

# Annual Activity Report 2020

## Mutual Legal Assistance



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Swiss Confederation

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# Editorial



*The COVID-19 pandemic affected every aspect of our daily life in 2020. The fight against the virus, which swept across the globe, nearly brought freedom of movement, previously almost unrestricted and long taken for granted, to a sudden halt from one day to the next. National borders were closed and flights were cancelled. Within the country, social dis-*

*tancing rules have made physical contact more difficult. As a result, established mechanisms and habits as well as proven procedures were put to the test and had to be reconsidered and adapted to new circumstances in the light of the pandemic.*

*The pandemic has also had a considerable impact on international cooperation and the work of the FOJ's Division for International Legal Assistance DILA. All spheres of activity of our Division were affected. The pandemic by its nature had a major impact on the physical transport of persons across national borders from one country to another, and therefore on the execution of extraditions and the transfer of sentenced persons. In addition, the pandemic-related restrictions also affected operational cooperation in relation to accessory mutual legal assistance. Cooperation with other authorities and countries at international and national conferences and meetings and the negotiation of international treaties were also affected.*

*With good will, flexibility and a not infrequent dash of creativity, we were able to overcome a number of obstacles that stood in the way of cooperation. This was possible not least thanks to the existing relationships of trust built up and carefully nurtured over many years with domestic and foreign partner authorities, which have turned out to be particularly relevant in times of crisis. In this way, the FOJ DILA was able to carry out its tasks in cooperation with its partners even under the particularly challenging circumstances of 2020. The latest Annual Report illustrates some of the problems that arose and the solutions that were found. The report also provides a few examples of cases and projects that the Division dealt with and was able to bring to a successful conclusion.*

*I wish you an interesting read!*

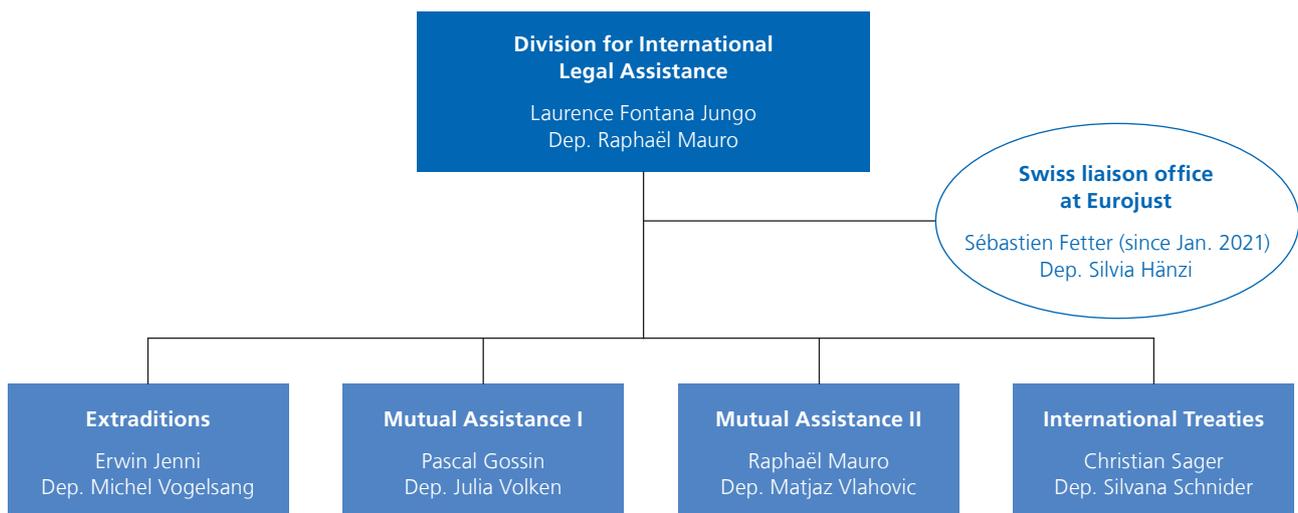
Laurence Fontana Jungo  
Vice-Director FOJ, Head of the Division for International Legal Assistance

# 1 The Division for International Legal Assistance

## 1.1 The Division

- Swiss central authority for international mutual legal assistance in criminal matters
- four units and the Swiss liaison office at Eurojust
- 47 permanent staff, made up of 33 women and 14 men from all parts of the country, making 39.6 full-time equivalents

### Organisational chart



### Overview of principal tasks

- Ensuring the rapid provision of international mutual legal assistance in criminal matters.
- Submitting and receiving requests for cooperation, unless the authorities concerned are permitted to contact each other directly.
- Making certain decisions with regard to extraditions, mutual legal assistance requests, criminal prosecution and sentence enforcement on behalf of other countries, as well as transfers of sentenced persons.
- Supervising the execution of requests for mutual legal assistance.
- Developing legislation on mutual legal assistance in criminal matters.
- Performing various operational duties, including those connected with mutual legal assistance in civil and administrative matters.

## 1.2 The Units and their remits

### Extraditions

- Extradition: decides 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. Has a right of appeal against any ruling by the Federal Criminal Court. Arranges for extradition to be carried out. At the request of Swiss prosecutors or enforcement authorities, submits search requests and formal extradition requests to foreign governments.
- Prosecutions on behalf of other countries: deals with Swiss and foreign requests to take over criminal proceedings in cases in which extradition is not possible or appropriate. Checks whether requests to foreign governments meet the requirements and decides whether they should be submitted. Receives, reviews and forwards foreign requests to the competent Swiss prosecution authorities, and may also decide whether or not to accept the foreign request in consultation with that authority.
- Sentence enforcement on behalf of other countries: receives and submits requests.
- Transfer of sentenced persons to their country of origin to serve the remainder of their sentence: decides in consultation with the competent cantonal authorities.
- Transfers persons wanted by an international tribunal, or of witnesses in custody.
- Provides 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

- Mutual legal assistance proceedings in cases involving politically exposed persons (PEP): may also conduct the related domestic proceedings independently.
- Forwards Swiss requests for mutual 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 executive authorities, unless the authorities concerned are permitted to communicate directly. Supervises the execution of the request, and has a right of appeal against the decision of the mutual legal assistance authorities and the Federal Criminal Court.
- May order precautionary measures, e.g. freezing of accounts, in urgent cases.
- Decides on the further use of evidence (doctrine of speciality).
- Works within national and international bodies and working groups on asset recovery-related issues.
- Negotiates with other countries or cantonal and federal authorities on sharing arrangements for forfeited assets at national and international level.
- Provides mutual 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 mutual legal assistance to foreign authorities and, following a preliminary review, delegates foreign requests for assistance in connection with obtaining evi-

dence and service of documents to the competent cantonal or federal executive authorities, unless the authorities concerned are permitted to communicate directly. Supervises the execution of the request and has a right of appeal against the decision of the mutual legal assistance authorities and the Federal Criminal Court.

- May order precautionary measures, e.g. freezing of accounts, in urgent cases.
- Central offices for cooperation with the USA and Italy: conduct mutual legal assistance proceedings independently, 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 countries for the purposes of criminal prosecution.
- Processes requests for mutual legal assistance concerning cultural property.
- Processes and forwards requests for service in criminal matters.
- Handles requests for mutual 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 mutual 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 related to mutual legal assistance in criminal matters.
- Provides input on other legislative instruments and projects relating to mutual 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 mutual legal assistance in criminal matters, specifically those of the Council of Europe and the UN.

### Swiss liaison office at Eurojust

- Gathers information, coordinates and establishes direct contact when 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 executive mutual legal assistance authorities at cantonal and federal level about the services and support available from Eurojust and/or the Swiss liaison office.
- 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 prosecution services and the Office of the Attorney General of Switzerland).

### **1.3 Change of personnel in the Swiss liaison office at Eurojust: New liaison prosecutor from the start of 2021**

At the start of 2021, Sébastien Fetter took up his new position as Swiss liaison prosecutor at Eurojust, succeeding Tanja Bucher. Sébastien Fetter previously worked as a public prosecutor for the prosecutor's office of the Canton of Vaud, where among other things, he specialised in combating computer crime.

## 2 Cooperation in the times of COVID-19

*Globally imposed entry bans, in some cases considerably limited freedom of movement and social distancing rules that made physical contact more difficult affected and complicated the work of the FOJ DILA in various respects during the year under review. The execution of extraditions and transfers of sentenced persons to and from other countries was particularly affected. Cooperation on accessory mutual legal assistance was also hampered by various pandemic-related restrictions and circumstances. Furthermore, from the outbreak of the pandemic, for instance, in-person participation at international conferences was no longer possible. Technical aids, such as videoconferencing, were able to help bridge the physical distance to some extent.*

*The following is a report on experiences in different areas:*

### **Extraditions during the COVID-19 pandemic**

Extraditions can be carried out in two ways: by air or by land. Most extraditions by land involve our neighbouring countries. In the case of an extradition abroad, the person facing extradition is taken by the cantonal police to a border post as previously agreed with the foreign authorities, handed over to the foreign police officers and transferred to a detention facility. In the converse case, in the case of an extradition to Switzerland, the person being extradited is handed over to the cantonal police at the border and is transported by rail or by road to the cantonal detention facility, normally via Jail-Train-Street (a joint venture between Securitas AG and the SBB).

If there is no direct border between the requesting and requested state, extradition is normally carried out by air. The requesting state sends an escort, usually two or three police officers, to the airport designated by the requested state. The person facing extradition is handed over to the escort at the airport and transported on a scheduled flight to the requesting state. In exceptional cases, for example, if the person facing extradition is uncooperative or violent, or has a medical condition, he or she will be extradited on a special flight.

In some cases, extradition involves transit through a third country, which can be carried out by land or by air. This form of extradition is used when there are no direct borders or direct flights between the requesting and requested states. In these cases, the third country is requested to issue a transit authorisation.

### *The pandemic as a game changer*

In the spring and once again from autumn 2020, the pandemic has made the organisation of extraditions considerably more difficult, especially extraditions by air. Apart from some difficulties and delays experienced with Italy and France, which were hard hit by the pandemic, extraditions by land could still be carried out reasonably well. As far as extraditions by air were concerned, however, the situation was quite different. Travel restrictions, closed borders and quarantine requirements brought all regular



air traffic practically to a standstill. Some extraditions had to be postponed several times because flights were cancelled at short notice. On top of that, in isolated cases, the authorities responsible for executing the extradition chose not to provide an escort to accompany the person facing extradition on the flight because of the special circumstances. A small number of persons facing extradition were able to take advantage of the situation and ultimately even had to be released from detention pending extradition.

### *Creative solutions were needed*

In most cases, however, the authorities in Switzerland and abroad have shown flexibility, so that extraditions could be carried out on schedule. Several extraditions were carried out using special flights. In a bid to reduce the additional costs, often considerable, when possible several persons facing extradition were put on the



The closure of national borders in response to the COVID-19 pandemic also creates difficulties for international cooperation in criminal matters.

Photograph: KEYSTONE/Georgios Kefalas

same flight. Thanks to good coordination and cooperation between the authorities concerned, creative solutions were found to the problems.

### Three in one go – extraditions to and from North Macedonia

In 2017, the FOJ DILA began proceedings to extradite a citizen of North Macedonia to his country of origin. The extradition subsequently had to be postponed until a sentence handed down in Geneva was served. On his release at the end of March 2020, the person concerned was detained pending extradition, as at this time as a result of the COVID-19 pandemic there were no flights between Switzerland and North Macedonia, which meant that the North Macedonian police escort was unable to travel to Switzerland to pick up the person concerned.

In July 2020, the Swiss authorities were in turn invited to pick up two individuals wanted by the cantons of Aargau and Ticino in Skopje. It was planned that the escorting officers would take a scheduled return flight the same day, without having to leave the aircraft in Skopje.

At the request of the FOJ DILA, the person detained in Geneva was transferred to Zurich in order to fly to North Macedonia from there under the supervision of the Aargau police escort. This unusual solution, which was achieved thanks to the cooperation between the cantonal authorities concerned made it possible to transfer three persons, one to North Macedonia and two to Switzerland, on the same aircraft on the same day.

In an extradition from Portugal, the subject was handed over to the Swiss police escort in the aircraft, because if the police officers had left the aircraft they would have had to go into quarantine. And at the first transfer of a sentenced person from Peru (see p. 16), the escort was not allowed to leave the airport. Fortunately, there was a hotel at the airport where the police officers could spend the night.



When planes no longer fly: Cancelled flights can obstruct even the most carefully planned extraditions – creativity is required.

Photo composition: KEYSTONE/imageBROKER/Lilly

When the pandemic situation stabilised temporarily in the early summer of 2020 and states began to ease restrictions and gradually reinstate flights, an increasing number of extraditions could again be carried out on scheduled flights, as is customary. This was the case, even if it sometimes required a stopover in a third country.

### Extradition in a roundabout way

In March 2020, the Federal Supreme Court upheld the decision of the FOJ DILA to extradite an Ecuadorian-Spanish dual national resident in Switzerland to Ecuador. He was suspected of having raped a minor. Organising the extradition of the person concerned to the requesting state – Switzerland's first ever extradition to Ecuador – was greatly complicated by travel restrictions as a result of the COVID-19 pandemic and by several unforeseen events on the day of the extradition itself. The extradition, which was finally successful in August 2020, was made possible thanks to the close cooperation between several dozen Swiss and foreign participants with diverse professional backgrounds (lawyers, diplomats, police officers and prison officers, doctors, etc.) that was coordinated by the FOJ DILA. The exceptional commitment of the Zurich airport police contributed significantly to the success.

The extradition procedures had been proposed by Switzerland in cooperation with the American authorities to allow the Ecuadorian police escort to travel back to Ecuador via the United States.

The pandemic also significantly affected intergovernmental cooperation in areas other than extraditions and transfers.

### Experiences from the point of view of accessory mutual legal assistance

The pandemic affected accessory mutual legal assistance above all during the lockdown phase in spring when individual states severely restricted public life. Postal delivery of requests for service of documents and mutual legal assistance to certain states was complicated or no longer possible at all. Furthermore, the execution of requests for mutual legal assistance involving hearings or searches of houses or business premises was delayed in some cases since it would have been difficult or impossible to comply with social distancing rules in executing these procedural acts. Numerous states informed the FOJ DILA very quickly after the start of the lockdown that requests for mutual legal assistance should only be sent to them electronically, that only priority requests would be processed, and that mutual legal assistance measures requiring physical proximity could not be carried out.

#### Service of procedural documents and court decisions

The FOJ DILA encountered a number of difficulties in its attempts to serve documents abroad during the lockdown, which requires sending the original documents in paper form. Since the Swiss Post suspended postal services to a large number of countries during the lockdown, the documents being served had to be kept at the FOJ DILA until the postal service resumed full operations.

The requesting Swiss authorities were notified of the circumstances. In contrast, requests for service which are made via the Swiss representations abroad (via diplomatic courier) because direct service between the authorities concerned is not possible were successfully transmitted in most cases. However, the transmission of the requests by the Swiss representations to the foreign ministries sometimes took considerably longer than usual because postal traffic within certain countries was not functioning.

After the Swiss Post resumed its postal service for deliveries abroad, requests retained by the FOJ DILA as well as new requests could again be sent to the foreign authorities.

The execution of Swiss requests for service has also proven to be more time consuming and sometimes even impossible. Certain requests that required service by a Swiss representation were returned with 'COVID-19' written in place of the signature when the postman or the agent of a postal service, such as Fedex could not get a signature from the recipient. In such cases, the postman or representative of the postal service, in the presence of the addressee, made a note to that effect. The service of the document was thus deemed to have been effected.

Foreign requests for service in Switzerland were less problematic as the Swiss postal service continued to function normally within Switzerland and service could continue to be effected relatively normally. The only difficulty was that here, too, the postman could not have the recipient sign the confirmation of receipt.

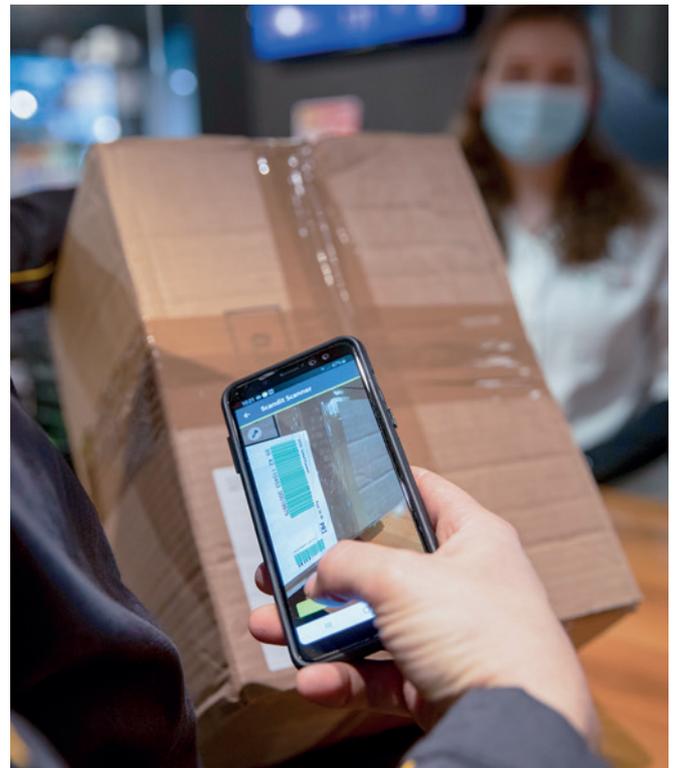
#### *Obtaining evidence*

For the above reasons, difficulties also arose in the postal delivery of Swiss requests for mutual legal assistance to obtain evidence from abroad, especially during the lockdown phase. Often, the problem could be solved by the electronic transmission of requests, which was accepted by various states. In some cases, the requests could also be sent to the foreign country by Fedex. In cases of urgency, the emergency addresses (E-mail-contacts) provided by some countries proved to be helpful.

As mentioned, the execution of Swiss requests for mutual legal assistance was delayed in some cases because many states were no longer able to execute procedural acts such as personal hearings or searches of houses and business premises. The reason for this was that either the social distancing rules could not be observed or the representatives of the authorities executing mutual legal assistance requests were mostly working from home. In some cases, these problems could also be solved: in certain states with a suitable treaty basis, for example, the requested hearings could be conducted by video conference. The execution of certain requests for mutual legal assistance that were not classified as priorities was, however, temporarily suspended in various states.

In contrast, no significant problems arose in the FOJ DILA's handling of foreign requests for mutual legal assistance. This is due to the fact that during the lockdown phase, the FOJ DILA accepted the transmission of requests for mutual legal assistance by electronic means and delegated these to the Swiss authorities executing mutual legal assistance requests.

However, as in the case of other states, there were delays in the execution of certain foreign requests for mutual legal assistance in Switzerland, which involved hearings or searches of houses and business premises. Here, too, the difficulties were partly solved, for example, by conducting hearings by video conference. In some cases, the execution of such procedural acts was also only postponed for a time, above all during the lockdown. In contrast to other countries, however, the Swiss authorities decided against a general suspension of the execution of mutual legal assistance requests.



Social distancing rules sometimes require special procedures: postal delivery during the pandemic. Photograph: KEYSTONE/Peter Klaunzer

As a result of the social distancing rules and the applicable travel restrictions, it was necessary to find alternatives to the physical presence of participants in multilateral cooperation, which normally involves meetings and conferences. Virtual conferences turned out to be the perfect solution.

#### **Virtual conferences as replacement for physical presence**

At first, meetings and conferences were often postponed. It soon became clear, however, that the situation would last longer than anticipated and that it would be necessary to resort to virtual formats.

At multilateral level in 2020, the FOJ DILA took part virtually in two working group meetings and a conference of the United Nations Office on Drugs and Crime (UNODC) in Vienna as well as in the meeting of the Council of Europe's Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) in Strasbourg. Both institutions relied on similar, but not the same, software: the 'Interprefy' system used by the UN allows simultaneous translation into the six UN languages. As is the case for in-person meetings, delegations are

required to register to attend the virtual meetings. During the meetings, participants see and hear only the person who officially has the floor. Participants wishing to speak can raise their hand virtually; the chair then gives them the floor. The 'Kudo software' used by the Council of Europe also provides simultaneous translation and works in a similar way to the UN platform. Both platforms allow participants to exchange group and private messages, which has proven to be useful in practice.

*Advantages...*

The virtual format opens up new possibilities: the elimination of business trips along with the associated costs and the time required allows participation – in some cases only partial participation – in a wider range of meetings. It also makes it possible for experts to participate who were previously unable to do so because of the time and expense involved. The shorter meeting times resulting from the virtual format lead to greater efficiency with more meetings starting on time, fewer breaks and delegations limiting their statements to the essential points and holding back from making detailed comments. From the point of view of resource management, virtual meetings are a solution that should be pursued in the future.

*... but also certain disadvantages*

The results of virtual participation are still a far cry from what can be achieved by in-person meetings. In virtual meetings personal contact and exchanges with members of other delegations and thus networking, which is important for the FOJ DILA, are lost, and consensus building is made difficult, at least in the case of the UNODC, since informal exchanges of opposing views are not possible. Moreover, in a purely virtual format, states tend to be unwilling to agree with a result if they were unable to follow the entire negotiations due to technical difficulties. UNODC was able to mitigate the problem by using a hybrid format, allowing one person per permanent representation to physically attend meetings while the remaining delegation members participate virtually.

In addition to multilateral cooperation, the FOJ DILA also engaged in interdepartmental cooperation in virtual formats. For example, the FOJ DILA took part in several conference calls with up to 20

participants from different federal offices within the framework of the interdepartmental structure for international cooperation on migration (ICM Structure). The virtual format made it possible for a UN spokesperson to give a presentation on the human rights situation of migrants in Libya. The conference calls enabled fruitful interaction and necessary contacts between the various divisions and federal offices involved, while at the same time ensuring compliance with social distancing rules.

**Cooperation under difficult conditions: Conclusion**

With a lot of good will, innovative and creative approaches could be found to overcome the challenges that arose. Despite the sometimes difficult conditions, the FOJ DILA succeeded in fulfilling its tasks in cooperation with its partners in Switzerland and abroad. Certain pandemic-related solutions such as holding conferences virtually may also make sense for the future from the point of view of resource management, although the advantages and disadvantages would need to be weighed up in each individual case.



Technical aids make it possible to hold meetings and conferences when in-person meetings are not possible; the picture shows a video conference. Photograph: KEYSTONE/Gaëtan Bally

## 3 Selected cases

*Below is a small selection of cases from various areas of activity of judicial cooperation in criminal matters that were handled by the FOJ DILA in the report year.*

### **Case S, or the stumbling blocks to the restitution of assets to an injured party**

*Unlike many other countries, Switzerland has an effective legal basis in Article 74a of the Mutual Assistance Act (IMAC; SR 351.1) for handing over unlawfully acquired assets that were seized at the request of foreign states to the requesting state or to the actual victims of the crime on the basis of a foreign forfeiture order. This may be preceded by a lengthy procedure. As the following case shows, there may still be obstacles preventing restitution even when the holder of the concerned bank account does not oppose the restitution of assets.*

The handover of funds seized by the Swiss authorities at the request of a foreign state to that state is often the crowning achievement of Swiss mutual legal assistance proceedings. In very many cases, the foreign state submits a request for mutual legal assis-

tance to the Swiss authorities with the aim of obtaining bank records of accounts held in Switzerland that are alleged to have played a role in a criminal scheme. At the same time, this state requests the freezing of the accounts in question, which implies the seizure of the assets held in them. The final step consists in the restitution of these assets (unless their seizure was previously revoked in response to a foreign request or by the Swiss authority because the requirements were no longer met). Normally, the requesting state must present a legally binding and enforceable forfeiture order issued in the course of its national criminal proceedings for this purpose. This order must make it possible to establish a connection between the seized funds and the criminal offences prosecuted by the foreign judiciary.

The present case provides a vivid example of the steps involved in the restitution of the assets to a foreign requesting state. The case was further complicated by the fact that the Swiss banking institution that held the accounts containing the funds to be returned claimed a lien on them. This was despite the fact that the account holder had agreed to the repatriation of the funds.

In this case, the US authorities initiated criminal proceedings against an American financial operator, who was eventually sentenced to a long prison term for having set up a Ponzi scheme and scammed thousands of investors who had purchased his financial products. The Swiss authorities had been cooperating for more than ten years, since many accounts at several Swiss banks had been used for the fraudulent system. The accounts were frozen and the relevant bank records were forwarded to the requesting US authorities by the FOJ DILA, which has expanded powers in relation to mutual legal assistance with the United States.

The US authorities were able to issue a forfeiture order for the around USD 190 million from the mentioned bank accounts, thanks to a large extent to the bank records they received from Switzerland. Based on the final order, the US Department of Justice requested the FOJ DILA to hand over this amount to the USA. According to the order, the entire amount was of illegal origin.

After receiving the request for legal assistance, the FOJ DILA carried out the procedure for handing over the assets. Approximately USD 40 million was transferred to the USA, mostly with the consent of the holders of the various bank accounts

and without any of the banks that held the funds filing claims. The funds were transferred in full to the US Department of Justice, and not divided between the two states involved as part of a sharing scheme, since there were victims of the fraud and they could be identified. The residual amount (around USD 150 million) relates to accounts held by different customers at the same bank. The bank opposed handing over the funds, citing its lien rights. The FOJ DILA subsequently ordered that the funds be handed over to the USA, and only this bank challenged the order in the Federal Criminal Court. In October 2020, the court dismissed the bank's appeals against the orders issued by the FOJ DILA and upheld the orders in all respects (decisions of the Federal Criminal Court RR.2019.165 and RR.2019.349+RR.2019.350+RR.2019.351 of 16 October 2020). The court held that the legal conditions for handing the assets over to the US authorities had been met. In contrast, it did not consider that any rights had been acquired to the assets in Switzerland in good faith or that the bank had any claim. No appeal against the judgments was filed with the Federal Supreme Court. The FOJ DILA was therefore able to transfer the funds to the US authorities.

## A family of fraudsters?

*A long period of preparation with challenges for the cantonal authorities concerned, followed by relatively swift proceedings and an entirely successful outcome: in 2020, Switzerland was able to extradite all the members of a family to Poland at the same time. There, they are accused of fraud, money laundering and other offences.*

The father, mother and daughter are accused of having formed a gang together with other co-defendants in their home country in order to commit large scale fraud and money laundering. Between 2009 and 2013, the gang allegedly promised various companies that it could lower their social security contributions by around 40%. The K family's businesses would take over the employees of a company and then 'hire them back'; the K family would pay the employees' salaries, social security contributions and taxes and the company concerned would pay the K family a service fee, which would be lower than the company's current costs. The difference would be paid by the European Union.

According to the statements of facts in the extradition request, the defendants set up a network of agents throughout Poland, who were supposed to deceive the targeted companies with professional promotional and marketing documents and persuade as many victims as possible to participate. Furthermore, the father and head of the gang invited potential business partners to Berlin in order to give them the impression that he was running a successful business. Around three-hundred companies fell for the cleverly presented deception, transferring social security contributions amounting to over CHF 20 million and making other payments. The K family then apparently moved these funds in several instalments and in different currencies abroad, in particular to Germany, instead of forwarding the social security contributions to the Polish state as they should have done. The companies that had been swindled and still owed social security contributions had suffered such significant financial losses that some of them even became insolvent.

After examining the Polish extradition request, the FOJ DILA issued an arrest warrant with a view to extradition against the family members, who had been living in Switzerland for a few years. This case presented a challenge for the cantonal authorities: on the one hand, they needed to coordinate the simultaneous arrest of three persons, and, on the other hand, they had to make sure there was space for the three persons in different detention centres to avoid any risk of collusion. It was particularly difficult to find separate space in separate detention centres for the two women, since there are only few spaces for female detainees in detention centres.

After the three family members were arrested by the Solothurn cantonal police and questioned by public prosecutors from the canton of Basel-Stadt, where vacant detention spaces were found, the FOJ DILA granted the three persons, as is customary, a period of time to respond and thereafter issued extradition orders against them all. The lawyer for the K family unsuccessfully appealed against these decisions, first to the Federal Criminal Court and then to the Federal Supreme Court (judgment of the Federal Supreme Court 1C\_197/2020, 1C\_198/2020, 1C\_199/2020 of 27 April 2020). The FOJ DILA's decisions became legally binding at the end of April 2020. The FOJ DILA approved the extradition of the K

family just at the time when almost all air traffic was grounded because of the COVID pandemic. The Polish authorities flew to Zurich airport on a special flight to pick up the three defendants.

## Extradition of a PKK member to Germany – the case of V

*The FOJ DILA takes its responsibilities in relation to clarifying important legal issues seriously: its appeal to the Federal Supreme Court against a decision of the lower court relating to dual criminality in connection with the support of a criminal organisation cleared the way for an extradition to Germany.*

Based on an alert by Germany in the Schengen Information System (SIS), V was arrested at Zurich Airport on 1 November 2019 prior to his planned departure to Iraq, and placed in temporary extradition detention at the request of the FOJ DILA. Since he did not agree to a simplified extradition to Germany, ordinary extradition proceedings subsequently began. According to the German extradition documents, V is alleged to have 'participated as a senior official in the 'Kurdistan Workers' Party' (PKK) from June 2014 onwards as a member of an association abroad whose purpose or whose activity is aimed at committing murder or manslaughter'. He is further alleged to have initially acted as a leading official of the PKK youth umbrella organisation Ciwanen Azad in the Stuttgart area until September 2014 and – following assignments as a PKK official abroad – as the responsible head of the PKK area Saarbrücken/Saarland from August 2015 until March 2016.

The FOJ DILA took the view that the offences with which V was charged came under the offence of supporting a criminal organisation pursuant to Article 260<sup>ter</sup> number 1 paragraph 2 of the Swiss Criminal Code (SCC; SR 311.0) and ordered V's extradition to Germany in January 2020. V appealed against this order to the Federal Criminal Court. In particular, he alleged that the requirement of dual criminality was not met in the present case. The Federal Criminal Court followed his arguments. In May 2020, the court overturned the FOJ DILA's decision on extradition and ordered V's immediate release from detention pending extradition. The Federal Criminal Court argued that the case involved the recruitment of fighters for a group involved in a civil war and had taken place in the context of a military conflict. Participation in an open civil war or a military campaign against oppression and occupation by ISIS (in Syria) could not be considered as support for a criminal organisation. Consequently, the conduct of which V was accused did not fall under Article 260<sup>ter</sup> SCC, as V had neither participated in a criminal organisation nor supported such an organisation.

In response to an appeal by the FOJ DILA, the Federal Supreme Court ordered that the detention pending extradition be continued. In the appeal to the Federal Supreme Court on the merits of the case, the FOJ DILA argued that fundamental questions of dual criminality arose in connection with the existence of a criminal or terrorist organisation or support of such an organisation, which required clarification by the Federal Supreme Court. The Federal Supreme Court overturned the decision of the Federal Criminal Court in June 2020 (judgment of the Federal Supreme Court 1C\_228/2020 and 1C\_261/2020 of 12 June 2020). It ruled that the conditions for the application of Article 260<sup>ter</sup> number 1 paragraph 2 SCC were generally satisfied if recruited fighters place themselves in the service of a criminal organisation. In this regard, it appears to be of secondary importance in which area they were

(initially) employed. It is of particular relevance to bear in mind that the criminal organisation could make use of the combat experience of the persons concerned in a different way and change their place of deployment. In addition, the FOJ DILA had rightly stated that it was beyond the scope of extradition proceedings to investigate precisely in which area and for what purpose the recruited fighters had been deployed.

The extradition was formally approved in June and V was extradited to Germany.

### Arrested in the ‘Switzerland of Central America’

*First extradition case with Costa Rica: after years of intensive searching, the wanted person was tracked down in Costa Rica, where he had been living for six years under a false identity. The extradition request by the FOJ DILA was preceded by close cooperation between the canton concerned, the FOJ, fedpol and the Federal Department of Foreign Affairs (FDFA).*

The public prosecutor’s office in the Canton of Aargau has charged a 60-year-old Swiss national with defrauding two companies based in Switzerland in 2012. Under the pretext of obtaining credit, the person concerned allegedly demanded guarantee payments totalling USD 12 million. However, contrary to the contractual provisions, he used this money for his own purposes.

When the subject failed to appear at the final examination hearing in 2014, the prosecutor’s office in Aargau issued an order for his arrest and requested the FOJ DILA to issue an international arrest warrant through INTERPOL. Extensive search efforts, including requests from the FOJ DILA for assistance from the USA and considerable efforts from the Federal Criminal Police’s target search unit over the course of several years, finally led to the man being tracked down in Costa Rica. He was living there under a false identity.

Up to this time, the FOJ DILA had no experience with extraditions from Costa Rica. Since Switzerland does not have an extradition treaty with Costa Rica, the FOJ DILA with the aid of the Swiss embassy in San José obtained information from the Costa Rican authorities as to whether and under what terms the extradition of the subject was possible. The Costa Rican Ministry of Justice stated that extradition was possible even without an extradition treaty, but that a comprehensive dossier of evidence had to be enclosed with the formal extradition request, as is customary in extradition transactions with common law states. In addition, the request needed to be translated into Spanish and include an Apostille.

In February 2020, based on the information received from the Costa Rican authorities, the FOJ DILA requested the arrest of the wanted person at the behest of the Aargau cantonal prosecutor’s office with a view to his extradition to Switzerland. Three months later, the FOJ DILA was informed that the person had been arrested on the basis of the Swiss arrest request and for violating migration law (entry and stay under a false identity). Subsequently, the FOJ DILA submitted a formal extradition request to the Costa Rican Ministry of Justice. At present, the person concerned remains in custody in Costa Rica. Extradition proceedings against him are ongoing.

### A hemp product covers the costs of extradition proceedings – an unusual case

*Under the IMAC, the personal property of a defendant can be used to cover the costs of extradition proceedings, provided it does not have to be delivered with the defendant. In the report year, an unusual case occurred: the FOJ DILA ordered the sale of 20 kilogrammes of the legal hemp product cannabidiol (CBD), which had been seized as the personal property of a person to be extradited to Italy. The proceeds from the sale were paid to the Federal Treasury.*



*This does not happen every day: the proceeds of the 20 kilogrammes of the hemp product cannabidiol seized from a person extradited to Italy are used to cover the procedural fees in the case.*

*Photograph: Federal Office of Justice*

As part of Swiss extradition proceedings, personal property belonging to the person concerned may be seized and used to cover the procedural fees. These include in particular the costs of detention and transport which the FOJ DILA pays to the cantons responsible for enforcement.

The canton that arrests a person on behalf of the FOJ DILA seizes any evidence and assets at the same time. It provides the FOJ with a list of what has been seized. Evidence and assets, in particular assets acquired as a result of the offence, are regularly handed over to the state concerned. Assets that are not handed over to the requesting state, and which usually have no clear connection with the offence on which the extradition request is based, may, however, be used to cover the costs of the extradition proceedings. This includes, for example, cash, money in bank accounts, jewellery, watches and vehicles. It goes without saying that the defendant has the right to be heard before the FOJ DILA issues such an order. As in the case of a decision on extradition, an appeal can be filed against this order. If the order becomes legally binding, liquid assets are transferred to the Federal Treasury. If the assets seized are valuables, the FOJ DILA will arrange for their sale. If the assets or the proceeds from the sale of valuables exceed the procedural fees, the remaining amount will of course be credited to the defendant.

### **20 kg of CBD as personal property**

A person wanted by the Italian authorities was arrested at the beginning of August 2020 in the canton of Vaud with a view to extradition. He was accused of obtaining counterfeit money and putting it into circulation. His car contained 20 kg of cannabidiol (CBD), a legal, non-psychoactive cannabinoid derived from female hemp. The CBD was seized.

After the person waived his right of appeal against the decision on extradition taken by the FOJ DILA, he was extradited to Italy in October 2020. In the final decision, the FOJ DILA also ordered the seizure and sale of the 20 kg of CBD to cover the costs of extradition, as it was assumed that these goods had a value of several thousand Swiss francs. The FOJ DILA subsequently found a Swiss company that was interested in purchasing the goods and made a specific offer to buy them. The extradited person was informed about the transaction and was told that he could redeem his goods by paying the amount offered by the interested buyer. This is what he decided to do. After the agreed amount was credited to the FOJ's account, the delivery of the CBD was organised for the beginning of December. The procedural fees were higher than the proceeds, which is why the entire amount was paid into the Federal Treasury.

### **First transfer of a Swiss national from Peru to Switzerland**

*Even if there is already a legal basis, the first transfer of a Swiss national from Peru to Switzerland shows that a long time can go by between filing the request and the actual transfer.*

In November 2009, the Swiss national C was arrested in Peru and subsequently sentenced to 12-years' custody for serious drug trafficking in January 2011. Based on the treaty on the transfer of sentenced persons between Switzerland and Peru, which came into force in May 2012, C submitted a request to be transferred to Switzerland.

In Switzerland, transfer requests are handled by the FOJ and the canton that has territorial jurisdiction. Since the convicted person did not reside in Switzerland prior to his arrest (he lived in the Dominican Republic), the authorities in the canton of Valais, C's place of origin, were responsible.

After it had been initiated, the transfer process came to a temporary halt, since, in Switzerland, the process can only move ahead with the support of the sentencing state. However, the Peruvian authorities apparently did not want to become involved until C had paid his outstanding debts.

After receiving all the required documents from the Peruvian authorities, the office for sanctions and accompanying measures in the canton of Valais initially rejected C's request for a transfer in July 2018. As it turned out, this decision was based in particular on a flawed report by a social worker at the prison in Peru where C was being held. On the initiative of C, his family and the FOJ

DILA, the decision was subsequently reconsidered. In October 2019, the Valais Cantonal Court issued the exequatur decision required for a transfer, according to which the sentence imposed on C can be continued to be served in Switzerland.

After C had also agreed to the conditions for his transfer, the FOJ DILA definitely approved the transfer in November 2019. Shortly before the worldwide crisis caused by the COVID-19 pandemic, the Swiss embassy in Lima was also given the green light from Peru for C's transfer. However, as a result of the pandemic, the execution of C's transfer did not appear to be feasible. On the initiative of the FDFA and thanks to the exceptional commitment of the authorities in the Valais, C was finally transferred to Switzerland on a special flight in July 2020.

The report year was also another challenging one for the Swiss liaison office at Eurojust: major international cases required the office's full commitment.

### **Hitting back against one of the world's largest online piracy networks**

In the course of criminal proceedings being conducted into breaches of copyright by a criminal group operating around the globe, the US authorities contacted the USA Central Office of the FOJ DILA (USA Central Office) in May 2020 to request mutual legal assistance. Switzerland was requested to shut down servers and secure data.

In dealings with wholesale suppliers, the suspects allegedly posed as licensed retailers and fraudulently obtained copyright protected films and television programmes. After circumventing the copyright protection using special software ('ripping'), they copied the works and offered them to the public on streaming web pages, peer-to-peer and torrent networks before the publication date for retail sale. As a result, the Motion Picture Association of America (Paramount, Sony, Universal Pictures, Walt Disney Studios and Warner Brothers) has apparently lost annual revenues of several dozen million dollars each year since at least 2011.

As the USA was requesting the servers to be shut down and data to be secured in Switzerland and in a further 14 countries, along with further measures in two other countries, with all measures coordinated to take place at the same time, the USA Central Office asked the Swiss liaison office at Eurojust for support. At the same time the USA made use of the Eurojust coordination and support services through its liaison prosecutor for the first time.

The Swiss liaison office at Eurojust subsequently attended a coordination meeting and became actively involved as part of a coordination centre. This situation room had been set up at Eurojust with a view to the agreed joint action day in support of colleagues in the various countries.

In preparation for these meetings, the Swiss liaison office and the USA Central Office held several video conferences with the prosecution services in the cantons of Lucerne, Vaud and Zurich, which were responsible for carrying out the operations. At these



As part of a joint 'Day of Action' coordinated by Eurojust in a major case of online piracy, the prosecution authorities from several cantons took part in operations. The Swiss liaison office at Eurojust supported them from The Hague.

Photograph: Vaud Cantonal Police

video conferences, the measures for the action day were discussed and the procedures agreed. Any points that were unclear were also discussed, and then forwarded via Eurojust to the USA for a response.

On the joint action day, operations were carried out simultaneously in 17 countries in North America, Asia and Europe and at the server sites in the cantons of Bern, Zurich and Geneva. Worldwide over 60 servers were shut down and several persons arrested.

The issues and problems that arose during the operations were promptly and successfully resolved with the aid of the coordination centre. The cooperation was a very good experience, not only internationally, but also at a national level. With the aid of video conferences, it was possible to bring colleagues from the various cantons to the same table and discuss all the issues. At the same time, it was possible to share the available expertise in a straightforward way and forge new contacts across the language barriers.

The Swiss liaison office at Eurojust is not only actively involved in the coordinated activities and operations of Eurojust, but also organises such measures itself if required to do so. This was precisely what happened in 2020 in a case of online piracy and illegal streaming in Switzerland, which also drew a lot of international media interest.

### Swiss case of illegal streaming: The Swiss liaison office at Eurojust orchestrates cross-border operations

In a criminal investigation led by the prosecution service in the canton of Vaud and the Cyber Investigations Section at the Vaud Cantonal Police, suspects are alleged to have sold multimedia boxes, known as 'KBoxes', which could be used to circumvent copyright protection and illegally access over 82000 films and

series. The films and series are thought to have been stored on servers in Switzerland, France, Germany, Monaco and the Netherlands. As a result of the sale of around 20000 of these KBoxes and the associated breaches of copyright, it is estimated that the film studios concerned have lost over CHF 2 million.

The Swiss liaison office organised a coordination meeting at Eurojust to discuss the case at the request of the prosecution service in the Canton of Vaud. The relevant prosecution authorities in France and the Netherlands were invited in order to discuss the planned action day and to coordinate the execution of the Swiss request for mutual legal assistance, and subsequently the prosecution authorities in Germany and Monaco were also asked to provide support. The Swiss liaison office at Eurojust also organised a coordination centre for the joint action day. The Eurojust representatives of the countries involved were in direct contact with each other, acting as intermediaries for the prosecution authorities in their respective countries. They were able to answer questions quickly and efficiently, to offer support with any problems, and to react very quickly to events. The Swiss prosecutor was continuously updated via the coordination centre on the status of the operations in the requested countries. A specialist from the Operations Department at Eurojust, highly experienced in cases of breaches of copyright, and two experts from Europol also supported the operations. Europol activated 'splash pages' on the websites concerned, notifying users that the webpages had been closed down in an international operation by the law enforcement authorities.

The excellent relationship that the Swiss liaison office enjoys with the prosecution authorities within Switzerland allowed action to be taken in Switzerland very rapidly as well. This was illustrated by the fact that the public prosecutor in Graubünden was requested to question a witness who travelled to Graubünden from the canton of Vaud on the evening before the action day and who had to be questioned on the same day.

As a result of the successful collaboration between all concerned, eleven servers were shut down in the five countries involved in the operation, and three suspects were arrested in Switzerland.



Photograph left: 'Splash Page' activated by Europol.

Photograph: Eurojust

**Further reinforcement at Eurojust – the network of third countries represented in The Hague is constantly increasing**

Since the opening of the Swiss liaison office at Eurojust in 2015, a few things have changed. At the time only Norway, the USA and Switzerland were represented as third countries. Now 10 third countries are represented at Eurojust: Norway, Switzerland and the USA have been joined by Ukraine, Montenegro, North Macedonia, Serbia, Georgia, Albania and, since leaving the EU, the United Kingdom. The network of third countries represented is growing continually. The Swiss liaison office can of course use this network to its advantage. As their offices are situated on the same floor, cooperation and contact between the liaison prosecutors from the various third countries is very close. The Swiss prosecution authorities can thus also obtain rapid and competent support with requests made to these third countries.



## 4 Follow-up – latest developments in ...

### 4.1 Sharing forfeited assets: A reward for successful cooperation

Sharing the proceeds of crime forfeited in your own proceedings with other countries whose cooperation has led to your success: this is the idea behind asset sharing. However, it is not simply a payback for providing support. In the interests of combating serious crime effectively, asset sharing should at the same time be an incentive to support other states in the future and thus encourage international cooperation – cooperation that is becoming increasingly important as crime becomes ever more globalised.

The Swiss authorities have always been very active in this field. Assets are shared on the basis of and in accordance with the principles of the Federal Act on the Division of Forfeited Assets (FADA; SR 312.4). In the case of active international sharing, the Swiss authorities secure forfeiture of the proceeds of crime under Swiss law in their own criminal proceedings, and offer a share to the foreign state that has provided support in the criminal proceedings through mutual legal assistance. In the case of passive international sharing, the scenario is reversed – Switzerland receives a share of the assets that are forfeited abroad in return for its help (transmission of evidence and/or handing over assets located in Switzerland based on Art. 74a IMAC). The FOJ DILA is responsible for arranging sharing, and more specifically for negotiating the required sharing agreements.

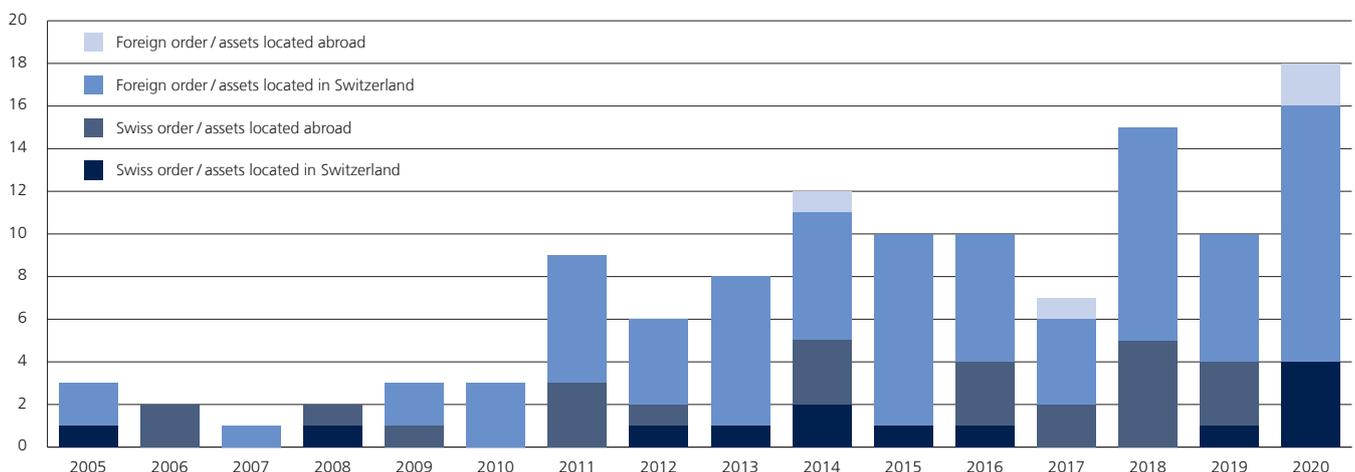
The FOJ DILA reported in detail on sharing in its 2016 Annual Report. As a follow-up, we report below on what has happened since.



Photograph: KEYSTONE

Since FADA came into force in 2004, there have been an average of seven instances of international sharing every year. Up to and including 2020, 119 agreements had been concluded. In the period from 2017 to the end of 2020 alone, 50 cases were agreed. Most cases involve passive sharing, in which foreign states, based on their national law, have secured the forfeiture of assets located in Switzerland. Active sharing comes second: cases in which a Swiss authority, based on Swiss law, has ordered the forfeiture of assets that are located abroad.

#### International sharing

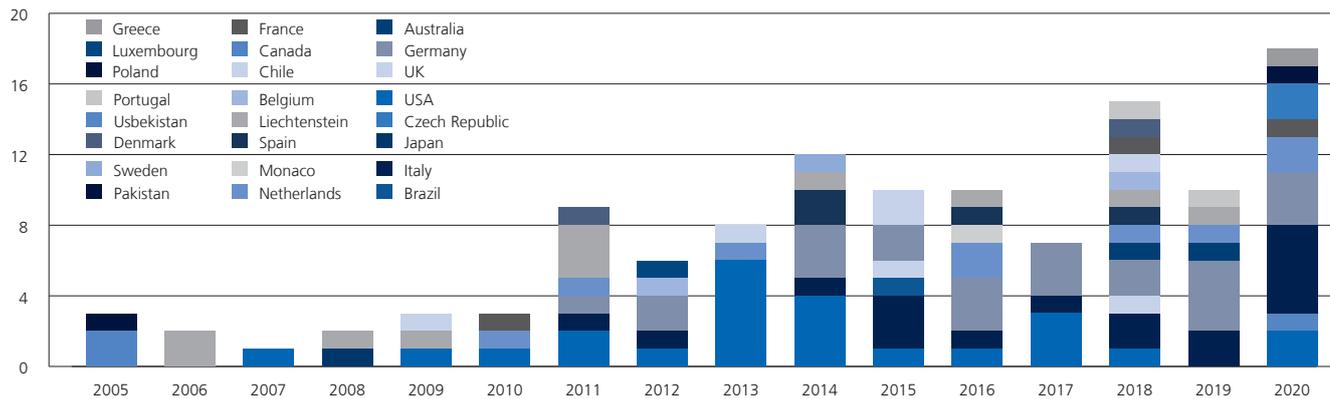


Switzerland shares forfeited assets with many different countries. Since 2004, it has concluded agreements with a total of 24 countries, most commonly with the USA (24 cases), Germany (23 cases), Italy (17 cases), Liechtenstein (11 cases) and the Netherlands (9 cases).

Of the total of 119 sharing arrangements, 32% of the shared assets have gone to Switzerland and 68% abroad. Switzerland has received around CHF 142 million and other countries CHF

308 million. Of that, around CHF 59 million has gone to the USA, around CHF 29 million to Japan, around CHF 20 million to Italy, around CHF 19 million to Brazil, and around CHF 14 million to Australia. The CHF 308 million or so also includes USD 131 million that will be returned to Uzbekistan as soon as the FDFA agreement on the procedures for returning the funds, which is linked to the sharing agreement, has been negotiated and has come into effect (see box on “First sharing agreement with Uzbekistan” on this page).

**Number of international sharing cases by country**



**First sharing agreement with Uzbekistan**

In 2012 the Office of the Attorney General of Switzerland (OAG) opened a criminal investigation against four Uzbek citizens with personal and economic connections to Gulnara Karimova, the daughter of Islam Karimov, the Uzbek president at the time. The case related to allegations of bribery, forgery and money laundering. The investigation was subsequently extended to include the president’s daughter herself. In the course of the proceedings, the OAG seized assets amounting to around CHF 800 million in the cantons of Geneva and Zurich. Since then around USD 131 million has been definitively

forfeited. In 2018 the Federal Council took the decision to return all the assets forfeited in this complex of cases to Uzbekistan (after deducting procedural fees and any monetary penalties). Such cases are known in German as ‘unechtes Sharing’ (non-genuine sharing). The Federal Council instructed the FDJP and the FDFA to consult with the cantons of Geneva and Zurich on whether these were prepared to forgo the shares that were due to them in terms of FADA. Both cantons subsequently waived their rights to a share of the definitively forfeited assets.

It was then necessary in a first step to formalise the refund of the entire amount to Uzbekistan in a sharing agreement based on FADA. In return, a declaration of reciprocity was required from Uzbekistan, which the FOJ DILA received at the start of 2020. On completion of the negotiations, Switzerland and Uzbekistan signed the agreement in October 2020. The total amount of around USD 131 million will be returned to Uzbekistan. Another agreement, negotiated by the FDFA, will regulate the modalities for returning the money. This aims to ensure that the funds are sent back in a transparent process, are used for the benefit of the population and/or to develop the country, and do not fall into criminal hands again.

The same course of action is planned for other assets in the same series of cases which may also be forfeited at a later date (first a request to the cantons concerned as to whether they are prepared to waive their entitlements; thereafter sharing agreement; lastly agreement on the modalities of the transfer).



Gulnara Karimova. Photograph: KEYSTONE/AP/Mikhail Metzel

FADA not only regulates sharing with other states, but also national sharing between the Confederation and the cantons. With simple rules on sharing, FADA creates a balance between the authorities involved in the criminal proceedings and thus avoids conflicts of interest. National sharing arrangements can, but need not, result from earlier international sharing arrangements. The FOJ DILA is also responsible for organising national sharing arrangements.

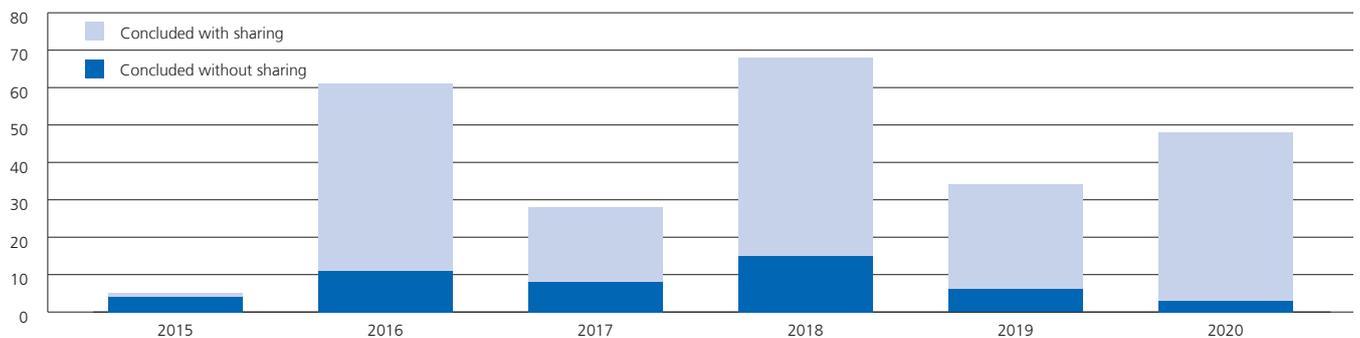
From 2015 until the end of 2020, a total of 244 national sharing cases were concluded. In 197 cases the assets were shared. In 26% of these 197 cases, an international sharing arrangement had already been made with a foreign state. In the remaining 74% of cases, no such procedure had taken place. In 47 of the 244 cases, no sharing took place, because the requirements were not met (for example because the forfeited assets were awarded to the victims of the offence or the case did not involve the minimum amount required by law of CHF 100 000).

The national sharing cases also involve large amounts of money: in the cases concluded between 2015 and 2020, around CHF 506 million was shared. Of that sum, 76% went to the Confederation (around CHF 385 million) and 24% to the cantons (around CHF 121 million), above all to the cantons of Zurich (around CHF 51 million) and Geneva (around CHF 48 million), but also for example to the cantons of Ticino (around CHF 6.5 million), St. Gallen (around CHF 4.5 million) and Basel-Stadt (around 4.3 million).

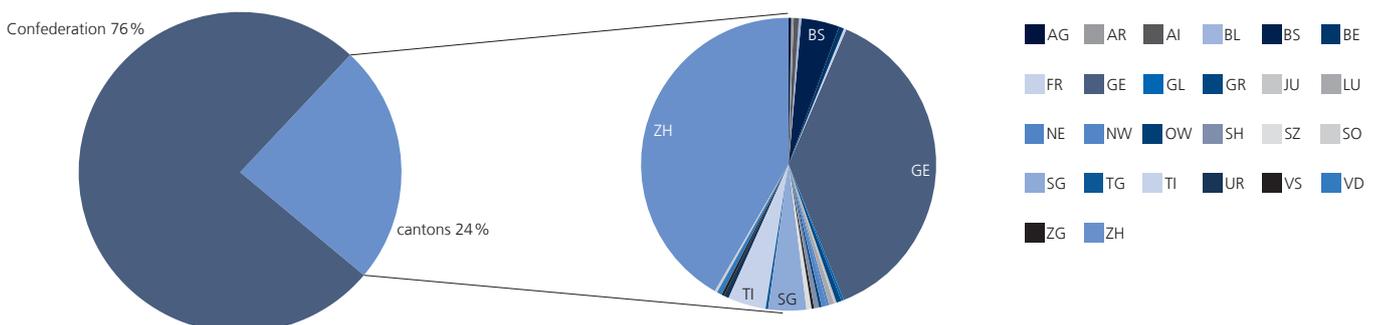
**The Devil is in the detail – success for the FOJ in the Federal Administrative Court**

Although the law lays down precise requirements for how assets are shared out, deductible costs etc., sometimes the precise situation is not clear. Occasionally the participating authorities and the FOJ DILA are unable to agree. In one case, for example, no agreement could be reached with the canton concerned on the deductibility of costs, despite repeated attempts. As a consequence, the canton challenged the sharing order issued by the FOJ DILA in an appeal to the Federal Administrative Court. The key question was whether procedural fees from other proceedings were deductible in national sharing cases, because the proceedings all concerned one criminal investigation. The canton insisted on making a deduction, while FOJ DILA opposed this and took the view that once cases have been separated, costs from separated cases can only be claimed in the criminal case in which they arose. Consequently, they can only be deducted in the related sharing procedure. The Federal Administrative Court sided with the FOJ in its decision of 27 July 2020 (judgment F-6672/2018 of 27 July 2020). It decided that FADA provides no statutory basis for including procedural fees from criminal proceedings other than that on which the sharing procedure is based, or for deducting them in advance from the amount to be shared. The canton's appeal was therefore dismissed.

**Number of cases concluded**



**Sharing of forfeited assets between the Confederation and the cantons since 2015**



## 4.2 Cooperation with the International Criminal Court, criminal tribunals and their successor court: Situation in 2020

The international criminal courts hear cases against individuals accused of serious international crimes, including genocide, crimes against humanity, war crimes and the crime of aggression. Switzerland supports the International Criminal Court (ICC), which is based in The Hague, and regards it as a vital institution in the fight against impunity and in promoting and demonstrating respect for humanitarian international law and human rights. Switzerland also supports other international criminal courts that try crimes committed during a specific period in a specific region (ad hoc tribunals).

As international criminal courts do not have their own police forces, they rely on cooperation with states. Switzerland has enacted statutory provisions to facilitate and regulate cooperation with the ICC and other international criminal courts.

### 1. International Criminal Court

Switzerland enacted its legislation on working with the ICC back in 2002 (Federal Act on Cooperation with the International Criminal Court; CICCAs; SR 351.6). The FOJ DILA, as the Central Office with wide-ranging powers, guarantees the best possible cooperation with the ICC. The Central Office accepts requests from the ICC and decides on the extent and modalities of cooperation.

In 2020, the FOJ DILA received seven requests for accessory mutual legal assistance from the ICC. In six cases, the FOJ DILA was able to provide the ICC with the evidence or other measures requested in the same year. The measures that the prosecutor's office at the ICC requested the Swiss authorities to carry out included summoning expert witnesses, providing migration files in order to locate potential witnesses, conducting investigations on Swiss territory and handing over documents. Federal and cantonal authorities supported the FOJ DILA in executing the requests.

#### The football official accused of involvement in crimes against humanity

In 2020, the FOJ DILA for the first time dealt with a request for mutual legal assistance from the ICC that combines financial offences with core crimes under international criminal law. A high-ranking football official was alleged to have supported an armed group in committing crimes against humanity by providing both financial assistance and by purchasing petrol, ammunition and foodstuffs. The Office of the Prosecutor at the ICC requested the Swiss authorities to obtain documents that could provide information about possible cash transfers. Based on the CICCAs, the FOJ DILA was able to decide on cooperation and to order the measures that could be taken. The OAG was given the task of executing the request. In November 2020, the evidence was sent to the ICC.



Photograph: KEYSTONE/Branko de Lang

### 2. Ad hoc tribunals and the International Residual Mechanism for Criminal Tribunals

In the aftermath of the conflicts in the former Yugoslavia and in Rwanda, Switzerland enacted provisions on cooperation with the ad hoc tribunals in The Hague and Arusha (Tanzania) in the Federal Act on Cooperation with the International Courts for Prosecuting Serious Violations of Humanitarian International Law (SR 351.20), the scope of which was extended to include cooperation with the Special Tribunal for Sierra Leone. In order to be able to work with the successor court established by the UN Security Council in 2010 to conclude the final cases being heard by the ad hoc tribunals, the concisely named International Residual Mechanism for the Criminal Tribunals (MICT), Switzerland again extended the scope of the Act in 2012.

In 2020, the FOJ DILA received one request for mutual legal assistance from the MICT. At the same time, the MICT reactivated a request from 2017. In the report year, the Swiss authorities also made a request to the MICT.

### 4.3 Ukraine – Yanukovich complex of cases: Conclusion of the pending proceedings

Under Article 79a IMAC, the FOJ has the independent power to decide in complex or particularly important cases on the admissibility of requests for mutual legal assistance. Following the overthrow of the former Ukrainian president Viktor Yanukovich in the spring of 2014, the FOJ DILA decided to make use of this option in line with the Federal Council strategy on the freezing, forfeiture and repatriation of dictators' assets (*Asset Recovery*).

Since then, the FOJ DILA has received formal requests for mutual legal assistance from the Ukrainian Central Public Prosecutor's Office in a total of eleven cases. In February 2020 the FOJ DILA was informed that the majority of these cases had been transferred to the Ukrainian Anti-Corruption Bureau NABU. In almost all these cases, the FOJ DILA was able to deal with the requests, taking measures which have included freezing assets held by high-ranking representatives of the former Yanukovich regime amounting to just under USD 150 million (a portion of these assets were already frozen in February 2014 based on the related ordinance issued by the Federal Council) and arranging for the production of bank records and additional documents. The OAG was in some cases delegated the task of carrying out the requested measures.

In 2020 the FOJ DILA successfully concluded all the mutual legal assistance proceedings still pending by transmitting the evidence obtained. Based on the evidence supplied, the Ukrainian authorities should be able to obtain forfeiture orders relating to the assets still frozen in Switzerland and thereafter to request their return.

## 5 New legal bases for cooperation

### 5.1 The revised Article 1 IMAC: Expanding cooperation with international penal bodies

*The IMAC has so far been limited to mutual legal assistance between states. It has not been possible to use it in order to work with international penal bodies such as ad hoc tribunals or UN-fact-finding committees. In the more recent past, this has led to some unsatisfactory situations. Thanks to an amendment to the Mutual Assistance Act, it will now be possible to provide mutual legal assistance to international penal bodies with which, in contrast to the International Criminal Court, the ad hoc tribunals and their successor court mentioned on p. 22, cooperation was previously not possible because of the lack of any statutory basis. Switzerland is thus making another important contribution to ensuring that serious international crimes do not go unpunished.*

In 2016 Switzerland received a request for mutual legal assistance from the Special Tribunal for Lebanon. This court was established by the UN in order to investigate the assassination of the former Lebanese president, Rafic Hariri. Switzerland, however, had to decline the request for disclosure of telephone metadata, as there was no legal basis for any cooperation, since the IMAC only allowed cooperation between states. Around the same time, the international, impartial and independent mechanism to support the investigation of crimes in Syria (the 'Syria Mechanism') came on the scene. The Syria Mechanism was established by a resolution of the UN General Assembly and is based in Geneva. Switzerland provided political support for setting up both the Syria Mechanism and the Special Tribunal for Lebanon. In the context of these two institutions, an evaluation was made of whether the



The revised Article 1 IMAC extends the scope of this Act to international penal bodies. The photograph shows the Director of the Syria Mechanism, Catherine Marchi-Uhel.

Photograph: KEYSTONE/Martial Trezzini

legal framework at that time for cooperation with international penal bodies was adequate. The evaluation concluded that there were shortcomings and a need for action. A detailed report on this was included in the 2018 Annual Report.

The FOJ DILA therefore drew up a bill to resolve these deficiencies. After it had successfully negotiated the consultative committee stage, the draft of a revised Article 1 IMAC received Federal Council approval on 6 November 2019. The Federal Assembly passed the bill in December 2020. The amendment will come into force on 1 June 2021.

The amended Article 1 IMAC now allows cooperation with international courts or other inter- or supranational institutions with criminal authority functions ('international penal bodies'). These also include 'national-international' institutions ('hybrid tribunals') such as the tribunals for Sierra Leone or Cambodia.

The amendment of Article 1 IMAC is structured in three levels: at the first level, the IMAC now applies automatically to cooperation with all international penal bodies that try classic crimes under international criminal law (genocide, crimes against humanity, war crimes). There is no requirement for the institution to be established by the UN. The Kosovo Tribunal, set up under an agreement between the European Union and Kosovo, may be cited as an example.

In a new move, the second level allows cooperation with international penal bodies that pursue offences other than the classic crimes under international criminal law – such as murder. Cooperation is possible, provided the institution is based on a UN resolution that is binding on Switzerland or which Switzerland supports. The Special Tribunal for Lebanon would fall into this category, for example.

In order to close this loophole completely and allow the Mutual Assistance Act to be applied as flexibly as possible to mutual legal assistance given to other institutions, the third level provides that the Federal Council can decide to apply the IMAC to cooperation with other international penal bodies. The institution concerned must have a legal basis that clearly specifies its competences under substantive and procedural criminal law, the procedure before the court or institution must guarantee compliance with constitutional principles, and cooperation must help to safeguard Switzerland's interests. This makes it possible to cooperate with penal bodies that are set up outside the UN framework and in whose case it may not (yet) be entirely clear whether they (exclusively) prosecute crimes under international criminal law. An example would be the 'Martyr-Committee', which investigated the trafficking of human organs and beings in Kosovo.

The new provisions bring maximum flexibility: in future, Switzerland can provide mutual legal assistance to any international penal body, but it is not obliged to do anything under the new law – in keeping with the tried and trusted principle in Article 1 paragraph 4 IMAC.

With the amendment of Article 1 IMAC, Switzerland is making an important contribution to bringing the perpetrators of the most serious international crimes to justice.

## 5.2 The new Articles 80d<sup>bis</sup> and 80d<sup>ter</sup> IMAC – JITs and dynamic mutual legal assistance: The innovations that the IMAC revision brings

*The ‘terrorism package’, which the Federal Assembly approved in the autumn session of 2020, also contains a partial revision of the IMAC. A legal basis has been created for joint investigation teams (JITs). In addition, in certain situations it will now be possible to provide information and evidence to foreign authorities before a final decision in the mutual legal assistance proceedings has been issued (‘dynamic mutual legal assistance’). This last aspect in particular remained controversial until the very end. It was only in the second round to resolve differences between the two chambers that a compromise was found. The new provisions will come into force on 1 July 2021.*

### Dynamic – but limited

Certain mutual legal assistance measures only make sense if their use can remain secret for a certain time, i.e. if disclosing information about the mutual legal assistance measure used in Switzerland to the persons concerned can be coordinated with the needs of the foreign criminal proceedings. For example, if a drug trafficking ring is operating in Southern Germany and using Swiss telephone SIM cards to communicate, it is more than likely that the German prosecution authorities will ask Switzerland to intercept calls to and from these telephone numbers. Usually, while these calls are being intercepted, an undercover investigation against the drug trafficking ring will be going on at the same time in Germany. If the holders of the telephone numbers in Switzerland – who in most cases are likely to be identical or closely connected to the targets of the covert German investigation – were now to be informed that their phone calls were being intercepted in Switzerland while a covert investigation is still underway in Germany, this would compromise the success of the German criminal proceedings. Yet this is exactly what the legal situation is in Switzerland. In a judgment (BGE 143 IV 186), the Federal Supreme Court held: “Real-time telephone surveillance, or at least the advance transmission of content data, can be very useful in investigations that must remain secret for a time. However, in the absence of any basis in domestic or international law, this type of procedure cannot be permitted. It can only be introduced if the law is amended.”

The FOJ DILA tried to comply with this ‘legislative mandate’ from Mon Repos by proposing a statutory basis in the IMAC. It seemed sensible to include the proposal in the ‘terrorism package’, as these mutual legal assistance measures play an essential role in fighting terrorism. Nevertheless, the new provision should be drafted so that it is not limited to the field of terrorism. Other

serious offences, such as drug trafficking, trafficking in human beings or large-scale money laundering should also be covered.

In the course of the debates in the Federal Assembly, however, it became apparent that this broad scope of application – particularly in the context of the terrorism bill – was too vague for parliament. The new Art. 80d<sup>bis</sup> IMAC therefore allows dynamic mutual legal assistance only, but nonetheless, if foreign investigations in terrorism or organised crime cases would be unreasonably hampered if this measure was not taken or in order to avert a serious and imminent danger, in particular the commission of a terrorist offence.

### Joint investigation teams now possible outside the Council of Europe instruments

When difficult, time-consuming and costly investigations with connections with other countries have to be carried out or if several countries are carrying out investigations which, based on the underlying circumstances, require a coordinated course of action between those countries, a joint investigation team (JIT) can be established. The JIT is set up for a specific purpose and a limited period. Its creation is a mutual legal assistance measure and must therefore be based on a request for mutual legal assistance. Once a JIT has been set up, information and evidence can be exchanged within the bi- or multinational group with less formalities.

Under Article 20 of the Second Additional Protocol to the European Mutual Assistance Convention (AP II; SR 0.351.12), the use of JITs was already possible. However, this was limited to the member states who had ratified this Additional Protocol. In large case complexes, as arise in particular in corruption cases, this framework proved to be too restrictive. For example, in the Petrobras case with Brazil, a JIT involving the Swiss and Brazilian prosecution authorities would have been very helpful. But there was no legal basis for setting one up.

This loophole has now been closed by Article 80d<sup>ter</sup> ff. IMAC. From now on, the IMAC contains an ‘erga omnes’ legal basis for the establishment of JITs, although the IMAC’s general requirements for providing mutual legal assistance must of course also be fulfilled. With the exception of a new provision in connection with the early transmission of information and evidence, the content of the provision is identical to Article 20 of AP II. The new provisions have been divided into several articles for legal drafting reasons. In particular, it should be noted that the rule known as the ‘Swiss Clause’ continues to apply; this states that information obtained within a JIT may only be used in evidence before a court after the Swiss mutual legal assistance proceedings have been formally concluded.

## 6 An overview of the electronic tools on the DILA website

### **For all areas of international mutual legal assistance in criminal matters: FOJ website ([www.bj.admin.ch](http://www.bj.admin.ch)>Security>International Mutual Legal Assistance>International Mutual Legal Assistance in Criminal Matters)**

- General information: contact address, activity reports, statistics.
- Legal basis.
- Overview of the individual processes involved in international legal assistance in criminal matters.
- Information on the treaty network.
- Links to the Elorge Database of Swiss localities and courts, to the European Judicial Network (EJN) and to Eurojust.

### **In addition, under [www.rhf.admin.ch](http://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 mutual legal assistance: The Mutual Legal Assistance Guide (in German, French and Italian, at [www.rhf.admin.ch](http://www.rhf.admin.ch)>Rechtshilfeführer)**

- Tools for the Swiss authorities for submitting requests to other states for obtaining evidence and service of documents.
- Country pages: an overview of the key requirements for requests to individual states for assistance with criminal, civil and administrative 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](http://www.elorge.admin.ch))**

- This website is aimed primarily at foreign authorities which, by entering a postcode or locality, are able to find 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 relating to international mutual legal assistance in criminal matters

## 7.1 Extradition and transfer of sentenced persons

- Decision of the Federal Criminal Court RR.2019.299 and RR.2019.338 of 12 February 2020 (extradition to Kosovo); detention conditions, guarantees; protection against private acts of revenge.
- Judgment of the Federal Supreme Court 1C\_228/2020 and 1C\_261/2020 of 12 June 2020 (extradition to Germany). Art. 260<sup>ter</sup> SCC (Definition of criminal organisation). The HPG (People's Defence Forces; armed wing of the PKK) must prima facie be classified as a criminal organisation.
- Decision of the Federal Criminal Court RR.2020.104 of 19 June 2020 (extradition to Kosovo). Scope of the right to respect for private and family life (Art. 8 ECHR) in the assessment of an extradition request. The Federal Supreme Court in Judgment 1C\_388/2020 of 13 July 2020 dismissed the appeal.
- Decision of the Federal Criminal Court RR.2020.127 of 20 July 2020 (extradition to Argentina). In addition to the guarantees obtained by the FOJ on detention conditions and the monitoring guarantee, Argentina must also provide a guarantee on unsupervised prison visits by a legal representative as well as a guarantee in relation to visits by the defendant's family members.
- Judgment of the Federal Supreme Court 1C\_379/2020 of 27 July 2020 (extradition to Portugal). Entry into force of the EU Convention on Extradition on 5 November 2019; importance for Switzerland in relation to the statute of limitations (Art. 8).
- Decision of the Federal Criminal Court RR.2020.51 and RR.2020.30 of 19 August 2020 (extradition to Russia). Problem of being unfit to remain in detention; importance of Russia's reservation to Art. 1 of the European Convention on Extradition (EAUE). The Federal Criminal Court overturned the FOJ's decision on extradition. The Federal Supreme Court dismissed the FOJ's appeal (Judgment 1C\_456/2020 of 26 November 2020).
- Judgment of the Federal Supreme Court 1C\_444/2020 of 23 December 2020 (extradition to Russia). The court overturned the decision of the Federal Criminal Court of 11 August 2020, which had rejected the appeal against the FOJ's decision and referred the case back for a new decision. It called for a reassessment of the question of Russia's compliance with guarantees given.

## 7.2 Accessory mutual legal assistance

- Decision of the Federal Criminal Court RR.2019.132 of 29 January 2020: execution of foreign decisions on forfeiture (Art. 94 ff. IMAC); compensation claims; Art. 70 para. 2 SCC: acquisition of assets by a third party acting in good faith; appeal allowed.
- Decision of the Federal Criminal Court, Appeals Chamber, CR.2019.10 of 24 February 2020; application for the review of a decision by the Appeals Chamber of the Federal Criminal Court.
- Decision of the Federal Criminal Court RR.2019.232 of 4 March 2020; distinction between international mutual legal assistance and police-type cooperation (confirmed by Judgment of the Federal Supreme Court 1C\_166/2020 of 24 March 2020).
- Decision of the Federal Criminal Court RR.2020.6-9 of 26 March 2020; requirement of dual criminality: breach of the Political Parties Act (party funding), assisting offenders; case with predominantly political character (confirmed by Federal Supreme Court Judgment 1C\_182/2020 of 14 April 2020).
- Decision of the Federal Criminal Court RR.2019.246 of 8 April 2020; mutual legal assistance to Turkey; defects in the foreign criminal proceedings (Art. 2 IMAC); proportionality; appeal partly allowed.
- Decision of the Federal Criminal Court RR.2019.357 of 28 April 2020; simplified procedure under Art. 80c IMAC; irrevocability of consent; principle of good faith.
- Decision of the Federal Criminal Court RR.2019.261-263 of 6 May 2020; mutual legal assistance to Brazil; precedence of the bilateral agreement on mutual legal assistance: no grounds for exclusion due to infringement of regulations on currency, trade or economic policy measures.
- Judgment of the Federal Supreme Court 1C\_259/2020 of 19 June 2020; Switzerland's essential interests (Art. 1a IMAC); jurisdiction of the FDJP and Federal Council; definition of Switzerland's essential interests.
- Judgment of the Federal Supreme Court 1C\_354/2020 of 21 July 2020; dual criminality: summary of the case law; in money laundering cases, it is sufficient that the request is based on objective suspicion arising from the circumstances, in particular with regard to establishing the predicate offence.
- Judgment of the Federal Supreme Court 1C\_423/2020 of 5 August 2020; party status and right of appeal: only the person in possession/keeper (stockist) of seized electronic data storage devices is directly affected and thus entitled to file an appeal, not the depositor or owner under civil law who is only indirectly affected by the seizure; the decisive factor is the actual power of disposal and direct possession; this also applies if third parties have remote access to the data.

- Decision of the Federal Criminal Court RR.2020.126 of 10 September 2020; handover of items or assets (Art. 74a IMAC); requirements for the handover of items or assets before a legally binding and executable decision on forfeiture is issued; summary of the case law.
- Decision of the Federal Criminal Court RR.2019.165 of 16 October 2020; handover of assets (Art. 74a IMAC); foreign decision on forfeiture; justification for the decision on forfeiture and connection with the assets seized in Switzerland; rejection of claim by a person not involved in the offence to have acquired rights in good faith (Art. 74a para. 4 lit. c IMAC).
- Decision of the Federal Criminal Court RR.2020.110 of 18 November 2020; search of houses and premises and seizure in duty-free warehouse; right of appeal: the precise nature of the contractual relationship with the duty-free warehouse is decisive.

## 8 Important statistical information on international legal assistance 2016–2020

Geschäftsgruppe	Geschäftsart	2016	2017	2018	2019	2020
Extradition requests to foreign countries		284	259	252	272	<b>204</b>
Extradition requests to Switzerland		384	360	350	321	<b>285</b>
Provisional arrest requests to foreign countries		310	281	249	268	<b>207</b>
Provisional arrest requests to Switzerland		32 789	31 697	34 151	36 511	<b>31 535</b>
Transfer of proceedings requests to foreign countries		166	153	225	221	<b>227</b>
Transfer of proceedings requests to Switzerland		118	133	135	142	<b>132</b>
Sentence execution requests to foreign countries	Custodial sentences	10	15	5	3	<b>7</b>
Sentence execution requests to Switzerland	Custodial sentences	2	6	5	4	<b>8</b>
	Fines	5		1		<b>4</b>
Prisoner transfer to foreign countries	At the request of the sentenced person	47	65	57	54	<b>36</b>
	Under the Additional Protocol	4	2	2	1	<b>1</b>
Prisoner transfer to Switzerland	At the request of the sentenced person	19	14	15	24	<b>15</b>
Provisional arrest requests for international tribunals						
Legal assistance requests to Switzerland	Obtaining evidence in criminal matters	1268	1085	1163	1270	<b>1279</b>
	Obtaining evidence in criminal matters: supervision	1170	1333	1146	1260	<b>1205</b>
	Obtaining evidence in criminal matters: own case	45	44	80	71	<b>67</b>
	Asset recovery	14	14	23	19	<b>30</b>
	Asset recovery: own case	4	4	3	2	<b>6</b>
	Obtaining evidence in civil matters	58	34	66	57	<b>48</b>

Geschäftsgruppe	Geschäftsart	2016	2017	2018	2019	2020
Legal assistance for international courts and tribunals	International Criminal Court	2	4	10		<b>7</b>
Legal assistance requests to foreign countries	Obtaining evidence in criminal matters	984	946	850	935	<b>845</b>
	Asset recovery	6	5	4	20	<b>12</b>
	Obtaining evidence in civil matters	35	28	13	23	<b>18</b>
Secondary legal assistance	For use in criminal proceedings	9	13	15	17	<b>13</b>
	For forwarding to a third country	7	2	7	9	<b>4</b>
Spontaneous transmission of information and evidence	To foreign countries (Art. 67a IMAC)	114	121	164	127	<b>168</b>
	To Switzerland	2	2	1	3	<b>3</b>
Document service requests to Switzerland	Under criminal law	264	238	265	213	<b>161</b>
	Under civil law	777	584	534	536	<b>324</b>
	Under administrative law	55	102	249	190	<b>188</b>
	Under administrative law (Convention No 94)*				22	<b>34</b>
Document service requests to foreign countries	Under criminal law	552	562	548	559	<b>616</b>
	Under civil law	857	917	798	821	<b>689</b>
	Under administrative law	602	529	552	543	<b>427</b>
	Under administrative law (Convention No 94)*				15	<b>33</b>
Sharing of forfeited assets	International sharing (Swiss forfeiture decision)	9	5	14	11	<b>12</b>
	International sharing (foreign forfeiture decision)	6	3	6	17	<b>9</b>
	National sharing	34	36	41	70	<b>55</b>
Swiss liaison office at Eurojust	Requests Eurojust-CH	144	131	132	134	<b>132</b>
	Requests CH-Eurojust	90	70	91	150	<b>145</b>
Instruction to the FDJP	Authorisations under Art. 271 SCC		1	1	1	

\* Since 1.10.2019 (entry into force of Convention No 94 for Switzerland)

**Judicial decisions**

<b>Court</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>
Federal Criminal Court	220	277	235	230	294
Federal Supreme Court	61	93	82	66	83
<b>Total</b>	<b>281</b>	<b>370</b>	<b>317</b>	<b>296</b>	<b>377</b>

