continue to occupy the DILA to a considerable degree over the years to come.

Ukraine – the Yanukovich affair

Under Art. 79a IMAC, the FOJ has the authority itself to handle legal assistance requests in complex or particularly important cases. Following the overthrow of former Ukrainian President Viktor Yanukovich in the spring of 2014, the DILA made use of this option, in line with the Federal Council's asset recovery strategy, which seeks to freeze, confiscate and return dictators' assets.

Since then, the DILA has received a total of ten formal requests for legal assistance from the Office of the Attorney General of Ukraine. The DILA was able to act on almost all of these requests, taking action such as ordering the freezing of assets of just under USD 150 million held by high-ranking representatives of the former President's regime, and the production of banking documentation and other documents. The OAG was charged with

carrying out some of the action that had been requested.

Via international legal assistance channels, the DILA provided the Ukrainian authorities with intensive support in tracking assets acquired unlawfully and returning them to their rightful owner. Coordination with the Basel Institute on Governance's International Centre for Asset Recovery (ICAR), which is advising the Ukrainian authorities, also proved helpful in this case.

The DILA was able to conclude the first case successfully as early as August 2016, when it handed over the evidence that it had gathered. Since then, further evidence has been conveyed to the Ukrainian authorities on an ongoing basis. Indeed, the DILA was able successfully to conclude a further five cases in this way in 2018 alone. The evidence that has been supplied should enable the Ukrainian authorities to obtain forfeiture rulings concerning the assets which remain frozen in Switzerland, and subsequently to apply for their handover.

4 New foundations for cooperation

Legal assistance to international penal bodies: closing the gaps!

To date, the IMAC has been limited in scope to the provision of legal assistance to states. It cannot be applied to cooperation with international penal bodies such as ad-hoc tribunals or UN investigative commissions. This has proven problematic to some extent in the recent past. In response, the scope of the IMAC is to be expanded.

The Special Tribunal for Lebanon is an ad-hoc tribunal established by the United Nations. It is investigating the murder of former Lebanese Prime Minister Rafik Hariri and other individuals from his entourage. In November 2016, Switzerland had to refuse a legal assistance request from the Tribunal seeking the handover of ancillary telephone data because there was no legal foundation for cooperating in this way. Almost simultaneously, the International, Impartial and Independent Mechanism (IIIM) to assist in the investigation of crimes in Syria (the 'Syria Mechanism') became a focus of interest. The Syria Mechanism was set up on 21 December 2016 by Resolution 71/248 of the UN General Assembly, and is based in Geneva. Switzerland provided political support for its establishment. These two events prompted the DILA to revisit the question of whether or not the applicable legal framework still meets the needs of cooperation with international bodies.

An analysis conducted in 2017 in partnership with the OAG and the Directorate of International Law of the Federal Department of Foreign Affairs showed that action was needed. Contrary to expectations, the establishment, in 2002, of a permanent International Criminal Court (ICC), based in The Hague, did not do away with further ad-hoc tribunals. Geopolitical factors mean that the ICC does not always receive the desired degree of support. Special courts of justice and chambers continue to be set up around the world to try war crimes, crimes against humanity, and genocide. In addition to the Lebanon Tribunal, these include the Special Tribunal for Kosovo and the Khmer Rouge Tribunal in Cambodia. In addition to the aforementioned classic crimes under international law, as is the case with the Lebanon Tribunal some bodies have been set up partly or wholly to prosecute political killings. It has sometimes proven difficult to draw the line.

Furthermore, a tendency to set up mere investigatory commissions and mechanisms can be observed, because in certain cases the international community cannot agree on referral to a court, but wishes at least to order the recording and securing of evidence. In addition to the Syria Mechanism, examples here include the UN investigatory commission in Darfur, and that of the Council of Europe in Kosovo, under former Swiss Councillor of States Dick Marty. For foreign policy reasons it may be desirable to work with such institutions, which sometimes also includes the provision of legal assistance in criminal matters.

The analysis also disproved the original assumption that cooperation with international bodies would work in a completely different way than that with states. The experience of the responsible services shows that the same legal assistance measures are applied for, that there are similar stumbling blocks with regard to compliance with the rule of law, speciality, etc., and that the challenges of cooperation are generally comparable. For these reasons, efforts are underway to permit cooperation with international bodies on the same legal foundations as apply to cooperation with states.

The DILA has thus instigated reform of the IMAC. In the future, in certain circumstances the scope of this law is to be extended to include cooperation with international bodies. However, in line with the IMAC's tried-and-tested tradition, the revision will provide only the option of cooperating with these institutions, but no obligation. The new regulation aims to close inconvenient gaps and bring the available legal instruments more closely into line with Switzerland's foreign policy objectives.

Consultations on the reform of the IMAC ran from 1 October 2018 to 15 January 2019. As plans currently stand, the change to the law is unlikely to come into effect before early 2021.

5 DILA participation in international organisations

The Council of Europe's PC-OC

With its 47 member states, the Council of Europe is an eminently important international institution for Switzerland in the field of international cooperation in criminal matters, as in other areas. The Council of Europe's conventions are Switzerland's most important international instrument in international mutual assistance in criminal matters. These multilateral instruments have been ratified by a large number of states, including Switzerland's most important partners. Switzerland's active participation in this context is thus correspondingly important. Just as vigorous is the involvement of the DILA, which represents Switzerland on the relevant Committee of Experts on the operation of European Conventions on Co-operation in Criminal Matters, the PC-OC, which monitors the functioning of the European conventions in this area.

The PC-OC Committee of Experts comprises representatives of the central authorities of the 47 member states of the Council of

Europe and the states which have acceded to the Council of Europe conventions in the field of judicial cooperation in criminal matters (with voting rights), as well as observers from third countries, other Council of Europe bodies, and other international organisations (without voting rights). It meets twice a year in Strasbourg, and is concerned primarily with legal assistance, extradition, and the transfer of sentenced persons.

The PC-OC carries out the mandates conferred upon it by the European Committee on Crime Problems (CDPC). One of its particular tasks is to monitor and to evaluate the conventions in the field of judicial cooperation in criminal matters, to investigate difficulties in practice, and to improve the effectiveness of international cooperation. To this end, it distributes questionnaires among the convention states with a view to evaluating the various practices in a given area. If the analysis of the questionnaire shows certain problems or shortcomings, or should the convention states otherwise identify a need for action, the PC-OC will draft new instruments to eliminate these problems or to counter



Seat of the Council of Europe in Strasbourg. The DILA plays an active part in the bodies within this important European institution which deal with legal assistance-related issues. Image: Keystone

the challenges that have been identified. These might take the form of legally binding conventions or additional protocols. For example, the Committee is currently discussing the drafting of a convention on international cooperation on the management, return and sharing of illegal assets. However, the Committee can also draft non-legally binding recommendations that supplement the conventions that already exist, and help to ensure that they are interpreted uniformly.

The meetings of the PC-OC bring together legal assistance practitioners and specialists, including representatives of observer states and international organisations active in the field. These fora provide a platform for a detailed discussion of specific issues and problems arising from the practical application of the conventions. On the periphery of official meetings it is also possible to hold bilateral talks in which individual states can address practical difficulties and thus improve cooperation. One product of such bilateral contact, for example, was the finalisation of a model agreement between Switzerland and France on the establishment of joint investigation teams (JIT).

The PC-OC monitors the judgments of the European Court of Human Rights (ECtHR), and collates its decisions relating to legal assistance. Finally, the PC-OC is involved in the Council of Europe's more global projects, specifically the Action Plan on transnational organised crime.

Representatives of the Committee take part in the meetings of other Council of Europe bodies being important for the international cooperation in criminal law matters, and also track the work of other international organisations that are active in this area, such as the United Nations and Interpol.

The DILA's participation in the PC-OC offers the Swiss authorities a unique opportunity to be involved in the implementation of existing conventions and in the drafting of new and relevant instruments. This allows Switzerland to propose changes that are needed in practice, and to state its position on changes requested by other states. Via the PC-OC, it can participate in the drafting of new binding legal instruments in the field and thus try to develop instruments that meet the needs of enforcement authorities while taking into account the requirements of Swiss law already at the negotiation stage. Via the DILA, Switzerland plays a proactive role in the PC-OC in other ways, such as proposing experts for issue-specific conferences. One such example was the special session to celebrate the 60th anniversary of the Convention on Extradition, in June 2018.

In the recent past, representatives of the DILA have twice been Vice-Chair of the PC-OC (most recently in 2018), and once Chair. This important position enables Switzerland to help set the agenda for this body, and thus influence future developments in international mutual assistance in criminal matters.

6 The DILA as a service-provider

In addition to various meetings with foreign partners, representatives of the DILA were active on the Swiss front during the year under review. They organised and attended a range of events with partner authorities to speak on the processes, procedures and other aspects of international mutual assistance in criminal matters, and also fostered exchange with these bodies. A small selection of this work is described below:

6.1 Conferences and working groups

'Mini' legal assistance conference for cantons of western Switzerland

On 3 May 2018, a four-strong delegation from the DILA held a half-day presentation in Biel for around 30 representatives of the criminal prosecution authorities of a number of cantons of western Switzerland, as well as the Bernese Jura. A range of specific technical aspects of legal assistance proceedings were discussed to support the work of the authorities concerned when fulfilling international legal assistance requests from other states. Rooted in practice, the talks addressed the steps of the legal assistance process in Switzerland, looking in particular at certain subtleties, including questions of party status. Other topics included the seizure, confiscation and handover of assets at the request of another state, the unsolicited transmission of information to foreign authorities, and criminal prosecution on behalf of another state.

2018 extradition conference

For the sixth year in a row, on 16 November 2018 the DILA once again organised its traditional mutual legal assistance conference that was attended by more than 100 representatives of authorities from almost every canton, as well as by a number of federal agencies. Organised by the Extraditions Unit, much of the conference was devoted to the role that cantonal police and judicial authorities play in extradition proceedings. Presentations were made by staff of the Extraditions Unit, by the Zurich Cantonal Police, and by fedpol's Fugitive Investigations Unit. Specifically, they covered the role of the cantonal authorities in targeted searches and arrests, the conduct of compulsory measures (taking fingerprints, searches of persons or premises, etc.) and interviews relating to requests for arrest and extradition, questions about the involvement and appointment of legal counsel, as well as enforcing detention pending extradition, and handover. In particular, there was an exchange of practical information and tips that enable interviews to be conducted as effectively as possible (with or without consent to simplified extradition). This discussion revealed that the same questions are relevant in almost every canton, one being the availability of suitable translators. Furthermore, a new form for detention pending extradition was presented at the conference. Available to cantonal authorities on the FOJ website, it contains guidelines on the regime that should apply, as well as on authorising visits.

In addition to knowledge transfer, a discussion of points of practice, and experience-sharing, the event once again offered an opportunity for participants to expand and to strengthen their contact networks.

Prisoner Transfer working group

The European Convention on the Transfer of Sentenced Persons allows foreign offenders serving a custodial sentence (sanction or punishment) to return to their home state to serve that sentence, subject to the fulfilment of certain conditions. Switzerland acceded to the Convention on the Transfer of Sentenced Persons in 1988, and to its Additional Protocol in 2004. The latter permits transfer even against the will of the sentenced person in some cases. It has also concluded bilateral transfer treaties with Cuba, the Dominican Republic, Kosovo, Morocco, Paraguay, Peru and Thailand, as well as a reciprocity agreement with Barbados.

To encourage the transfer of sentenced persons to their home state, and to increase the low number of transfers actually completed, in 2017 the DILA established a working group consisting of representatives of the FOJ and cantonal authorities responsible for the execution of sentences and measures (executive authorities). A product of the 2016 extradition conference, the working group has drawn up checklists and documentation that were made available to all cantonal executive authorities in 2018. Work centred on the checklist which sets out the conditions for instigating transfer proceedings both with the consent and against the will of the sentenced person. It is intended to enable cantonal executive authorities to review systematically whether or not transfer proceedings are likely to succeed and be completed in any given case. The checklist also provides tips on how the foreign offender can be informed at an early stage about the possibility of transfer to their home country.

As part of the transfer proceedings, Switzerland exchanges information and documentation with the offender's home state in order to reach a final decision on their transfer. A further checklist produced by the working group sets out in detail which documents the cantonal authorities must provide, as well as those that they can expect to receive from the foreign authorities.

At the request of representatives of the cantonal executive authorities, the working group updated the information sheet for Swiss citizens sentenced in other states, and added further questions to the application form for transfer to Switzerland. As a result, the cantonal authorities receive information on sentenced Swiss citizens (e.g. previous convictions, state of health) at an early stage. To date, this information has come to light only after the person has been transferred.

The DILA was able to make an oral presentation about the working group's achievements at a conference of cantonal executive authorities in Bern in October 2018.

"All good things are worth waiting for"

The treaty between Switzerland and Kosovo on the transfer of sentenced persons came into force on 11 May 2014. To date, it is Switzerland's only bilateral treaty that, in very specific circumstances, permits transfer against the will of the person concerned. It was applied in practice for the first time in April 2018, when two sentenced offenders were flown to Pristina to serve the remainder of their sentences. Transfer proceedings had finally been concluded successfully after four years and eighteen months respectively. An additional individual was transferred to Kosovo in the autumn of 2018. In this case, too, transfer proceedings had taken four years. Further transfer proceedings remain pending.

6.2 Other events**Personal impressions of the Office of the Swiss Liaison Prosecutor at Eurojust in The Hague**

The Office of the Swiss Liaison Prosecutor at Eurojust, based in The Hague, has been operational since 2015. In the interests of fulfilling its pivotal function as a link between Swiss public prosecutors' offices and Eurojust more effectively, since then the Office has staged many roadshows targeted specifically at Swiss criminal prosecution and legal assistance authorities. These events were intended to present the Office and its remit and services to the Swiss authorities, and to raise its profile among a broader public. In May 2018, the Executive Committee of the Swiss Conference of Public Prosecutors (SSK/CPS) paid Eurojust and the Office of the Swiss Liaison Prosecutor a visit. As part of a two-day programme, the members were able to see for themselves what Eurojust does and how it works, and gain their own impressions of the specific remit and activities of the Office.

6.3 An overview of the electronic tools on the DILA website

For all areas of international mutual assistance in criminal matters:

FOJ website (www.bj.admin.ch>Security>International Mutual Legal Assistance>International Mutual Legal Assistance in Criminal Matters)

- General information: contact address and contact form, activity reports, statistics.
- Legal basis.
- Overview of the individual processes involved in international legal assistance in criminal matters.
- Cooperation with the International Criminal Court and other international criminal tribunals.
- Information on the state treaty framework.
- Links to the Legal Assistance Guide and to the ELORGE database of Swiss localities and courts (both described in detail below), as well as to the European Judicial Network (EJN) and to Eurojust.

In addition, under www.rhf.admin.ch>Strafrecht (in German, French and Italian):

- Links to instructions, checklists and circulars, legal foundations, case law and authorities.

Specifically for accessory legal assistance.

The Legal Assistance Guide (in German, French and Italian, at www.rhf.admin.ch>Rechtshilfeführer)

- Tools for the Swiss authorities for submitting requests for the collection of evidence and service of documents to other states.
- Country pages: an overview of the key requirements for requests to individual states for assistance with both criminal and civil cases.
- Model requests, as well as forms relating to the collection of evidence and service of documents.

Database of Swiss localities and courts (www.elorge.admin.ch)

- This website is aimed primarily at foreign authorities which, by entering a postcode or locality, are able to find out the competent local Swiss authority for international accessory legal assistance in criminal and civil matters, and thus, where applicable, make direct contact.
- It also contains a directory of those Swiss authorities which have the power to enter into direct legal assistance relationships with foreign partner authorities to provide and receive accessory legal assistance.

7

Selected decisions by Swiss courts on international mutual legal assistance in criminal matters

7.1 Extradition and transfer

- Decision of the Federal Criminal Court RR.2017.323 of 17 January 2018 and ruling of the Federal Supreme Court 1C_58/2018 (dismissal) of 19 March 2018: transfer to Serbia against the will of the sentenced person (Art. 3 of the Additional Protocol of 18 December 1997 to the Convention on the Transfer of Sentenced Persons).
- Decision of the Federal Criminal Court RR.2017.336 of 15 February 2018 and ruling of the Federal Supreme Court 1C_99/2018 (dismissal) of 27 March 2018: extradition to Kosovo. Extradition is permissible, but assurances must be obtained from Kosovo in respect of detention conditions.
- Decision of the Federal Criminal Court RR.2018.38 of 7 March 2018: transfer to Poland against the will of the sentenced person (Art. 3 of the Additional Protocol of 18 December 1997 to the Convention on the Transfer of Sentenced Persons).
- Decision of the Federal Criminal Court RH.2018.6 of 18 May 2018 and ruling of the Federal Supreme Court 1C_269/2018 (dismissal) of 5 June 2018: extradition to Portugal; extradition warrant. Flight risk, substitute measures. Electronic tagging cannot prevent a person absconding, merely establish that they have fled.
- Decision of the Federal Criminal Court RR.2018.171 of 19 June 2018 and ruling of the Federal Supreme Court 1C_323/2018 (dismissal) of 4 July 2018: extradition to Portugal. Extradition constitutes unlawful intervention in the right to respect for private and family life guaranteed by Art. ECHR only in exceptional cases.
- Decision of the Federal Criminal Court RR.2018.138 of 25 June 2018: transfer to Kosovo against the will of the sentenced person. Based on the bilateral treaty with Kosovo. Criteria for intervention in the right to respect for private and family life guaranteed by Art. 8 ECHR (mutatis mutandis application of the criteria developed for extraditions).
- Decision of the Federal Criminal Court RR.2018.152 of 23 July 2018: extradition to Austria. Fraud under Austrian law may, under certain circumstances, meet the criteria for the offence of embezzlement under Swiss law.
- Decision of the Federal Criminal Court RH.2018.13 of 19 September 2018: extradition to Italy; extradition warrant. Reciprocal extradition obligation for indirect fiscal offences.
- Decision of the Federal Criminal Court RR.2018.235 of 4 October 2018: extradition to Poland; judgment in absentia.

7.2 Accessory legal assistance

- Decision of the Federal Criminal Court RR.2017.189 of 24 January 2018: legal assistance request to a foreign state; appeal against the decision of the FOJ not to forward the request (rejection of appeal).
- Decision of the Federal Criminal Court RR.2017.330 / RP.2017.74 of 6 February 2018: legal assistance request to a foreign state; 'entraide sauvage'.
- Judgment of the Federal Supreme Court 1C_633/2017 of 12 February 2018: legal assistance to Venezuela; conditions subject to acceptance pursuant to Art. 80p IMAC (diplomatic guarantees).
- Decision of the Federal Criminal Court RR.2017.234 of 1 March 2018: rejection of a violation of the principle of speciality; proportionality of account freezes.
- Decision of the Federal Criminal Court RR.2017.260 of 12 March 2018: Art. 3 para. 1 IMAC (exclusion on the grounds of the predominantly political nature of the offence); no political offence committed.
- Decision of the Federal Criminal Court RR.2018.130 of 19 June 2018: rejection of dual criminality; criminal law provisions on corruption, distinction between corruption and permitted conduct, such as lobbying.
- Decision of the Federal Criminal Court RR.2017.288 of 27 June 2018: inspection of the records of completed legal assistance proceedings; balancing of interests (decision upheld by Federal Supreme Court judgment 1C_352/2018 of 18 September 2018).
- Decision of the Federal Criminal Court RR.2018.47 of 2 July 2018: legal assistance with Mongolia. Insofar as the relevant provisions are directly applicable, the United Nations Convention against Corruption (UNCAC) provides a legal foundation for legal assistance.
- Decision of the Federal Criminal Court RR.2018.182 of 4 September 2018: dual criminality; Federal Act on the International Transfer of Cultural Property; Art. 74a IMAC, hand-over of a painting.
- Decision of the Federal Criminal Court RR.2018.77-80 of 23 October 2018: authorisation to appeal in the case of trusts as account-holders.
- Decisions of the Federal Criminal Court RR.2018.209 and RR.2018.210 of 30 October 2018: rejection of tax fraud, contrary to the view of the Federal Tax Administration.

- Ruling of the President of the Federal Criminal Court RP.2018.50 of 7 November 2018: appeal against an interim ruling. The requirement to prove a direct disadvantage that cannot be redressed does not apply to the FOJ in its capacity as a supervisory authority.
- Decision of the Federal Criminal Court RR.2018.291 of 14 November 2018: legal assistance to the USA; sealing of evidence; authority with competence to conduct the sealing process as part of legal assistance proceedings under the Federal Act on the Treaty with the United States of America on Mutual Legal Assistance in Criminal Matters (BG-RVUS).
- Decision of the Federal Criminal Court RR.2018.238-239 of 16 November 2018: secondary legal assistance; authorisation for a parliamentary investigative committee to use evidence handed over in legal assistance proceedings.
- Judgments of the Federal Supreme Court 1C_397/2018 and 1C_393/2018 of 14 December 2018: particularly important case under Art. 84 para. 2 Federal Supreme Court Act (FSCA); breach of elementary principles of procedure in Swiss legal assistance proceedings; principle of good faith, legal hearing.

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Important statistical information on international legal assistance, 2014–2018

Action group	Type of action	2014	2015	2016	2017	2018
Extradition requests to foreign countries		259	257	282	259	252
Extradition requests to Switzerland		364	397	372	360	350
Search requests to foreign countries		289	278	312	281	249
Search requests to Switzerland		24 940	29 664	33 401	32 005	34 356
Prosecution transfer requests to foreign countries		220	199	164	153	225
Prosecution transfer requests to Switzerland		113	110	117	133	135
Sentence execution requests to foreign countries	Custodial sentences	4	5	10	15	5
Sentence execution requests to Switzerland	Custodial sentences	6		2	6	5
	Fines	2		5		1
Prisoner transfer abroad	At the request of the sentenced person	47	48	48	65	57
	Under Additional Protocol	2	3	4	2	2
Prisoner transfer to Switzerland	At the request of the sentenced person	14	13	18	14	15
Searches for international tribunals			1			
Legal assistance requests to Switzerland	Gathering of criminal evidence	1 173	1 180	1 268	1 085	1 163
	Gathering of criminal evidence: supervision	1 033	1 113	1 171	1 333	1 146
	Gathering of criminal evidence: own case	33	43	46	44	80
	Handover of assets	13	16	13	14	23
	Handover of assets: own case	4	2	4	4	3
	Eurojust enquiry	89	179	144	131	132
	Gathering of civil evidence	44	43	57	34	66

Legal assistance for international tribunals	International Criminal Court	2		3	4	10
Legal assistance requests to foreign countries	Gathering of criminal evidence	1 052	900	982	946	850
	Handover of assets	5	5	6	5	4
	Eurojust enquiry	15	50	90	70	91
	Gathering of civil evidence	23	13	34	28	13
Secondary legal assistance	For use in criminal proceedings	11	10	9	13	15
	For forwarding to third country	3	10	7	2	7
Unsolicited legal assistance	To foreign countries (Art. 67a IMAC)	88	105	114	121	164
	To Switzerland	2	3	2	2	1
Document service requests to Switzerland	Criminal law	368	306	264	238	265
	Civil law	579	586	777	584	534
	Administrative law	50	59	55	102	249
Document service requests to foreign countries	Criminal law	629	549	552	562	548
	Civil law	990	924	855	917	798
	Administrative law	587	588	602	529	552
Sharing	International sharing (Swiss forfeiture ruling)	6	1	9	5	14
	International sharing (foreign forfeiture ruling)	8	5	7	3	6
	National sharing		120*	33	36	41
Instruction to the FDJP	Limitation of cooperation (Art. 1a IMAC)	1				
	Authorisations under Art. 271 of the Swiss Criminal Code	6			1	1

* Authority for national sharing was only transferred to the DILA from the FOJ Criminal Law Division in 2015.

Judicial decisions

Court	2014	2015	2016	2017	2018
Federal Criminal Court	265	242	195	241	235
Federal Supreme Court	50	67	56	79	82
Total	315	309	251	320	317

