

# Annual Activity Report 2021

## Mutual Legal Assistance



Schweizerische Eidgenossenschaft  
Confédération suisse  
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Confederaziun svizra

Swiss Confederation

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# Editorial



*The internet has become an indispensable part of our daily lives. Thanks to digitalisation and technological change, its uses are now almost limitless. People with criminal intentions also take advantage of this: crime is increasingly being committed in cyberspace, with the aid of state-of-the-art technology.*

*Ransomware attacks are just one example of this, albeit one prominently reported in the media. Not only private individuals, but also businesses and public authorities can be affected. The perpetrators sometimes demand high ransoms from the victims to unlock blocked computer systems. Imagine the consequences that blocking the computer system can have for a hospital, for example! Executing mutual legal assistance requests in relation to ransomware attacks regularly poses a serious challenge. Considerable amounts of data often have to be sifted through and checked for relevance under great time pressure. When these attacks affect several countries, the individual law enforcement agencies must coordinate their efforts as best they can. The EU agency Eurojust in The Hague, which is celebrating its 20th anniversary this year and with which Switzerland has close links through its own local office affiliated to the DILA, offers valuable support in this regard.*

*The DILA is also increasingly confronted with cases whose only link to our country is that a secure email service has been used that is based here. The offences to which such requests for*

*cooperation relate cover a wide range of topics: the cases described in the latest annual report range from blackmail and threats of various kinds to abductions.*

*In general, accessing electronic data or collecting electronic evidence is a major challenge for national law enforcement agencies. This is particularly the case when it comes to data stored by communication service providers abroad. The issue of easier and quicker cooperation in this area is being discussed in various bodies in the Council of Europe, the European Union and the United Nations. New instruments are emerging to try to find adequate answers to the problems that arise. In connection with the US CLOUD Act, the Federal Office of Justice drew up a report in 2021 which recalls the principles arising from Swiss law. The activity report provides a summary of this.*

*There will be no shortage of challenges in the coming years, not only in relation to the pitfalls of the internet and the problem of electronic evidence, but also in relation to other completely different issues. But for now, I wish you an interesting read of the DILA Annual Report for 2021!*

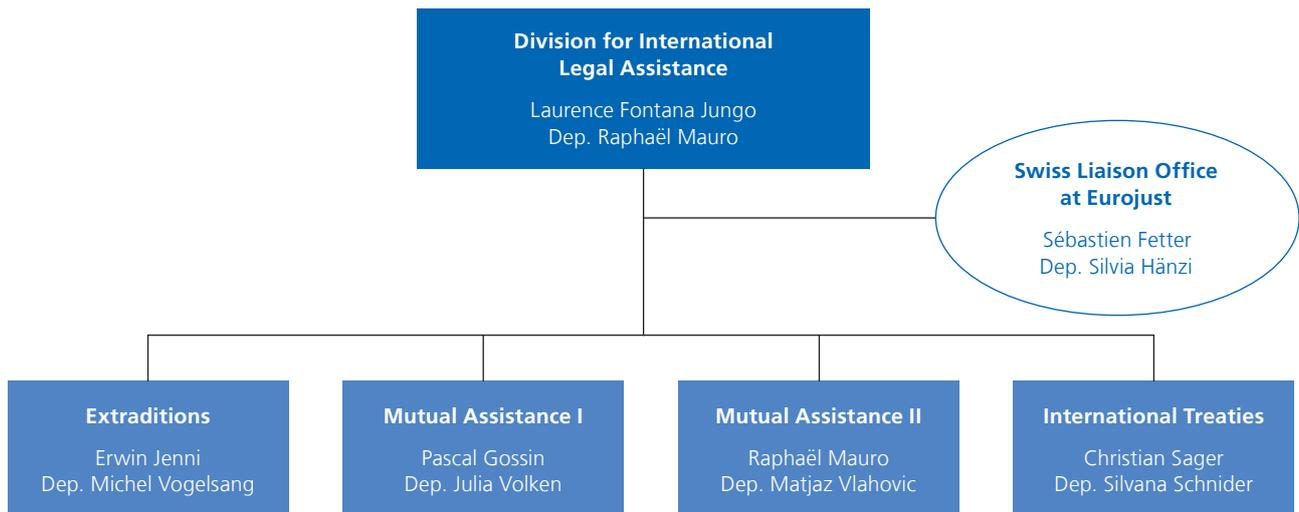
Laurence Fontana Jungo  
Vice-Director FOJ, Head of the Division for International Legal Assistance

# 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
- 50 permanent staff, made up of 33 women and 17 men from all parts of the country, making 42.1 full-time equivalents (status as of 1.5.2022)

### Organisational chart



### Overview of principal tasks

- Ensuring the rapid provision of international mutual legal assistance in criminal matters.
- Submitting and receiving Swiss and foreign requests for cooperation, unless the authorities concerned are permitted to contact each other directly.
- Making certain decisions with regard to extraditions, mutual legal assistance requests, prosecution and sentence enforcement on behalf of other countries, and transfers of sentenced persons.
- Supervising the execution of requests for mutual legal assistance.
- Developing legislation on international 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. Right of appeal against any ruling by the Federal Criminal Court. Arranges for extradition to be carried out. At the request of Swiss prosecutors, enforcement authorities or courts, submits search requests and 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.
- Decides on the transfer of 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).

- 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 evidence 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 obtain evidence and serve documents in civil and administrative cases.

### 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.

### **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 and provides information, coordinates and establishes direct contact between Swiss prosecuting authorities and those of the EU or third countries represented at Eurojust.
- Organises and participates in coordination meetings 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 and to courts about the services and support available from Eurojust.
- 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).

## 2 Topics

### 2.1 Accessory mutual legal assistance to the USA

*When Switzerland provides another state with accessory mutual legal assistance, it is frequently the USA. US requests for mutual legal assistance often involve complex criminal proceedings, such as those related to corruption. This makes cooperation intensive and time-consuming, with some cases going on for many years. Requests now regularly also relate to offences committed using computers and by exploiting digital information and communication techniques, or committed against computer systems. The mere presence of email service providers on Swiss soil is the reason for a wide range of requests for mutual legal assistance. The Central Office for the USA, which is affiliated to the DILA, has special powers in connection with the requests for mutual legal assistance from the USA.*

The DILA is responsible for conducting mutual legal assistance proceedings with the USA. The basis for this is the bilateral mutual legal assistance treaty from 1973 (SR 0.351.933.6) and the federal act related to the treaty (SR 351.93). The DILA decides on the strategic aspects of conducting proceedings and issues all the rulings required in proceedings. These relate, among other things, to the seizure of assets, for example when bank accounts are frozen. The execution of mutual legal assistance measures is delegated to the prosecution service responsible, which to a certain extent acts as an extension of the DILA. In addition to other mutual legal assistance measures, it conducts interviews, searches houses and business premises, and seizes documents that are discovered in the course of these searches. Thereafter it is the responsibility of the DILA to ensure that the persons concerned are granted a fair hearing and to decide what information and evidence should be handed over to the US authorities. Unless the persons concerned themselves agree to information being handed over, the DILA also decides on this.

The US authorities are demanding partners that do not lack the financial resources required to conduct their investigations. With the exception of requests in relation to computer crime (see p. 11 f.), the mutual legal assistance measures requested still relate in most cases to bank records. Generally, the authorities concerned first seek to obtain bank documents and in part also the seizure of assets of illegal origin that are held in the accounts concerned, ultimately requesting the handover of the seized assets. The latter process requires a supplementary request for mutual legal assistance. Normally this request for the handover of assets seized in Switzerland is accompanied by a legally binding and enforceable forfeiture order from the USA. In response, the DILA conducts further mutual legal assistance proceedings with a view to authorising the handover, and then arranges for the assets to be transferred to the US authorities. The funds are commonly used to compensate the victims of the offences.

#### Cooperation on corruption cases

Mutual legal assistance in criminal matters plays a decisive role in fighting international corruption, particularly where unlaw-



The US Department of Justice, an important mutual legal assistance partner for Switzerland.

Image: Getty Images/wingedwolf

fully acquired assets are moved through countless business accounts around the world or laundered through the purchase of moveable goods or real estate. Various major corruption cases, some with far-reaching international ramifications and serious consequences, sometimes political, have given the DILA a lot of work to do in recent years. A selection of these cases are described below:

#### *Odebrecht*

The Brazilian construction group Odebrecht is responsible for the biggest corruption scandal in the history of Latin America; this complex of cases was already mentioned briefly in the 2018 Annual Report in connection with *Lava Jato*. Millions in bribes were paid, in some cases via Swiss bank accounts. Through mutual legal assistance, the transactions are being documented in a form that is admissible in court and funds are being seized. The USA has also requested mutual legal assistance from Switzerland in connection with the criminal proceedings that it is conducting.

The Odebrecht Group is one of the world's largest engineering and construction concerns with over 50,000 employees in 25 countries. At the heart of the group is Constructora Norberto Odebrecht, the largest engineering and construction company in Latin America. It was founded in 1944 by Norberto Odebrecht, the great-grandson of a German engineer and cartographer, who emigrated to Brazil in 1856.

150 years after the young immigrant set foot on Brazilian soil, the name Odebrecht has become the byword for a corruption scandal on a scale that beggars belief. In 2001, the Odebrecht Group set an enormous corruption machine in motion. It is alleged to have paid over USD 700 million to willing politicians around the globe in order to secure contracts for public infrastructure projects. In Brazil alone, it appears that over 400 politicians and 26 political parties at all levels of the state were

bribed. Given the scale of the operation, it is hardly surprising that the Brazilian chief prosecutor said it made Watergate look like child's play.

The US Department of Justice did not spare its superlatives either, calling the affair the 'largest foreign bribery case in history'. The American authorities had stepped in because the Odebrecht Group was alleged to have moved bribes through US accounts and to have held conspiratorial meetings in the USA. They forced the Group to reach a plea agreement, in which it arranged to pay a fine of USD 3.3 billion – a sum equivalent to the profits it had illegally raked in, according to US estimates.

In Brazil, CEO Marcelo Odebrecht spilled the beans in return for a reduced sentence. The facts uncovered shook Brazilian society to its foundations and caused aftershocks in numerous neighbouring countries: dozens of states launched investigations, in the course of which former presidents were also convicted of corruption.

The bribery process always followed a similar pattern. The Odebrecht Group channelled funds to politicians – frequently disguised as election campaign donations – and naturally expected a return on its 'investment': contracts for infrastructure projects (which it also overcharged for), the elimination of administrative obstacles, the exertion of influence on legislative projects, etc. By 2006, bribery had become such a part of its corporate culture that the Odebrecht Group dedicated a specific division to the task – officially known as the 'Department for Structured Operations'. This Department used a secret communication system in which bribe payments were meticulously recorded, complete with the amount and code names for the recipients. During the criminal inquiry, the Brazilian public were kept in suspense for months as it gradually came to light who the politicians were behind the colourful code names, which included 'Barbie', 'Dracula' and 'Viagra'. As a further sign of the era-defining nature of the scandal, the Odebrecht saga became a storyline in the Netflix political drama 'The Mechanism'.

In order to move the bribe payments from country to country, the Odebrecht Group opened bank accounts in the name of offshore companies in various countries around the globe, including Switzerland. This is the reason why the Swiss mutual legal assistance authorities are currently playing a crucial role in the criminal investigation into this global corruption case. The aim is to secure documentation on bank transactions that can be used in court, obtain server data and freeze criminal funds. The DILA is the authority directing proceedings for requests from the USA relating to cases in several Latin American countries; it decides whether to grant mutual legal assistance and if necessary argues for its execution in court. However, evidence is always gathered in close cooperation with a Swiss prosecution authority such as the Office of the Attorney General of Switzerland. Numerous requests have already been successfully executed in this way – others are being processed.

*Petróleos de Venezuela S. A. (PDVSA)*

Various US prosecution authorities have since 2012 been conducting complex investigations into an exceptionally large criminal group in the USA and Venezuela in connection with



Corruption offences involving the Brazilian construction group Odebrecht were among the cases dramatised in the Brazilian Netflix series 'The Mechanism'.

Image: KEYSTONE/Courtesy Everett Collection/Netflix

offences under the Foreign Corrupt Practices Act and aggravated money laundering. Numerous members of the political and social elite in Venezuela are alleged to have helped themselves to sums amounting to several billion US dollars from the foreign exchange reserves held by the state-owned petroleum company PDVSA. So far over 15 separate fraud and bribery schemes have been uncovered, and the number of perpetrators and the extent to which they enriched themselves has left even the most hardened prosecutors speechless.

In one bribery scenario, the perpetrators exploited the fact that the Venezuelan government can exchange the national currency, the bolivar, into US dollars at a fixed rate that is several times better than the black market exchange rate. Access to this fixed rate of exchange is controlled by the government and is only granted to certain persons and companies. The perpetrators bribed Venezuelan government officials in order firstly to gain access to the US dollar reserves in the Venezuelan State Treasury that PDVSA had amassed from oil sales and secondly to be able to benefit from the government's guaranteed rate of exchange. After selling the US currency on the financial market, they paid back the bolivar to the government at the guaranteed exchange rate, thus profiting from the difference with the black market rate, and subsequently shared these profits with the Venezuelan officials.

In another bribery scenario, the offenders allegedly bribed various Venezuelan government officials and PDVSA executives in order to secure themselves contracts for power generation projects with the PDVSA and its subsidiaries in terms of a tendering procedure. The perpetrators moved the unlawfully obtained assets through an extensive network of companies that were also under their control.

Since 2014, the DILA has provided the USA with extensive mutual legal assistance in connection with these cases. In response to over 30 requests for mutual legal assistance, more than 390 bank accounts held by the criminal group in around 40 Swiss banks have been identified and bank records sent to the USA. Numerous persons have been indicted and in some cases have received lengthy custodial sentences in the USA so far. In addition, the DILA has seized assets of more than USD 102 million, of which 85.4 million has so far been forfeited in terms of legally binding decisions and handed over to the USA.

#### *1Malaysia Development Berhad (1MDB)*

International cooperation makes it possible to trace, seize and ultimately secure the forfeiture of unlawfully acquired assets. This is what happened in the 1MDB embezzlement case. Senior managers of this fund, which administers Malaysia's national assets, assisted by Malaysian and foreign accomplices, had diverted billions of US dollars in order to finance their lives of luxury. They used complex financial vehicles, also in Switzerland, in order to launder the misappropriated funds through bank accounts or by purchasing assets such as luxury yachts and famous paintings with estimated values of several million US dollars.

The investigations conducted by the Office of the Attorney General of Switzerland and the prosecution authorities in other countries, particularly the USA and Malaysia, have led to the DILA issuing and receiving numerous requests for mutual legal assistance. Thanks to the excellent cooperation between the various judicial authorities in these mutual legal assistance proceedings, it has been possible to track highly complex movements of funds following the embezzlements in the 1MDB case. Cooperation in such cases is indispensable and in this case has allowed items of property and assets, in some cases worth several million US dollars, to be traced and seized in Switzerland, thus preventing the funds from disappearing forever. Cooperation from other countries, in particular Singapore and Luxembourg, has also helped to uncover the massive levels of corruption in the 1MDB case.

Since 2016, the USA has submitted numerous mutual legal assistance requests to Switzerland in relation to suspicions of money laundering and fraud in connection with the embezzlement of these funds. In response, the DILA has ordered bank records to be handed over and evidence obtained in Swiss proceedings to be passed on to the USA. It has also ordered the seizure of works of art and unlawfully acquired assets held in Swiss bank accounts.

In October 2019, a settlement was reached in the USA with some of the suspects who are believed to have misappropriated billions of US dollars from the 1MDB fund and then laundered the money in the USA, Switzerland, Singapore and Luxem-

bourg. The assets forfeited under the settlement are estimated at over USD 700 million. This means that since the beginning of their investigations into the 1MDB case, the USA has been able to secure the forfeiture of an estimated total of over USD 1 billion in assets.

Thanks to international cooperation, the investigations into the 1MDB scandal and the proceedings relating to the forfeiture of the assets misappropriated from this state-owned fund are continuing.

#### **Increase in requests for mutual legal assistance in connection with internet service providers and email services**

Due to the presence of telecommunications providers on Swiss soil, the number of US requests for mutual legal assistance has increased in recent years. Nowadays requests frequently relate to cybercrime, and must be processed alongside the more conventional requests for mutual legal assistance related to allegations of bribery, fraud and money laundering, which remain complicated and time-consuming to deal with. In particular, secure messaging services are used to commit countless offences, which the DILA is increasingly called upon to deal with as part of its cooperation with the USA. These offences range from extortion, often by hacking attacks using different types of ransomware, via the widest variety of threats, to cases of abduction.



Ransomware attacks are being carried out with increasing frequency. They can cause enormous damage and pose serious challenges to prosecution and mutual legal assistance authorities.

Image: Getty Images

The DILA is ever more frequently faced with US requests for mutual legal assistance in connection with serious cyber-attacks that make use of internet service providers based in Switzerland.

### **When internet service providers are exploited to commit ransomware attacks**

In ransomware attacks, the perpetrators use malware to attack servers and computer files belonging to companies and to infect computer systems in order to extort money from the victims. The blackmailers encrypt the data of the company or authority concerned to an extent that their IT systems become impossible to operate. In return for paying a ransom, the victims receive a key to decrypt the data. These attacks cause high financial losses, as much as \$100 million in any one case. The attacks target not only large and medium-sized private companies, but also schools, hospitals and government offices.

After activating the malware on a computer, the perpetrators attempt to delete all the back-up files they find on the computer. They then use an algorithm to encrypt all the data on the hard drive of the local computer, along with data on storage drives linked to that computer and on all drives that the perpetrators can access via a network connection. These highly professional criminals use a different encryption method for each file, leaving a ransom demand on the computer before they go. In certain cases, they send the victims an email address at which the perpetrators can be contacted in order to pay the ransom – often into a ready-made bitcoin account – and receive a ‘decryption program’ in return, with which the victims are supposed to be able to regenerate the encrypted data. In other cases, the perpetrators threaten that, in the event of non-payment of the ransom, they will for example publish the stolen company data on a website that they operate and which is generally accessible to the public.

These requests for mutual legal assistance pose a major challenge for the DILA for a variety of reasons. Data transfers via Swiss internet service providers, commonly also via TOR, a network that enables anonymous communication, almost always prove to be extremely extensive and can in certain cases involve several terabytes of data. Sifting through such a volume of data and analysing it for its potential relevance is an enormous feat for the DILA and the executive authorities, often achieved under time pressure, as the attacks often persist over a protracted period and the data is urgently needed for the ongoing criminal investigations abroad.

### *Secure messaging – starting point for some unusual requests for mutual legal assistance: two cases of abduction*

One of the incidents that the DILA had to deal with in the report year involved an urgent request for mutual legal assistance from the US Department of Justice relating to the abduction of a teenage girl. She was alleged to have been abducted by her father in the USA and kept at a secret location there for more than a year, while being abused. The US investigators found that the father communicated by using several email accounts at a Swiss provider. The DILA contacted the prosecution service in the canton concerned without delay. It obtained information on the various email accounts from the provider immediately and, with authorisation from the cantonal compulsory measures court, ordered their retrospective surveillance. The request for mutual legal assistance was executed quickly, and the information provided from Switzerland helped indirectly to locate the victim.

Another case that the DILA also handled in 2021 makes it clear how, with help from the email provider concerned, mutual legal assistance can be provided rapidly in cases of urgency. This can prevent serious consequences for the victims.

In this case, the US Department of Justice submitted an urgent request to the DILA following the abduction of a young girl by a sex offender. In the course of their enquiries at the victim’s home, the US authorities found that the perpetrator was using several addresses from an email provider based in Switzerland in order to communicate with the minor. The DILA immediately delegated the execution of the request for mutual legal assistance to the prosecution service in the canton where the email provider is based, which obtained the requested information. The information was subsequently handed over to the US Department of Justice. This enabled the abducted girl to be found and released and the perpetrator to be brought to justice.

An ever more important element of international cooperation, which pertains in particular, but certainly not exclusively to cooperation with the USA, is the gathering of electronic evidence as part of criminal proceedings. The Federal Office of Justice prepared a report on this subject in the year under review.

## **2.2 Gathering electronic evidence: Federal Office of Justice report on the US CLOUD Act**

*The US CLOUD Act, the EU e-evidence proposals, the Second Additional Protocol to the Council of Europe Convention on Cybercrime – and now even a proposal for a global UN convention: there are numerous international and national initiatives to tackle the issue of electronic evidence at present. The question arises as to the need for legislative action, as the ‘non-physicality’ and volatility of such data presents a major challenge for conventional mutual legal assistance, which is strongly based on principles such as territoriality and sovereignty. However, in view of the data protection requirements on the one hand and the need to protect basic procedural rights and essential Swiss legal principles on the other, a considered approach is required.*

Numerous protagonists from the prosecution authorities, professional associations and the private sector have approached the FOJ calling for talks with the USA on an agreement under the US CLOUD Act. In view of this, the FOJ decided to set out the legal position with regard to this issue – and indeed with regard to ‘e-evidence’ itself – in a report. This was published in September 2021 in German and French on the FOJ website ([www.bj.admin.ch](http://www.bj.admin.ch) > Publikationen & Service > Berichte und Gutachten) and is intended to form the basis for a discussion with all those interested. A summary of the report is provided below.



Image: Shutterstock/gotphotos

### The US CLOUD Act

The US CLOUD Act (*Clarifying Lawful Overseas Use of Data-Act*) is a US federal act that allows the American prosecution authorities under certain conditions to access data stored abroad in the course of US criminal proceedings. This practice is contrary to the fundamental principle of territoriality that applies in criminal law. The USA is aware of this. As a result, the USA offers to enter into so-called executive agreements with other states. States then tolerate US prosecution authorities when they access data that are stored on their territories – in return, prosecution authorities in these partner states are given access to data that are stored in the USA.

#### *Data protection and fundamental rights*

Whether Switzerland could enter into one of these executive agreements with the USA is questionable from a legal point of view. Constitutional guarantees of legal protection (fundamental procedural rights) as well as Swiss and European data protection law stand in the way of the procedures envisaged in the CLOUD Act. Other important partners that Switzerland has, such as the EU, are also in the process of developing systems for more efficient cooperation in relation to e-evidence. They are adopting a different approach that is *prima facie* more easily compatible with the Swiss legal system.

#### *The EU e-evidence proposals*

The EU's e-evidence proposals are of considerable interest to Switzerland, primarily because of the data protection aspects (keyword: adequacy decision), but also in view of the tried and tested cooperation with the EU-member states, which is of crucial importance to international cooperation on criminal law enforcement for Switzerland. In its own negotiations with the USA, the

EU will seek (at least) a conflict-of-law solution between the fundamentally incompatible approaches of the EU and the USA to electronic evidence. The EU seems to be seeking to conclude an agreement that is not based exclusively on the CLOUD Act, but which also includes data protection and fundamental rights standards.

#### *Quo vadis, Helvetia?*

For Switzerland, a similar solution could also be desirable. It would obviate any conflict with the EU data protection legislation, for example. If the decision is taken to legislate on e-evidence, it would therefore make sense to decide on Switzerland's options for cooperating more quickly and easily in collecting and handing over electronic evidence at a domestic level first, under the normal legislative procedure involving parliament and the other relevant actors. The changes to the law that would probably be necessary would have to be carefully examined and should not be considered in isolation in relation to a particular partner or on the basis of particular interests. This paradigm change – the direct collection of data as formal evidence outside the scope of mutual legal assistance – would also have an influence, one way or another, on other areas of international cooperation on criminal matters or on cooperation with other partners.

### 2.3 Immunity in judicial cooperation in criminal matters: jurisdictional immunity under customary international law

*In a specific case, questions may arise relating to the jurisdictional immunity of a person concerned by a request for mutual legal assistance or extradition. For example, if the case relates to a head of state or member of the government of a country. In such cases, special rules apply.*

Corruption, money laundering, participation in or support for a criminal organisation: frequently these offences are committed across state borders and can involve politically exposed persons (PEPs), often heads of state or government, or foreign ministers.

Related requests for judicial cooperation made to Switzerland normally involve PEPs who are no longer in office. However, occasionally a request for mutual legal assistance or extradition concerns a state representative who is still in office – the DILA was also involved in various cases of this type in the report year. Is it possible in these circumstances to comply with the request? Does the person concerned enjoy absolute immunity from jurisdiction in Switzerland? If so, are there any circumstances in which mutual legal assistance could nonetheless be provided or extradition authorised?

### State immunity and immunity of state representatives

Immunity is not granted with the aim of giving preferential treatment to certain individuals. Instead it is intended to protect a state, its interests and its ability to function, and in particular to ensure that the person concerned can carry out his or her official duties properly.

A distinction should be made between the following terms:

- **State immunity:** this protects a foreign state and its assets. *Immunity from jurisdiction* prevents prosecution by other states. In practice this means immunity from civil or administrative proceedings, as a state cannot be prosecuted under criminal law. State immunity is not absolute in its application, but is limited to sovereign acts rather than acts subject to private law. Likewise, *immunity from enforcement* protects a state from enforcement measures taken against the assets and property that it uses to run the country. The following remarks do not pertain to this concept of immunity.
- **Immunity of state representatives:** State representatives may enjoy immunity abroad as a result of their official functions, although a distinction should be made between personal and functional immunity:
  - o *Personal immunity* covers both official and private acts before and while a person is in office. It is absolute and is limited to the term of office i.e. it expires when the term of office expires.
  - o *Functional immunity* is limited to acts carried out in order to perform official duties, and continues to apply after the term of office is over.

### Jurisdictional immunity under customary international law in Switzerland

Immunity is derived from customary international law, as discussed in the following remarks, from international agreements (bilateral or multilateral, such as the Vienna Convention of 18 April 1961 on Diplomatic Relations or the Vienna Convention of 24 April 1963 on Consular Relations, which govern the status of members of diplomatic and consular representations, or the Convention of 8 December 1969 on Special Missions, which provides immunity for representatives of a state sending persons to a special mission and for its diplomatic staff), and/or from national law. The scope of the immunity largely depends on the function of the person concerned.

#### *Heads of state, heads of government and foreign ministers ('troika')*

Under customary international law, while in office, heads of state and of government and foreign ministers enjoy absolute jurisdictional immunity in Switzerland both for official and for private acts. On expiry of their term of office, they only enjoy immunity for acts carried out in order to perform their official duties. It is not sufficient for an act to have been carried out while in office – the act must also be clearly recognisable as part of the person's

official duties. Ultimately the court decides whether the person concerned can successfully invoke immunity or not.

#### *Other members of government*

Other members of government enjoy immunity for all acts carried out in order to perform their official duties, but not for private acts.

#### *Family members (spouses and children) of the troika or other members of government*

Family members enjoy only a certain level of immunity when they accompany public officials on official journeys.

### Waiving immunity under customary international law in Switzerland

According to the Federal Supreme Court, the immunity of state representatives is limited in the following two cases:

- The immunity of a head of state, head of government or foreign minister continues on expiry of their term of office only for acts performed in an official capacity whilst in office.
- If a state expressly waives the immunity of its representative, the representative may no longer invoke that immunity.

If a state prosecutes one of its representatives, this does not automatically cause jurisdictional immunity in a third country to lapse. If a request is made for mutual legal assistance against the representative of a foreign state, the Swiss authorities must consider in that specific case whether the person concerned enjoys immunity for the acts alleged or whether immunity has been waived in that particular case (see criteria for validity p. 15).

The scope of the immunity of state representatives for the most serious felonies under the *ius cogens* is currently the subject of international debate. The question is whether national courts can deny immunity in certain cases. The Federal Criminal Court has decided that it is not possible to invoke functional immunity in criminal proceedings for felonies under international law (BB.2011.140, E. 5.4.3). In addition, international courts – such as the International Criminal Court – may assess a person's criminal liability irrespective of any immunity that the person may enjoy under national or international law (see for example Art. 27 of the Rome Statute of the International Criminal Court, SR 0.312.1).

**Practical example: Is it possible to freeze the Swiss bank accounts of a head of state who is currently in office?**

The DILA is notified by the Federal Department of Foreign Affairs (FDFA) in 2021 that a diplomatic note has been received containing a request from a South American state to freeze accounts held in Switzerland by the serving president of that state.

In principle, all the requirements of the International Mutual Assistance Act (IMAC, SR 351.1) are met for the request to be delegated to the responsible authority for execution. However, the question arises of whether the serving president enjoys absolute jurisdictional immunity in Switzerland. The request for mutual legal assistance includes the personal consent of the president for the seizure of his Swiss accounts so that criminal proceedings can be conducted in his country. Does this mean that the head of state's immunity is lifted?

A person who enjoys immunity cannot simply waive it of their own volition, because immunity is granted for the benefit of the state that the person represents. Consequently, only that state can waive the immunity and allow a foreign state to take legal action against one of its representatives. The authority competent to waive the immunity of the head of state is determined by the state concerned according to its national law. Under Swiss law and legal precedent, the following requirements must be met in order for the waiving of immunity to be recognised:

- Confirmation of the formal waiving of immunity from jurisdiction under customary international law by a competent authority under the national law of the requesting state;
- Confirmation that the said authority is responsible under the national law of the requesting state for waiving immunity. If responsibility for waiving immunity under customary international law is not expressly regulated by any law, it must be ensured that the immunity was waived by a credible and legitimate authority (for example by parliament or a constitutional court).

The DILA sends an enquiry to this effect to the requesting authority. On receipt of suitable confirmation from the requesting authority, the foreign request for mutual legal assistance can be passed on to the competent Swiss authority for execution.

**Addendum of 30th August 2022:**

*The case described here never happened in reality, but is a fictitious case, which on the one hand is intended to illuminate the legal situation regarding immunity described on p. 14, and on the other hand serves to illustrate the working procedures of the FOJ in the examination of requests for mutual legal assistance.*

**2.4 10 years of institutionalised cooperation between Switzerland and Eurojust**

*22 July 2021 marked the tenth anniversary of the agreement institutionalising cooperation between Switzerland and the EU agency Eurojust coming into force. And Eurojust celebrates its 20th anniversary in 2022. This is an ideal opportunity to review how cooperation has developed and to look at the most important activities of Switzerland's Liaison Office at Eurojust (referred to below as 'the Swiss Office') in The Hague, the Netherlands.*



Image: Eurojust

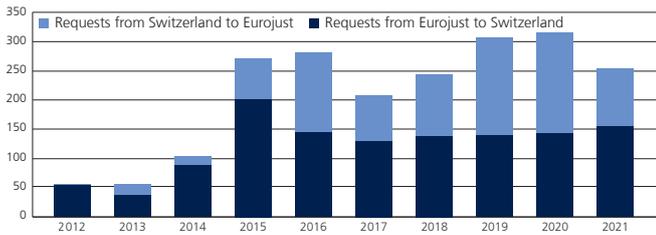
**Increased support for the prosecution authorities in Switzerland**

As an agency for judicial cooperation in criminal matters, Eurojust supports EU states and third countries linked by agreement to Eurojust in their fight against cross-border crime. Eurojust facilitates contacts between the prosecution authorities of the participant countries, coordinates measures to be carried out and offers support for the entire duration of the criminal proceedings, up to and including the conviction of the offenders and the enforcement of the imposed sanctions. The aim is to help provide justice across borders.

At the beginning, Switzerland cooperated through a contact point located at the DILA in Bern. In 2015, one person was initially detached to The Hague as Switzerland's representative, followed by an additional person as their deputy at the end of 2017. The Swiss Office works closely with Eurojust representations of other countries and with the various specialised units of the DILA and federal and cantonal prosecution services when dealing with cases.

The number of cases has multiplied over time, in particular since the Swiss Office at Eurojust was established: while the contact point at the DILA initially handled around 50 cases a year, most of which originated from abroad, in recent years up to around 300 cases a year have been opened in view of the support provided by Eurojust, including a growing number of enquiries from the Swiss prosecution authorities.

Cases dealt with by the Swiss Office



Source: Switzerland’s Liaison Office at Eurojust

**Speeding up and simplifying mutual legal assistance**

Essentially, the Swiss Office provides legal and operational support to prosecution authorities in connection with requests for mutual legal assistance from Switzerland and abroad. Its efficiency is based on the privileged direct relations with the representations of the other states at Eurojust as well as on its simple and informal way of communication. The Swiss Office is housed in the recently built Eurojust building in The Hague and works alongside the representatives of Eurojust member states as well as third countries on a daily basis. This proximity is conducive to the establishment of partnerships, the discussion of cases and issues and the development of solutions to advance investigations and international cooperation. This stimulating international environment allows the staff of the Swiss Office to become acquainted with foreign penal systems and instruments for combating crime, and to exploit opportunities for the international coordination of criminal investigations to benefit the Swiss authorities.

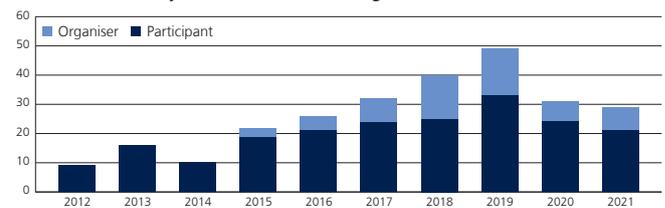
Thanks to Eurojust and the Swiss Office at this EU agency, international mutual legal assistance in criminal matters is simpler and faster as a result of the direct exchange between prosecution services, a better understanding of the legal framework and its special features in other countries, and the direct transmission of requests for mutual legal assistance and the follow-up of their execution between prosecution services.

**Meeting place for prosecutors**

A distinctive feature of Eurojust is that it invites and welcomes prosecutors from all over Europe and from third countries. Anyone in charge of an investigation in Switzerland or who is instructed to execute a mutual legal assistance measure will find that Eurojust is a place to discuss, assess and negotiate with partners from other countries involved. Thanks to Eurojust’s interpretation service, everyone can speak in their mother tongue and thus communicate without linguistic barriers. Discussions are held on legal or practical questions about investigative activities, formally initiated through the mutual legal assistance channel, as well as on the strategy for achieving a common goal, i.e. arresting, gathering evidence on and ultimately convicting offenders. While such discussions are often possible bilaterally, Eurojust can bring prosecutors from various countries together in the same room and provide them with a space for debate and reflection.

The practical information exchanged in the coordination meetings serves only to clarify the requests for mutual legal assistance and remains confidential: the only evidence that may be used in the proceedings is that provided by executing a request for mutual legal assistance.

Switzerland in Eurojust coordination meetings



Source: Switzerland’s Liaison Office at Eurojust

Until the COVID-19 pandemic, Swiss prosecutors travelled to The Hague 30 to 40 times a year to meet with their foreign counterparts. The cost of these business trips is for the most part borne by Eurojust: for each meeting, the travel and hotel costs for two people per country are covered. As in other professional fields, only virtual meetings have been held for much of the pandemic.

**Joint action days**

Numerous investigations require the coordination of measures in several countries, whether they involve arrests, searches, seizures or questioning. Establishing the truth sometimes requires that a measure be carried out simultaneously in various jurisdictions, for example, to prevent suspected persons from concealing or destroying evidence, or from absconding or colluding on their respective statements.

On joint action days, Eurojust provides operational support to judicial authorities by setting up an operations centre where the representatives of the countries concerned meet in a coordinated operation. Prosecutors are informed in real time about what is happening on the ground and can be put in direct contact with each other when necessary, for example when a new situation arises or if specific legal problems arise. This allows individual requests for mutual legal assistance to be



Joining forces against cross-border crime: a meeting at the EU agency for judicial cooperation in criminal matters Eurojust. Image: Eurojust

quickly supplemented or adjusted as needs change (for example if unidentified assets are discovered, a new suspect is identified, additional search requests are made, etc.). This flexible and rapid multilateral coordination provided by Eurojust is a very effective way of putting a stop to cross-border crime.

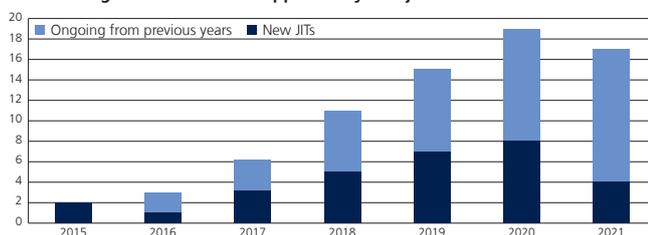
### Joint investigation teams

Prosecution services and police authorities in different countries can set up joint investigation teams (JITs) to take structured action against cross-border criminal phenomena or offences. Joint investigation teams are provided for in the Second Additional Protocol to the European Mutual Legal Assistance Convention (ZP II, SR 0.351.12) and, since July 2021, also in the IMAC. They facilitate the early exchange of information and evidence between the investigating offices during investigations. Whether it is a matter of procuring documents or electronic data, the results of questioning or surveillance, JITs enable prosecution services and police to adapt their investigations to current developments in real time, gather the required evidence and arrest suspects. In this way, serious crime, such as Mafia-type activities or large-scale drug trafficking, can be effectively combatted.

Eurojust supports the establishment of joint investigation teams, making a financial contribution. In the past years, Switzerland has been increasingly involved in this form of cooperation; it has proven to be the third country most frequently asked for assistance under this system.

Due to the requirements of the IMAC, each act of setting up a JIT in which Switzerland participates contains a clause by which the partner states undertake to use the evidence and information collected in Switzerland only for purposes of the investigation concerned. The use of this evidence in court naturally presupposes that mutual legal assistance proceedings have been concluded.

JITs involving Switzerland and supported by Eurojust



Source: Switzerland's Liaison Office at Eurojust

The following example illustrates in detail the sometimes complex interrelationships when combating cross-border crimes involving multiple states, and the resulting interplay between national prosecution services, the Swiss Office at Eurojust and Eurojust itself.

In May 2019, the French desk at Eurojust opened a case following a cyberattack using the LockerGoga ransomware against the company Altran. Since the beginning of 2019, there had been increasing numbers of reports in Switzerland and abroad of SMEs and large companies being attacked using ransomware.

Investigations following a request from France sent to the Swiss prosecution services via Eurojust in relation to the LockerGoga ransomware showed that a case was being conducted in the canton of Bern that might have connections to the French case. Due to a lack of case information or any specific links to Swiss proceedings, an initial coordination meeting was held at Eurojust in July 2019 without Swiss participation. As the investigations proceeded, nothing came to light in the Bern case that indicated that the same perpetrators were responsible for the cyberattacks.

The Zurich public prosecutor's office, which was responsible for coordination on the LockerGoga ransomware cases in Switzerland, contacted the Swiss Office at Eurojust in November 2019 with a request to participate in the next coordination meeting related to LockerGoga. The exchange of information at this meeting was intended to clarify whether it was appropriate to join the JIT that had been set up between France, Norway, and the United Kingdom.

Prosecutors from Zurich attended the coordination meeting in January 2020 in The Hague. It became clear at the meeting that many resources were required to evaluate the data and that it was only possible to establish specific connections with existing proceedings in Switzerland, Belgium, Germany, the Netherlands, Ukraine and the USA after the parties participating in the JIT had exchanged and evaluated their data. To this end, the coordination meeting focused on organising transmission channels for exchanging information and sending requests for mutual legal assistance.

In May 2020, the Thurgau public prosecutor's office contacted the Swiss Office about a ransomware case involving a Swiss SME. There were suspicions that this could be a LockerGoga case. Eurojust put the prosecution services involved in contact with each other, in order to identify any specific links. As the circumstances of the offence were to some extent atypical in comparison with the *modus operandi* used in LockerGoga cases, it was not possible to assess conclusively whether the same criminal group was involved; the proceedings continued separately.

In September 2021, another coordination meeting was held, at which preparations for a day of action in October 2021 were made. Ukraine had joined the JIT in the meantime, and the pending mutual legal assistance measures were also to be discussed with the authorities in Switzerland, the Netherlands and the USA. In response to a request for mutual legal assistance from France, prosecutors from Basel-Landschaft took part in the meeting in The Hague in agreement with the Zurich public prosecutor's office, as did the Swiss member of the Joint Cybercrime Action Taskforce (J-CAT) at Europol. At this coordination meeting, the start of the planned operations was set for 26 October 2021. Eurojust organised a coordination centre to provide support for the operations in the countries concerned.

The results of the coordinated operations, in which the Basel-Landschaft public prosecutor's office was involved both in line with the French request for mutual legal assistance and as a result of an independent investigation, were reported in a press release on 29 October 2021 ([www.eurojust.europa.eu/media-and-events/press-releases-and-news](http://www.eurojust.europa.eu/media-and-events/press-releases-and-news)). Twelve individuals were detained, numerous electronic devices were seized for evaluation and assets were seized.

## 3 Selected cases

Below is a small selection of cases from various areas of judicial cooperation in criminal matters that the DILA has been working on in the year under review.

### The Ryanair case

The mere fact that a provider of secure email services is based in Switzerland can trigger a flood of foreign requests for mutual legal assistance on a wide range of issues. This can result in the Swiss authorities being unexpectedly confronted with cases that attract worldwide attention. Normally, the foreign prosecution authorities want to find out who has sent an email or who is the owner of a particular email account.

In this case, a passenger plane en route from Athens to Vilnius was forced to make an emergency landing in the Belarusian capital Minsk on 23 May 2021 after it was claimed that Islamist groups had said there was a bomb on board. After the forced landing, Belarusian security police arrested a critic of the Belarusian government who was on the plane. After several hours, the plane was allowed to continue its flight; with the exception of the Belarusian dissident, all its passengers, among them several Lithuanian citizens, were on board. Shortly afterwards, Lithuania requested information from Switzerland by way of mutual legal assistance on the email account allegedly used to deliver the bomb threats. The Office of the Attorney General of Switzerland, entrusted by the DILA with the execution of the Lithuanian request, obtained the information available from the email service provider as part of the Swiss mutual legal assistance proceedings and was able to release it to the requesting state just a few days later.

This case shows that the Swiss authorities executing mutual legal assistance requests are able to act very quickly in criminal cases in situations not only when it is in the interests of the requesting state, but also when Switzerland's reliability and reputation for international cooperation are at stake.

### 'Taiwan Connection' also known as the 'Frigate Affair'

The case known as the 'Frigate Affair' is exceptional in various respects. This is due both to its duration and to the numerous facets of mutual legal assistance in the context of international arms sales that it highlights. It also illustrates the rigorous approach of the Swiss authorities and their willingness to use mutual legal assistance to protect the good reputation of the Swiss financial centre. Lastly this case is unique in that it marks the beginning of cooperation in criminal matters with Taiwan (Chinese Taipei), although the latter is not recognised by Switzerland as an autonomous state in line with its One China policy.

In 1991, the French company Thomson (now Thales) entered into a contract with Taiwan (Chinese Taipei) to provide six frigates at a price of around USD 2.5 billion. Although commission payments had been expressly excluded by contract, a significant increase in the price actually charged on invoicing fuelled suspicions of a serious case of international corruption.

In the course of an investigation into the French company ELF, information on the transaction came to the attention of the Geneva prosecution authorities, whereupon they opened criminal proceedings and sent requests for mutual legal assistance to France and Taiwan (Chinese Taipei).

In 2001, Taiwan (Chinese Taipei) in turn requested mutual legal assistance from Switzerland in a complex case relating to corruption and other offences in connection with the sale of the French frigates. Switzerland agreed to provide mutual legal assistance and, in the same year, froze the bank accounts of family members of a Taiwanese businessman who had brokered the sale; bribes amounting to around USD 500 million were allegedly paid into these accounts.

In response to a subsequent appeal, the Federal Supreme Court upheld the decision to grant mutual legal assistance. It emphasised that the Swiss authorities could ask Taiwan (Chinese Taipei) for mutual legal assistance in criminal matters or could provide it with mutual legal assistance without this changing the fact that Switzerland recognises the People's Republic of China as the only Chinese state (BGE 130 II 217, E. 5). This made it possible, in 2005, to hand over bank records for the frozen accounts to Taiwan (Chinese Taipei), after Switzerland had received procedural guarantees. The accounts remained frozen pending the decision on the forfeiture of the funds by Taiwan (Chinese Taipei).

The criminal proceedings in Switzerland were closed in 2008 and the mutual legal assistance file was subsequently transferred to the DILA. The only outstanding question was whether the assets should be handed over through mutual legal assistance.

In 2014, the Taiwanese authorities requested the transfer of the seized funds on the basis of a forfeiture order issued by the Supreme Court of Taiwan (Chinese Taipei). The DILA rejected the request because the law of Taiwan (Chinese Taipei) at that time did not provide for funds in the hands of third parties to be forfeited. However, the assets remained blocked. After a revision of the forfeiture legislation in 2016, a further request for the transfer of the assets was received. Switzerland was able to comply with this after the Supreme Court of Taiwan (Chinese Taipei) issued a legally valid and enforceable forfeiture order at the end of 2019. In early 2021, the DILA finally ordered the handover of USD 265 million to Taiwan (Chinese Taipei).



The sale of warships was the starting point for a major corruption case: the 'Frigate Affair'. Image: KEYSTONE/AP/Focke Strangmann

### Russian businessman extradited to the USA

In March 2021, a Russian citizen travelled by private jet to Switzerland, where he and his family planned to spend a ski vacation in the Valais. The US Department of Justice requested the DILA to arrest the then 40-year-old with a view to his extradition because criminal proceedings were pending against him in the USA for unlawfully accessing a computer network and securities fraud.

The US authorities accuse him of being the head of a gang allegedly formed between 2018 and 2020 to make illegal profits through insider trading on the stock market. The suspects are alleged to have penetrated computer networks in two US companies on which as yet unpublished, stock market-relevant information on their customers had been stored. By obtaining this information, the suspects were supposedly able to determine whether the stock prices of the companies in question were likely to rise or fall when the information was published. It is claimed that they used the illegally obtained information to trade securities, thereby generating tens of millions of dollars in unlawful profits.

In response to the arrest warrant from the US Department of Justice, the DILA issued an order against the Russian businessman so that he could be arrested by the cantonal police on arrival at the airport in Sion and placed in detention pending extradition.

The Russian businessman subsequently contested his extradition, claiming in particular that the extradition request made by the USA was only a pretext and had a political background. In June 2021, the DILA issued a decision on extradition and requested

the Federal Criminal Court to reject the objection that the charges were politically motivated. In November 2021, the Federal Criminal Court, following the arguments of the DILA, dismissed the appeal and, as requested, the objection that the charges were politically motivated (Decision RR.2021.127, RR.2021.149 of 16 November 2021). The Federal Supreme Court declined to consider an appeal against this decision (Judgment 1C\_748/2021 of 10 December 2021). As a result, the DILA's decision on extradition became legally binding and the Russian businessman was extradited in December 2021.

### Extradition to the USA in connection with the exploitation of insider information

In March 2020, the USA requested that the DILA arrest a dual Israeli-Lithuanian citizen with a view to his extradition. The man was wanted for acts that qualify under Swiss law as exploiting insider information in terms of Article 154 paragraph 3 of the Financial Market Infrastructure Act (FinMIA, SR 958.1) and that carry a custodial sentence of up to one year. The wanted man was located in Geneva in October 2020 and taken into custody pending extradition.

In the course of the proceedings initiated by the DILA, the defence argued against extradition in particular on the grounds that the principle of dual criminality was not met, in that the alleged acts did not constitute an extraditable offence. They also maintained that the principle of favourability, i.e. the rule more favourable to the granting of mutual legal assistance did not apply. Under the extradition treaty between Switzerland and the USA (SR 0.353.933.6), an offence is only extraditable if it carries a custodial sentence of more than a year under the laws of both contracting parties.

In January 2021, the DILA ordered the man's extradition to the USA. In April 2021, the Federal Criminal Court confirmed that the allegations of the US authorities do indeed correspond to an extraditable offence, in particular in view of Article 154 paragraph 3 FinMIA (Decision RR.2021.24 of 7 April 2021). The Federal Supreme Court subsequently confirmed this (Judgment 1C\_196/2021 of 28 May 2021) and also held that the principle of favourability applied: the IMAC – which requires that the offence in question carries a custodial sentence of at least one year and is thus less strict than the extradition treaty – allows the extradition to be justified.

The man was handed over to the US authorities in June 2021. This is the first extradition for criminal offences under the Financial Market Infrastructure Act.

### Extradition to Germany in the 'Cum-Ex transactions' case

Under Article 3 paragraph 3 IMAC, an extradition request cannot be complied with if the subject of the proceedings is an act that appears to be aimed at reducing liability to tax. This does not apply to aggravated tax fraud. In states subject to the Convention implementing the Schengen Agreement, there is also a mutual extradition obligation for certain indirect fiscal offences (such as those related to customs duty and VAT). According to the Federal Supreme Court's case law, however, anyone who, on their own initiative, decides to unlawfully enrich themselves or third parties by misleading the authorities – including the tax authorities – in a sophisticated scheme for claiming undue tax refunds on behalf

of existing or fictitious persons and obtaining the payment of sums of money, in particular by making tax refund claims on the basis of bogus or untrue official documents, is guilty of common law fraud.

The German authorities requested Switzerland to extradite a German citizen in connection with 'Cum-Ex transactions'. Acting with other persons, he is alleged to have deceived the tax authorities in Germany between 2006 and 2013 into paying out very large amounts of money. The perpetrators had deliberately circumvented tax controls on the processing of share transactions by means of short sales. This involved a scheme in which two parties to a transaction each obtained tax certificates confirming payment of withholding taxes for capital gains on the same block of shares, even though the tax had only been deducted once. Subsequently, both parties submitted their certificates to the tax authorities, which erroneously refunded the incorrectly certified capital gains tax. In total, the German tax authorities paid out refunds amounting to more than EUR 390 million to the various offenders.

In July 2021, the wanted man was arrested at his home by the Graubünden cantonal police on instructions from the DILA. He did not agree to simplified extradition and lodged an appeal with the Federal Criminal Court against the arrest warrant with a view to extradition issued by the DILA. In August 2021, the court concluded that his extradition was not obviously unlawful and that there were grounds for arrest (Decision RH.2021.8 of 5 August 2021). In the same month, the DILA, as the authority of first instance, ordered extradition to Germany. According to the case law of the Federal Supreme Court, the DILA assumed that the systematic exploitation of the tax refund system under Swiss law constitutes common law fraud and is therefore an extraditable offence. The Federal Criminal Court rejected an appeal against the DILA's decision in December 2021 (Decision RR.2021.200 of 20 December 2021). The Federal Supreme Court declined to consider the appeal against this decision in February 2022 (Judgment 1C\_3/2022 of 16 February 2022). In the same month, the extradition was authorised by the DILA and subsequently executed.

#### **A coordinated arrest operation leads to success – several extraditions to Italy**

On the instruction of the DILA and in response to extradition requests from Italy, six persons were detained pending extradition in the cantons of Graubünden, St. Gallen, Ticino and Zurich on 16 November 2021. The requests were based on arrest warrants issued by the court in Florence and the public prosecutor's office in Milan. The Italian authorities accuse the persons concerned of drug offences and, in some cases, of membership of a criminal organisation. The offences are alleged to have been carried out both from Italy and, in some cases at least, in Switzerland. The arrests were preceded by investigations, in particular by the cantons and by the Federal Criminal Police and the Office of the Attorney General of Switzerland.

Even if offences were committed in Switzerland, extradition may be granted by way of exception under the IMAC, provided the cantonal prosecution services and the Office of the Attorney General of Switzerland want to give precedence to extradition. Rea-

sons for this may include the better chances for the social reintegration of the offenders or procedural economy.

The persons arrested were questioned regarding the Italian extradition requests by the authorities in the cantons of Graubünden, St. Gallen, Ticino and Zurich on the instructions of the DILA, which is responsible for extradition. Three of the six persons agreed to their own immediate extradition. The DILA approved their extradition and within a few days they were handed over to Italy. The other three persons went through the ordinary extradition procedure, in which the DILA needs to reach a decision on extradition based on the Italian requests and the statements of the persons concerned.

By March 2022, the remaining three persons had been extradited to Italy.

## 4 Legal bases for cooperation

### 4.1 Expansion of the network of cooperation instruments

In 2021, work continued on expanding the network of instruments for judicial cooperation in criminal matters. Despite the ongoing pandemic, the DILA was able to initiate, conduct and, in some cases, conclude negotiations. One example of this is a memorandum of understanding with Angola, which was concluded in the report year.

#### Memorandum of Understanding (MoU) in criminal matters with Angola

In the summer of 2018, Angola approached Switzerland with a request to enter into an MoU on mutual legal assistance in criminal matters, and submitted a draft instrument in December of the same year. There was interest on both sides in improving intergovernmental cooperation. In addition, the FDJP's treaty strategy in relation to judicial criminal justice cooperation prioritises cooperation with important financial centres and emerging economic powers. Closer relations with Angola, one of the largest economies in sub-Saharan Africa, would be in keeping with this strategy.

The MoU aims to bring further rapprochement in bilateral cooperation and, in particular, to support the Angolan government in its commitment to fight corruption. This commitment is also in the interest of preventing malpractice in Switzerland's financial centre. As a political declaration of intent, the instrument does not create any legal obligations – mutual legal assistance will continue to be provided in accordance with the domestic law of the two countries or, if applicable, with international conventions. However, it introduces important administrative and organisational innovations in the interest of efficient cooperation. For example, in future the central authorities of both states (in Switzerland, the DILA) will be able to communicate directly with each other. In addition, as with the MoUs previously negotiated by the DILA, Switzerland and Angola were able to agree on a model request that meets the formal requirements of both states for mutual legal assistance.

The MoU was signed in Luanda on 19 July 2021 and became effective immediately upon its signing.

#### Entry into force of the mutual legal assistance treaty in criminal matters with Indonesia

In 2017, the DILA successfully concluded negotiations with Indonesia on a treaty on mutual legal assistance in criminal matters. The treaty was signed in Bern in February 2019 and, after being approved by the United Federal Assembly in March 2021, came into force on 14 September 2021.

### 4.2 Special case of the European Public Prosecutor's Office

With the aim of increasing cooperation, a majority of EU member states decided in October 2017 to establish the European Public Prosecutor's Office (EPPO) to combat offences against the EU's financial interests (including fraud against the EU budget, corruption, cross-border VAT fraud, etc.). This EU authority, which now includes 22 EU member states, became operational on 1 June 2021. In view of Switzerland's geographical location and the importance of its financial centre, as well as the fact that the EPPO prosecutes financial offences in particular, it was foreseeable that Switzerland would receive requests for mutual legal assistance from the EPPO. Due to the lack of a legal basis for cooperation with the EPPO, Switzerland therefore felt compelled to consider its options for future cooperation. Several approaches were examined, in particular the use of the instruments of the Council of Europe.

Switzerland supports efforts to extend the Council of Europe's mutual legal assistance instruments to the EPPO. However, it should be noted that the EPPO is an EU authority and not a judicial authority of a member state. Accordingly, a way must be found to derive rights for the EU from these instruments.

The EU member states participating in the EPPO have unilaterally, in consultation with the European Commission, issued a declaration relating to Article 24 of the European Convention on Mutual Assistance in Criminal Matters (ECMA, SR 0.351.1) as amended by Article 6 of the Second Additional Protocol (AP II, SR 0.351.12). According to their declaration, in the exercise of its activities, the EPPO is considered a judicial authority within the meaning of the Mutual Assistance Convention and its protocols. Therefore, according to the understanding of the EU and its member states, the aforementioned cooperation instruments of the Council of Europe form the basis for mutual legal assistance between the EPPO and the states outside the EU which – like Switzerland – have ratified the Convention together with its protocol(s).

This declaration raises several questions regarding its compatibility with international law. The ECMA, concluded in 1959, aims to regulate international cooperation in criminal matters among participating *states*. This limitation is clear from the wording of the Convention. The development of international criminal law has led to the establishment of various international, non-state penal bodies without the Convention being adapted accordingly. The Second Additional Protocol, concluded in 2001, does not provide for any changes in this regard, although several international penal bodies existed at the time of its adoption. While a convention must be interpreted in the light of developments in international law, in the present case, the extension of its scope to include a state's cooperation with a non-state authority such as the EPPO is not consistent with the Switzerland's interpretation of the ECMA and of its additional protocols. The EU has acceded to certain Council of Europe instruments in the past. However,

these were previously adapted to allow ratification by the EU, or its predecessor, the European Community, which is not the case with the Council of Europe mutual legal assistance instruments.

In response to the declaration of the states participating in the EPPO, Switzerland has therefore decided to declare to the depositary of the ECMA that it is not in a position to follow this declaration for legal reasons. According to the Swiss interpretation, as has been explained, the EPPO is not a judicial authority of a contracting party within the meaning of the ECMA. Switzerland is of the opinion that the EPPO can only be notified as a judicial authority under the instruments mentioned once the EU has ratified the Convention together with the protocol(s) or can otherwise derive rights from it. In addition, notification would have to be made by the EU, as the EPPO is the judicial authority of the EU – and not by the member states. Switzerland would like to create clarity with its declaration and prevent new obligations from being imposed on it that it does not consider to be in conformity with international law.

In parallel, Switzerland is advocating in the Council of Europe's Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) for the development of an international instrument that would allow the EU to ratify the ECMA and its protocols or provide for their extension to international cooperation in criminal matters between the contracting parties to the Convention and the EPPO. Such an instrument would clarify the situation and provide a clear legal basis for cooperation with this new authority.



The European Public Prosecutor's Office (EPPO) became operational in 2021. Pictured is the European Attorney General, Laura Codruța Kövesi.

Image: KEYSTONE/AFP/Kenzo Tribouillard

### 4.3 Special session of the UN General Assembly against corruption

Even when international principles for fighting crime have been negotiated and the corresponding instruments ratified, the work of the states involved is usually not over. An example of this is the special session of the UN General Assembly against corruption held in the report year.

Under the Charter of the United Nations, the UN General Assembly can hold a special session (known as an UNGASS) if circumstances so require. An UNGASS took place for the 32nd time from 2 to 4 June 2021. It was also the first special session to address the issue of corruption. In addition to official speeches by heads of state and ministers – for Switzerland by Federal Councillor Ignazio Cassis – a political declaration was adopted (UN Doc. A/S-32/L.1). The contracting states to the United Nations Convention against Corruption (UNCAC, SR 0.311.56) negotiated the terms of the declaration in virtual meetings between September 2020 and May 2021. Switzerland, including the DILA in its sphere of responsibility, actively participated in these negotiations.

Two of the seven chapters of the political declaration, namely International Cooperation and Asset Recovery, also concern the work of the DILA. In relation to international cooperation the states emphasised that corruption cannot be effectively combated by one state alone, but that preventing and combating corruption is a responsibility of all states. Accordingly the states stated their intention to intensify their joint efforts to prevent and combat corruption, to address and effectively overcome challenges and obstacles to international cooperation, and to provide mutual legal assistance and technical support in the most comprehensive manner. In the area of asset recovery, states recognised the need for effective and efficient international cooperation for the successful forfeiture and return of assets. In doing so, they emphasised the importance of mutual legal assistance measures, including, for example, the possibility of confiscating assets even when the perpetrator has not been convicted of an offence.

In 100 paragraphs, the declaration reflects the current state of political consensus on corruption and anti-corruption. It largely follows the UNCAC, but also goes beyond it in certain respects, for example by scheduling a special session of the UNCAC Conference of States Parties on Asset Recovery, which is likely to take place in 2025.

## 5 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.
- Cooperation with the International Criminal Court and other international criminal tribunals.
- Information on the network of treaties.
- Links to the Mutual Legal Assistance Guide and database of Swiss localities and courts, ELORGE (both described in detail below) as well as to the European Judicial Network (EJN) and Eurojust.

### **In addition at [www.rhf.admin.ch](http://www.rhf.admin.ch)>Stafrecht you will find:**

- Links (available in German, French and Italian) to guidelines, checklists and circulars, legal bases, case-law and authorities.

### **Specifically for accessory mutual legal assistance: 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 for obtaining evidence and service of documents in other countries.
- Country pages: an overview of the key requirements for requests to individual countries for assistance with both criminal, civil and administrative cases.
- Model requests, as well as forms relating to obtaining 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 mutual legal assistance relationships with foreign partner authorities to provide and receive accessory legal assistance.

# 6 Selected decisions by Swiss courts relating to international mutual legal assistance in criminal matters

## 6.1 Extradition

- Decision of the Federal Criminal Court RR.2021.24 of 7 April 2021 (extradition to the USA): principle of dual criminality (Art. 154 FinMIA); extradition to the USA does not contradict Art. 3 ECHR and Art. 7 UN Covenant II (neither due to the detention facilities nor due to poor state of health). The Federal Supreme Court subsequently dismissed the appeal against this decision.
- Decision of the Federal Criminal Court RR.2021.127 and RR.2021.149 of 16 November 2021 (extradition to the USA): political offence; no right under Art. 6 ECHR to verbal hearing or public court hearing; plea bargaining is in principle compatible with Art. 6 ECHR. The Federal Supreme Court subsequently declined to consider the appeal against this decision.
- Decision of the Federal Criminal Court RR.2021.165 of 18 November 2021 (extradition to Germany): health reasons do not per se prevent extradition, adequate medical care is the responsibility of requesting state; exception, if there are genuine grounds to assume that the requesting state does not guarantee adequate medical care.
- Decision of the Federal Criminal Court RR.2021.200 of 20 December 2021 (extradition to Germany): extraditable fiscal offence (Art. 3 para. 3 IMAC); principle of abstract dual criminality; aggravated tax fraud requires increased requirements for the presentation of the facts (adequate suspicion); aggravated fraud to the detriment of the state as an extraditable criminal offence; denial of the FOJ's duty to recuse itself. The Federal Supreme Court subsequently declined to consider the appeal against this decision.

## 6.2 Accessory mutual legal assistance

- Judgment of the Federal Supreme Court 1C\_701/2020 of 29 January 2021: right to file an appeal against the handing over of a Swiss criminal judgment.
- Decision of the Federal Criminal Court, Appeals Chamber, RR.2020.308 of 2 February 2021: disclosure of personal data to a third country (Art. 11f IMAC).
- Decision of the Federal Criminal Court, Appeals Chamber, CR.2021.3 of 12 March 2021; request for revision; jurisdiction

of the Appeals Chamber and applicable procedural law; object of challenge.

- Decision of the Federal Criminal Court, Appeals Chamber, RR.2020.285 of 11 June 2021: international mutual legal assistance to Egypt; dual criminality, Cultural Property Transfer Act; conditions for surrender for forfeiture (Art. 74a IMAC) not met.
- Decision of the Federal Criminal Court, Appeals Chamber, RR.2021.38 of 14 June 2021: lack of party capacity of trusts; trustee's right to appeal; inaccurate designation of a party, excessive formalism.
- Decision of the Federal Criminal Court, Appeals Chamber, RR.2020.252, RR.2020.253, RR.2020.254 of 22 June 2021: requirements for preliminary measures under Art. 18 IMAC; irrelevance of the appeal proceedings and costs and consequential damages.
- Decision of the Federal Criminal Court, Appeals Chamber, RR.2021.29, RP.2021.6 of 10 August 2021: international mutual legal assistance to Brazil; politically motivated as well as deficient criminal proceedings (Art. 3 no 1 let. e and f of the bilateral mutual legal assistance treaty between Switzerland and Brazil; Art. 2 IMAC): inadmissible complaints in the present appeal proceedings.
- Decision of the Federal Criminal Court, Appeals Chamber, CR.2021.10 of 8 November 2021: international mutual legal assistance to the Vatican City State; request for review; lack of grounds for the review.
- Decision of the Federal Criminal Court, Appeals Chamber, RR.2021.130-131 of 17 November 2021; violation of the right to be heard: right to inspect the original request for mutual legal assistance in the case of a supplementary request for mutual legal assistance; right to inspect the annexes of the request for mutual legal assistance.
- Decision of the Federal Criminal Court, Appeals Chamber, CR.2021.23 of 6 December 2021: request for review; significant facts in the file overlooked (Art. 121 let. d FSCA); calculation of time limits; holiday recognised by cantonal law (Art. 20 para. 3 APA).
- Decision of the Federal Criminal Court, Appeals Chamber, RR.2021.206 of 14 December 2021: '*entraide sauvage*', principle of proportionality and fishing expedition; rejection of the appeal.

## 7 Important statistical information about international mutual legal assistance 2017–2021

Group	Type	2017	2018	2019	2020	2021
Extradition requests to foreign countries		259	252	272	204	<b>179</b>
Extradition requests to Switzerland		360	350	321	285	<b>312</b>
Provisional arrest requests to foreign countries		281	249	268	207	<b>178</b>
Provisional arrest requests to Switzerland		31 697	34 151	36 511	31 535	<b>28 046*</b>
Transfer of proceedings requests to foreign countries		153	225	221	227	<b>232</b>
Transfer of proceedings requests to Switzerland		133	135	142	132	<b>154</b>
Sentence execution requests to foreign countries	Custodial sentences	15	5	3	7	<b>9</b>
Sentence execution requests to Switzerland	Custodial sentences	6	5	4	8	<b>6</b>
	Fines		1		4	<b>4</b>
Prisoner transfer to foreign countries	At the request of the sentenced person	65	57	54	36	<b>60</b>
	Under the Additional Protocol	2	2	1	1	<b>1</b>
Prisoner transfer to Switzerland	At the request of the sentenced person	14	15	24	15	<b>12</b>
Provisional arrest requests for international tribunals						
Legal assistance requests to Switzerland	Obtaining evidence in criminal matters	1085	1163	1270	1279	<b>1375</b>
	Obtaining evidence in criminal matters: supervision	1333	1146	1260	1205	<b>1266</b>
	Obtaining evidence in criminal matters: own case	44	80	71	67	<b>100</b>
	Asset recovery	14	23	19	30	<b>36</b>
	Asset recovery: own case	4	3	2	6	<b>2</b>
	Obtaining evidence in civil matters	34	66	57	48	<b>64</b>

Group	Type	2017	2018	2019	2020	2021
Legal assistance for international courts and tribunals	International Criminal Court	4	10		7	<b>3</b>
Legal assistance requests to foreign countries	Obtaining evidence in criminal matters	946	850	935	845	<b>995</b>
	Asset recovery	5	4	20	12	<b>6</b>
	Obtaining evidence in civil matters	28	13	23	18	<b>19</b>
Secondary legal assistance	For use in criminal proceedings	13	15	17	13	<b>15</b>
	Transmission to third country	2	7	9	4	<b>6</b>
Spontaneous transmission of information and evidence	To foreign countries (Art. 67a IMAC)	121	164	127	168	<b>116</b>
	To Switzerland	2	1	3	3	<b>6</b>
Document service requests to Switzerland	Under criminal law	238	265	213	161	<b>225</b>
	Under civil law	584	534	536	324	<b>381</b>
	Under administrative law	102	249	190	188	<b>208</b>
	Under administrative law (Convention No 94)**			22	34	<b>51</b>
Document service requests to foreign countries	Under criminal law	562	548	559	616	<b>342</b>
	Under civil law	917	798	821	689	<b>701</b>
	Under administrative law	529	552	543	427	<b>411</b>
	Under administrative law (Convention No 94)**			15	33	<b>28</b>
Sharing of forfeited assets	International sharing (Swiss forfeiture decision)	5	14	11	12	<b>15</b>
	International sharing (foreign forfeiture decision)	3	6	17	9	<b>11</b>
	National sharing	36	41	70	55	<b>50</b>
Swiss Liaison Office at Eurojust***	Requests Eurojust–CH	131	138	141	143	<b>154</b>
	Requests CH–Eurojust	77	105	165	173	<b>100</b>
Instruction to the FDJP	Authorisations under Art. 271 CC	1	1	1		

\*Of which alerts in the Schengen Information System (SIS; number from fedpol): 17'256, INTERPOL 10'776 ("Red Corners"; number from INTERPOL) and 14 requests sent directly to the FOJ. This does not include 12'940 "diffusion" alerts via INTERPOL, for which there is no precise information on how many of these were also addressed to Switzerland. It should also be noted that a concrete check of the alerts in the SIS and via INTERPOL is only carried out in about 20% of the cases, namely if a concrete connection to Switzerland is recognizable or when the wanted person is stopped in Switzerland.

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

\*\*\*incl. third states

**Judicial decisions**

<b>Court</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>
Federal Criminal Court	277	235	230	294	203
Federal Supreme Court	93	82	66	83	61
<b>Total</b>	<b>370</b>	<b>317</b>	<b>296</b>	<b>377</b>	<b>264</b>



