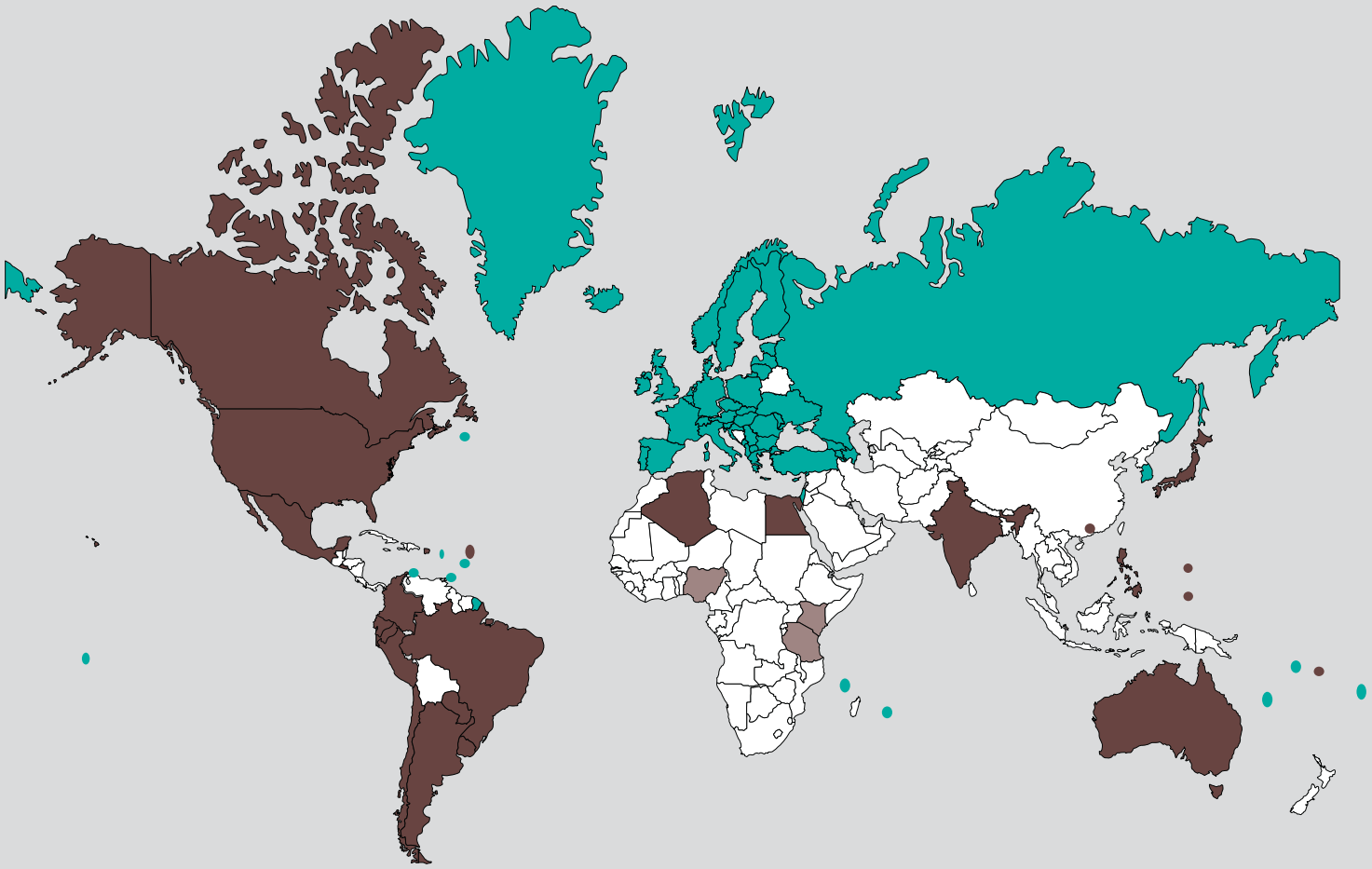
Annual Activity Report 2016
Mutual Legal Assistance



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Switzerland is connected to many states around the world as part of an extensive network of treaties on international mutual legal assistance in criminal matters. In general, these govern cooperation irrespective of offence. The cover page offers a schematic illustration of this framework for accessory (or specific) legal assistance. The countries marked in green are those which, like Switzerland, have acceded to the European Convention on Mutual Assistance in Criminal Matters. Those marked in brown are states with which Switzerland has concluded a bilateral instrument of legal assistance (brown: treaties; paler brown: declarations of intent/MoUs). Switzerland is also connected to many other states around the world via multilateral conventions which govern cooperation in connection with certain individual offences. This is the case with regard to corruption and transnational organised crime, for example. Both the subject of UN conventions, these two types of offence are examined more closely in this year's Activity Report.

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Editorial

'Crime should not pay'. Does that seem obvious to you, too? Criminals should not only be punished for their crimes, but should also be prevented from benefiting financially from what they have done. It stands to reason, doesn't it? Assets that have been gained by unlawful means must therefore be confiscated by the state and, where appropriate, used to compensate victims or those otherwise affected by the crime. Yet how can this principle be put into practice if the circumstances mean that the person must be prosecuted, and any assets seized, in a different country? To give you a specific example: how do we prevent a former politician from a South American state enriching himself unlawfully by taking payment from a company in exchange for certain favours, and then investing the proceeds of this corruption in Switzerland via a series of non-transparent financial transactions?

International legal assistance in criminal matters deals with these very questions. Every day, my staff and I at the Federal Office of Justice are joined by dozens of public prosecutors at cantonal level and at the Office of the Attorney General of Switzerland in the fight to ensure that crime ultimately does not pay, also across borders. This is particularly true in cases involving corruption. The proceeds of corruption abroad often reach Switzerland via circuitous routes. It should be possible to hand these assets over to the foreign state concerned, providing it is serious about prosecuting and punishing the offences and ultimately succeeds in confiscating those assets. However, before this can happen, those assets must be frozen in Switzerland. Frequently, the freeze must then be defended before the competent courts in response to an appeal by the account holder. This is the only way to prevent the money being withdrawn before the criminal proceedings abroad have been completed in the normal way. This Swiss contribution to the international fight against corruption is vitally important in going at least some way towards countering it, as it is a phenomenon that undermines the fabric of government and society. Ultimately, our actions also help to achieve more stable, more transparent and more democratic structures in other states.

The relationships involved in organised crime are similarly complex. Here, too, cooperation within the framework of mutual legal assistance is often key to tracking down and prosecuting internationally active criminal – perhaps even terrorist – organisations more effectively. If our efforts are successful, our work is of considerable benefit to society in a way that extends beyond criminal prosecution in itself.

The 2016 International Legal Assistance Activity Report is intended to lend greater visibility to this over-arching benefit of our daily work, to raise awareness of complex forms of transnational crime, and also to highlight the legal and practical obstacles to tackling these phenomena efficiently. We offer you an insight into how the principle that crime should not pay can become a reality also across international borders.

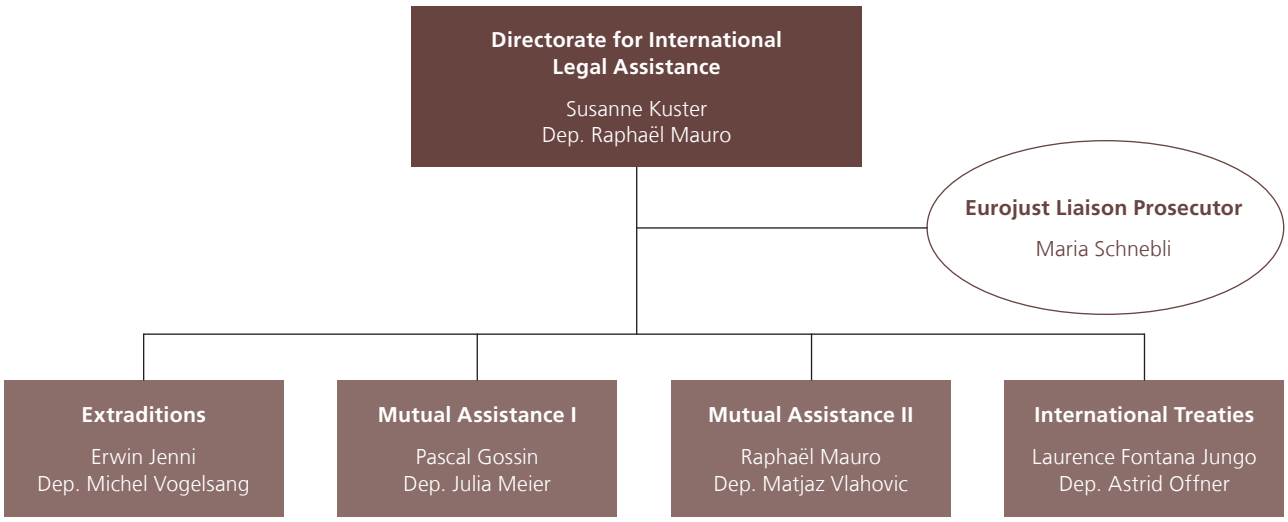
Susanne Kuster,
Vice-Director FOJ, Head of the Division for International Legal Assistance

1
The Division for International Legal Assistance and its Units

1.1 The Division

The Division for International Legal Assistance DILA forms part of the Federal Office of Justice FOJ. It is structured into four Units and the office of Switzerland's liaison prosecutor at Eurojust. It employs 45 staff (36.5 full-time equivalents), numbering 31 women and 14 men from all parts of Switzerland.

Organisational chart



Overview of principal tasks

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

1.2 The Units and their remits

Extraditions

- Extradition: orders the arrest of a person wanted by another country so that they can be handed over to that country. Decides on the person's extradition in the first instance. Right of appeal against any ruling by the Federal Criminal Court. Arranges for extradition to be carried out. At the request of Swiss public prosecutors or enforcement authorities, submits search requests and formal extradition requests to foreign governments.
- Criminal prosecution on behalf of another state: handles Swiss and foreign requests to assume criminal proceedings in cases in which extradition is not possible or appropriate. Reviews the conditions for and decides on requests to foreign governments. Receives, reviews and forwards foreign requests to the competent Swiss criminal prosecution authority, and may also decide whether or not to accept the foreign request in consultation with that authority.
- Sentence enforcement on behalf of another state: receiving and submitting requests.
- Transfer of sentenced persons to their country of origin to serve the remainder of their sentence: the Unit makes the decision in collaboration with the competent cantonal authorities.
- Other tasks: transfer of persons wanted by an international criminal court, or of witnesses in custody.

Mutual Assistance I: seizure and handover of assets

- Legal assistance proceedings in cases involving politically exposed persons (PEP): may also conduct the corresponding domestic proceedings independently.
- Forwards Swiss requests for legal assistance to foreign authorities and, following a preliminary review, delegates foreign requests for assistance in connection with seizure and handover of assets (asset recovery) to the competent cantonal or federal enforcement authorities, unless direct contact between the authorities concerned is possible. Supervises the execution of the request, incl. right of appeal against the decision of the legal assistance authorities and the Federal Criminal Court.
- Precautionary measures, e.g. account freezes, may be ordered in urgent cases.
- Decides on the further use of evidence (doctrine of speciality).
- Collaborates on asset recovery-related issues within national and international bodies and working groups.
- Negotiates with other states or cantonal and federal authorities about sharing arrangements for confiscated assets at national and international level.
- Provides legal assistance to the International Criminal Court and other international criminal tribunals.
- Handles cases involving the unsolicited provision of evidence and information to foreign criminal prosecution authorities.

Mutual Assistance II: obtaining evidence and service of documents

- Forwards Swiss requests for legal assistance to foreign authorities and, following a preliminary review, delegates foreign requests for assistance in connection with the collection of evidence to the competent cantonal or federal enforcement authorities, unless direct contact between the authorities concerned is possible. Supervises the execution of the request, incl. right of appeal against the decision of the legal assistance authorities and the Federal Criminal Court.
- Precautionary measures, e.g. account freezes, may be ordered in urgent cases.
- Central offices for cooperation with the USA and Italy: independently conducts legal assistance proceedings, including asset recovery (generally in the case of the USA; in the case of Italy in complex or particularly important cases concerning organised crime, corruption or other serious offences). Negotiates with these states about sharing arrangements for confiscated assets.
- 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 for the purposes of criminal prosecution.
- Processes requests for legal assistance concerning cultural property.
- Processes and forwards requests for service in criminal matters.
- Handles requests for legal assistance to gather evidence and serve documents in civil and administrative cases.

International Treaties

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

Eurojust Liaison Prosecutor

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

1.3 Organisational challenges: digital case management expanded to include personal records

Since early November 2016, all personal records relating to international legal assistance in criminal matters, as well as to private international law and international civil procedure, have been kept and processed in electronic form. In contrast to the technologically obsolete PAGIRUS system used up to that point, the new TROVA system no longer holds the master record as a hard copy. All incoming post is now scanned, and the entire mutual legal assistance process within the FOJ is conducted electronically. After a phase of transition and consolidation, the round-the-clock availability of the necessary information should make it possible, for example, to further simplify internal processes and to improve cooperation. Further subsequent developments will include allowing those involved in proceedings to inspect records digitally, for example, and the capacity for the FOJ to make its submissions to the federal courts via a single medium, transmitted electronically.

The use of the TROVA system is based on the new Ordinance on the Electronic Person, Record and Business Management System at the Federal Office of Justice, known as the PRBM Ordinance (SR 351.12), which entered into force on 1 November 2016. The new system was purchased in a public procedure in accordance with the Federal Act of 16 December 1994 on Public Procurement (PPA; SR 172.056.1).

Switching to a fully electronic way of working posed major organisational and resource-related challenges for the DILA during the year under review. The transition from the old to the new system nonetheless proceeded satisfactorily overall, although there are still certain teething problems to be resolved, and particular attention must be paid to the effect that fully electronic working will have on the way that work is organised internally.

2 Operations in 2016

This section cannot provide a complete overview of the operations of the Division for International Legal Assistance in 2016. Rather, individual topics and cases have been chosen to illustrate the diversity of the DILA's remit and activities. In addition to cases which have attracted considerable media coverage, this selection also includes issues that were important behind the scenes, or which are particularly significant from the legal perspective.

2.1 Fighting organised crime

Organised crime in Switzerland? Many people find that impossible to imagine. When they think of organised crime, stereotypes such as 'The Godfather' come to mind. The facts tell a different story, however. Organised crime is an international phenomenon. In recent years in particular, it has become a challenge that Switzerland, as other countries, must take seriously. In many cases, it involves laundering the proceeds of crime – specifically drug-dealing, human trafficking and smuggling, trading in toxic waste and illegal arms trading – via banks or by investing in property or in catering businesses, thereby concealing its criminal origin. In this respect Switzerland, too, is under threat from international organised crime.

According to Federal Supreme Court precedent, the term 'criminal organisations' not only covers Mafia-like crime syndicates from Italy or Eastern Europe but also, specifically, terrorist groups such the Islamic extremist 'Martyrs for Morocco', the extremist Kosovo-Albanian underground organisation 'ANA', the Italian 'Brigate Rosse', and the international Al-Qaeda network, to name just a few.

The figures for international legal assistance in criminal matters also make a convincing case that the threat from criminal organisations is as real in Switzerland as it is elsewhere. In 2016, in connection with organised crime the DILA handled 16 extradition requests (8 from Turkey, 4 from France, 3 from Italy and 1 from Tajikistan), as well as 34 other requests for legal assistance (9 from Italy, 8 from France, 4 from Turkey, 3 from Germany, 3 from Spain and 7 from other countries).

The level of complexity involved generally makes proceedings related to organised crime very labour-intensive and legally demanding. Furthermore, many of these cases have high public profiles and attract the corresponding level of media interest. When arrests, in particular, are involved, the Division's procedures come in for close scrutiny both at home and abroad. The cluster of cases surrounding the ''Ndrangheta cell' in Frauenfeld, in particular, hit the headlines in 2016.

In March, the police arrested suspected members of the 'Ndrangheta crime organisation in Frauenfeld.
Image: Carabinieri di Reggio Calabria

The Frauenfeld 'Ndrangheta cell
In early 2015, the Italian Ministry of Justice asked Switzerland to extradite several individuals suspected of being members of a Swiss branch of the criminal 'Ndrangheta organisation, which is part of the Italian mafia. The Office of the Attorney General (OAG) had been conducting criminal proceedings against these individuals since 2009, on the same suspicion, i.e. membership of a criminal organisation.

The FOJ deemed the conditions for extradition to be fulfilled, a priori, and on 8 March 2016 thus ordered the arrest of the 13 persons being sought by Italy who are not Swiss citizens. All of those concerned contested their simplified extradition to Italy. Since the flight risk in this specific case was classified as low, all 13 individuals were released from custody a short time later, a variety of substitute measures having been put in place.

If criminal proceedings are being conducted on the same grounds both in Switzerland and abroad, as a rule the Swiss proceedings will take precedence, prior to extradition. However, in this case it emerged as part of the OAG proceedings that the offences being prosecuted in Switzerland formed part of a comprehensive enquiry by the Italian authorities. In response to an enquiry by the DILA, the OAG thus supported giving precedence to extradition. Having reviewed the very detailed Italian extradition requests, the DILA also concluded that the offences in question originated in Italy, where the 'Ndrangheta still seems capable of infiltrating politics, business and the government, and thus undermining the rule of law. For reasons of economy of procedure, precedence was thus given to extradition to Italy. By the end of 2016 the DILA had ordered the extradition of the 13 accused. All of them lodged an appeal with the Federal Criminal Court. One extradition could be completed in February 2017, while all other appeals are still pending at the time of writing.

The provision of legal assistance in criminal matters generally requires the requesting state to be responsible for conducting criminal proceedings. In other words, the offence underlying the request for legal assistance must fall under the jurisdiction of that state. Under Art. 7 para. 1 of the European Convention on Extradition of 13 December 1957 (ECE; SR 0.353.1), the requested state may reject extradition on the grounds of a criminal offence which, under its own legislation, was committed wholly or partly on its own territory. This is an optional provision that permits the requested state to decline an extradition. Swiss law provides that extradition is generally permissible if, according to the documentation submitted with the request, the offence is not subject to Swiss jurisdiction (Art. 35 para. 1 let. b of the Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters; IMAC; SR 351.1). As an exception, a wanted person may nonetheless be extradited for an offence that is subject to Swiss jurisdiction if this is justified by specific circumstances, namely that the person is more likely to reintegrate into society in the requesting state (Art. 36 para. 1 IMAC). Art. 36 para. 1 IMAC is intended in particular to prevent two different criminal cases being brought against the same person for the same alleged offence. According to legal precedent, the judge ruling on the extradition is able to exercise a great deal of discretion in deciding whether or not, exceptionally, a person should be extradited, despite Switzerland having jurisdiction. A further fundamental point is that a suspect does not have a legal right to be extradited or not to be extradited. The likelihood of better reintegration into society is just one of several possible criteria that may be considered when applying Art. 36 para. 1 IMAC. The legal precedent is that certain circumstances might actually support extradition in some cases, even though the person might be expected to reintegrate more effectively in Switzerland. This would be the case, for example, for reasons of economy of procedure, or because it would then be possible to try several offenders together.

A distinction must be drawn between those criminal organisations which are generally run for financial gain, such as the Mafia, and those whose objectives tend to be more political in nature, and which intend to achieve these aims through violence. The latter may also be referred to as terrorist organisations. One particular case that was wrapped up in 2016 can be singled out as typical of this special form of organised crime.

Recognised refugee of Turkish origin extradited to Germany on the grounds of membership of a terrorist organisation

The German authorities accused the Turkish citizen, who had been living in Switzerland for several years and was recognised here as a refugee, of membership of the foreign terrorist organisation known as the 'Communist Party of Turkey/Marxist-Leninist' (TKP/ML). He was thought regularly to have participated in assemblies since the summer of 2012, primarily in Germany, and to have been involved in the passing of resolutions. These were said to have covered issues such as the procurement of funding throughout Europe, and the recruitment and training of members. He was also accused of having organised propaganda events, and to have been involved in transferring money to Turkey or to have made such transfers himself.

In response to the corresponding request from Germany, the FOJ had already decided in 2015 to approve the suspect's extradition to Germany. In its ruling of 23 February 2016, the Federal Supreme Court rejected the man's appeal as the court of final instance. As the Federal Criminal Court had ruled previously, it dismissed the claim that the offence in question was a political one. In its decision, the Federal Supreme Court stated that the distinction between 'legitimate' political resistance and terrorism was a delicate one. It nonetheless ruled that, based on the case made by the German authorities, the conduct of which the wanted man was accused could no longer be deemed a political offence. The Federal Supreme Court also stated that, according to the information provided in the German request, the TKP/ML would be classified under Swiss law as a (terrorist) criminal organisation.

The wanted man was handed over to the German authorities on 8 March 2016.

This particular extradition case attracted considerable public attention. Indeed, there were several demonstrations in Switzerland against the man's extradition. The case clarifies the conditions that must be met for extradition owing to membership of a (terrorist) criminal association. The decision also illustrates that a person's refugee status protects them against extradition or expulsion from Switzerland to the state in which they would be persecuted, but not from criminal proceedings in Switzerland or a third country. That said, onward extradition or removal to the persecuting state, in this case Turkey, would have been possible only with Switzerland's express consent.

A further case which is attracting great media attention and also mobilising a number of figures at the political level remains pending.

Extradition request from Spain to enforce a conviction on the grounds of membership of a criminal organisation (ETA)

In 2012, Spain circulated a search request for a Spanish woman on the grounds of membership of a (terrorist) criminal organisation, Euskadi ta Askatasuna (ETA). This was followed in 2015 by a request for Switzerland to extradite the woman. In 2009, the wanted woman had received a final and absolute sentence of six years and nine months in prison. She was arrested in Switzerland in April 2016.

The woman had been living in Switzerland for some time under an assumed identity, and did not challenge the extradition warrant issued by the FOJ. She nonetheless objected to extradition to Spain, claiming in particular that the Spanish sentence – relating to offences committed in 1999 – had been handed down on the basis of a confession obtained by torture. She thus maintained that this confession was not a valid basis for the judgment that had been passed. Shortly after her arrest she also submitted a request for asylum.

The FOJ subsequently obtained additional information and documentation from the Spanish authorities so that it could thoroughly examine the questions that had been raised. Since asylum proceedings were ongoing in parallel with extradition proceedings, under the Federal Act of 1 October 2010 on the Coordination of Extradition and Asylum Proceedings (AS 2011, 925 ff.) the State Secretariat for Migration SEM records were consulted in the extradition proceedings, and the extradition records were made available to the SEM.

On 23 March 2017, the FOJ granted the extradition. A short while later, the SEM rejected the asylum request. Appeals against these decisions are pending at the time of writing.

Although it is not the task of the requested authority to review the actual facts of the case, questions relating to the basic rights of the wanted person must be answered. A further factor in cases such as this is the considerable time and resources which must be invested to examine delicate issues (which might well relate to long-ago events), to coordinate between the various authorities concerned, and to communicate to the public.

2.2 Fighting corruption

The issue of corruption occupied a great deal of the DILA's time in 2016. It has gained significantly in importance in recent years. Indeed, it might even be described as having become one of the biggest problems for crime-fighting policy in Switzerland and internationally. The various offences regarded as corruption, such as bribery, the acceptance of favours, embezzlement or the abuse of public office, all have one thing in common – the abuse of a position of power for personal gain. An individual uses the power that they hold by virtue of their office or position to achieve an advantage for themselves, such as personal enrichment. Such practices erode confidence in the rule of law and in political structures.

The Federal Council described the effect of corrupt conduct as follows some 20 years ago: "Where bribery spreads, democratic and unbiased opinion-forming and the impartiality of the authorities can no longer be guaranteed. Such a development destroys confidence in the state and respect for the law, and thus undermines the very existence of the democratic rule of law." (Federal Council response of 9 December 1996 to 96.3457 – the Schüle motion on corruption and its legislative consequences). Corruption corrodes society, subverts government institutions, concentrates public-sector resources on the few, and casts entire sections of the population into poverty. This further eats away at the fabric of governments and societies that are already unstable.

Switzerland has committed to working with other states in the fight against corruption by ratifying a number of multilateral conventions, including those established by the UN, the Council of Europe, and the OECD. As part of this undertaking, it also plays an active part in the ongoing work of the responsible bodies, which deal with issues such as the application and continued development of the applicable law. The DILA has an important role here. On the basis of the IMAC, Switzerland has already collaborated comprehensively with other states in this field in the past. As a major banking and financial centre, Switzerland has a particular responsibility, especially when the proceeds of corruption find their way into accounts with Swiss banks. Beyond the fundamental principals of justice and the rule of law, effective cooperation with the countries affected by such cases is also in Switzerland's own core interests, as such assets in Swiss banks pose an enormous reputational risk to the nation's financial sector.

In the fight against corruption, and the money laundering that goes hand in hand with it, Switzerland itself relies on international cooperation, since the underlying acts have generally been committed abroad, thus requiring evidence to be collected locally. Furthermore, it is often the case that several states are conducting criminal proceedings in relation to the same offences, and investigations must be coordinated. Specific frameworks apply to cooperation and coordination in such cases. The 'Petrobras' and '1MDB' cases which provided so much work for the DILA in the year under review provide vivid examples of this.

The Petrobras case: one of the biggest corruption scandals ever seen in South America began at a Brazilian car wash. Image: Keystone, Marcelo Sayao

From car wash to corruption case that shook a nation: Petrobras

The massive corruption scandal which would shake the political and business worlds in Brazil to their core and also have a huge impact on a variety of other, mainly South American states, began with a harmless arrest at a car wash in Brazil. Working alongside other countries, the Brazilian attorney general subsequently uncovered a system of corruption which centred on the semi-nationalised and mainly oil-focused Brazilian company Petrobras and the privately owned Odebrecht construction company. Brazilian and foreign companies bribed senior Petrobras managers in return for contracts. In many cases, the profits from the excessively high sums that were then charged found their way to Brazilian politicians. The Odebrecht group, in particular, benefited from government orders. Some of the money 'earned' in these transactions was laundered via Swiss bank accounts, where some of it remains. Alongside numerous criminal proceedings taking place in Brazil, the Office of the Attorney General of Switzerland is conducting criminal proceedings in its own right on a number of fronts on the grounds of money laundering, although certain elements of these prosecutions have been delegated to the Brazilian authorities. International legal assistance in criminal matters is crucial to achieving progress in the proceedings in both countries. The DILA has handled a large number of requests for assistance primarily from Brazil to Switzerland, but also in the other direction. These concern a range of typical legal assistance measures, such as hearings and interviews, the handover of banking records, as well as the transfer of other documents. Atypical, however, is the large number of bank accounts concerned and the scale of the evidence that has been collected. Despite resistance from a number of those concerned, several Brazilian requests for assistance have been executed, and the evidence that was gathered handed over to the Brazilian authorities. This Swiss support has been one of the factors in a number of convictions in Brazil.

New requests for legal assistance were subsequently received as investigations into Petrobras, and especially Odebrecht, revealed that the corruption scandal extended to many other South American states.

The importance and scale of a headline corruption case such as Petrobras, which involves large numbers of Brazilian politicians and businesspeople and thus attracts enormous international media coverage, means that cooperation is a significant challenge for all of the authorities concerned. This is true not only of the OAG and the Brazilian and other South American prosecuting authorities which are conducting the national criminal and legal assistance proceedings, but also of the DILA. The latter must handle requests for legal assistance in both directions and delegate Brazilian requests to the OAG for execution, submit requests to Brazil to prosecute cases on Switzerland's behalf, and also fulfil its function as a supervisory authority and ensure that legal assistance proceedings are handled smoothly. To date, it has proven more than up to the task. The existing synergies and the trust displayed by all of the authorities concerned as they have worked together has enabled this complex and time-consuming case to be dealt with efficiently. Many requests have already been executed as a result.

While the Petrobras case offers a positive example of a united, cross-border effort, the 1MDB case illustrates the difficulties that arise where there is a lack of political will in the state that is most closely involved to prosecute and to tackle corruption. An interest in investigating cannot be taken for granted, especially when the corruption extends to the highest political levels of the foreign state. A successful prosecution can be obstructed or even thwarted entirely if a key player refuses to conduct its own criminal proceedings and to work with other states. This in itself shows that effective international cooperation is the only way to tackle international corruption.

Where corruption results in the outflow of funding intended for a nation's economic and social development, as in the '1MDB' case, the loss to the society concerned is immense. Image: Keystone, Joshua Paul

The billion-dollar scandal surrounding the Malaysian government's 1MDB fund

In August 2015, the Office of the Attorney General (OAG) commenced criminal proceedings against two former officials of the Malaysian government's 1MDB (1Malaysia Development Berhad) fund, and against persons unknown, on the grounds of bribery of foreign officials, misconduct in public office, money laundering and criminal mismanagement. There were serious indications that funds had been embezzled at the expense of the 1MDB government fund. These assets had been intended to promote economic and social development in Malaysia. Investigations by the OAG also revealed that some of the money had been transferred to Swiss accounts held by former Malaysian officials, as well as officials from the United Arab Emirates. The embezzled funds were estimated to be as high as several billion US dollars.

The OAG relied on legal assistance from Malaysia, because the alleged predicate offences to money laundering had been committed in the country. It therefore asked Malaysia to gather and hand over evidence. At the same time, the Malaysian authorities were notified that Malaysia could become party to the Swiss criminal proceedings in its capacity as injured party. This, they were told, would have a number of advantages for the country. However, the OAG waited for some time in vain for Malaysia to supply the legal assistance it had requested. At the end of 2016, it received notification that its request would not be accommodated.

This case involves other states, however, and this has given rise to exemplary cooperation between them and Switzerland. Indeed, Singapore, the USA and Luxembourg are also investigating the offences committed against the Malaysian government fund, and the laundering of the proceeds. Switzerland and these states are cooperating swiftly and efficiently within the mutual legal assistance framework. Despite the lack of support from the state thought to be the injured party, this partnership means that these countries' individual criminal investigations are moving ahead.

2.3 Returning assets acquired unlawfully: asset recovery

In general terms, 'asset recovery' refers to the location and provisional freeze of suspected criminal assets, through to their confiscation and handover.

Switzerland has helped to draft and also ratified a number of multilateral conventions in this field. Furthermore, the IMAC creates Switzerland's own domestic legal foundation on which to cooperate extensively with foreign governments and authorise assets acquired by unlawful means to be handed over for restitution to their rightful owners, or confiscation. Specifically, the relevant Article 74*a* IMAC allows Switzerland to hand frozen assets back directly to their rightful owners, even if it is under no treaty obligation in this regard. This avoids much more complex and time-consuming exequatur proceedings and allows assets to be handed over directly on the basis of the foreign forfeiture order. Furthermore, Switzerland consistently advocates for forfeited assets to be handed back to any injured parties. This legal foundation and practice makes it a pioneer in this field. Existing multilateral undertakings provide only for confiscation in the requested state – if at all – but not for the handover of assets to the requesting state. Where 'potentate assets' are concerned, which are understood to be assets acquired unlawfully by foreign politically exposed persons (PEP) through corruption and similar crimes, the remit and authorities of the DILA enable it to play a role in stabilising foreign states while at the same time helping to achieve a clean Swiss financial sector. Both of these objectives are in line with the Federal Council's Asset Recovery Strategy.

Adopted by the Federal Council in 2014, as reported in the last Activity Report this national strategy on the freezing, confiscation and handover of potentates' assets pursues four aims:

1. To return assets as swiftly as possible, in accordance with applicable law;
2. An international commitment to levelling the playing field (avoiding distortions of competition);
3. The agreement of transparent, carefully selected arrangements for the restitution of assets;
4. Clear and active communication about these aims.

Although cases involving potentates' assets regularly dominate the headlines, asset recovery is not limited to the location, freeze, confiscation and handover of assets held by such high-profile individuals, such as former Ukrainian President Viktor Yanukovych (for more on the cluster of cases in this particular instance, please refer to Section 2.6). Rather, in the context of Switzerland's international legal assistance activities, it refers more generally to the process of locating and returning assets in connection with criminal investigations and legal assistance proceedings. In fact, most of the asset recovery cases handled by the DILA are not related to PEPs. The requesting state does not always ask that assets be frozen. Often, the main objective is to follow the paper trail to locate these suspected criminal assets in the first place. Here, the focus is on the handover of evidence in the form of Swiss banking records.

Under current Swiss legislation on international legal assistance, the strategic objectives are the same for both cases involving potentates' assets, and those considered 'normal', concerning suspected criminal assets in general. This is especially true in corruption cases. The issues that arose as the strategy was being drafted tend to come up in any event in connection with asset recovery cases. Often, the difficulty from the Swiss prosecuting authorities' perspective is that the money has been moved around the houses before it reaches its destination country, where obstacles to cooperation make it difficult to locate. From the opposite point of view, it is also important to explain to foreign states how the Swiss system of legal assistance works, to foster an understanding of what we require, and to illustrate clearly the extent to which the Swiss authorities are able actively to support criminal proceedings abroad.

With a view to achieving aims 1 and 4 of the Federal Council Strategy, the DILA plays an important role in knowledge transfer, with a particular emphasis on international contact. It is also involved in a number of multilateral bodies.

For example, the DILA regularly represents Switzerland on the Working Group on Asset Recovery established under the aegis of the United Nations Convention of 31 October 2003 against Corruption (UNCAC; SR 0.311.56). This working group meets once a year to discuss specific aspects of the UNCAC chapter on asset recovery (chapter 5). Furthermore, in November 2016 the DILA had the opportunity to participate in a further meeting entitled 'Open-end intergovernmental expert meetings to enhance international cooperation under the UNCAC', and to present its position as a panel member. Here, the DILA raised the issue that provisions relevant to the location, freezing and restitution of assets often refer to applicable domestic law. Despite the UNCAC and other multilateral legal instruments, discrepancies between the different systems of law persist in this area.

In addition to the UN, the DILA is represented on European Union bodies and, in particular, fosters close contact with the Asset Recovery Offices of its Member States. EU Member States meet twice a year. In view of its experience in asset recovery, Switzerland – or more specifically the DILA – is a welcome guest at these meetings. One of the major issues that is discussed is increasing the direct exchange of information between Member States. A further important aspect is the recently enacted Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127 of 29.4.2014, p. 39). Applicable to all EU Member States, the Directive sets out mandatory minimum requirements for the confiscation of assets in criminal proceedings, as well as for the freezing of such assets so that they might subsequently be confiscated. Observing developments within the EU, and direct exchange with colleagues from EU Member States, has proven extremely useful to Switzerland.

The DILA makes every effort to publicise the Federal Council's four asset recovery objectives even more effectively within all of the federal and cantonal authorities concerned. It is also willing, on request, to provide speakers for dedicated seminars and conferences, and is also available for training courses in this area.

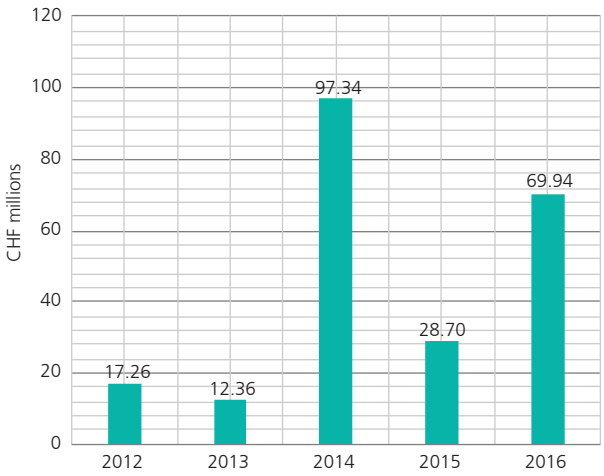
2.4 Cooperation has its rewards: sharing

To encourage international cooperation on criminal cases, and in particular where the confiscation of suspected criminal assets is concerned, international conventions recommend sharing assets confiscated in domestic criminal proceedings with those states which have provided support. Switzerland has its own legal foundation in this respect, the Federal Act of 19 March 2004 on the Division of Forfeited Assets (DFAA; SR 312.4). In principle, the Act permits all of the states that were involved in confiscating assets acquired by criminal means to share in the proceeds. That said, the Swiss position is that assets may be shared internationally only if there are no injured parties. The Act governs the conclusion of sharing agreements between Switzerland and foreign states, as well as at the domestic level between the federal government and the cantons. The DILA is responsible for putting these national and international sharing arrangements into practice.

International sharing

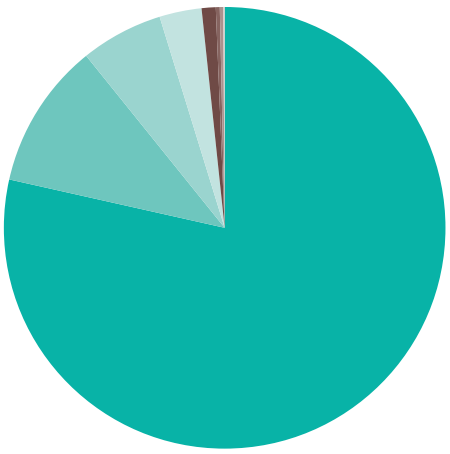
The DFAA distinguishes between active and passive international sharing. In the active sense, the Swiss authorities confiscate assets of criminal origin under Swiss law as part of their own criminal proceedings. They will then offer a share to the foreign state which provided legal assistance in the case concerned. Meanwhile, 'passive' international sharing refers to criminal proceedings conducted by a foreign authority, which then confiscates the criminal assets, held in Switzerland, under its own system of law. Further to a satisfactory request for legal assistance, the Swiss authorities will send these authorities the necessary evidence, or will hand over the assets that are held in Switzerland pursuant to Article 74*a* IMAC. In return, the foreign state may cede a share of the forfeited assets to Switzerland under the terms of a sharing agreement.

International sharing arrangements, 2012–2016
cash in various currencies, equities and precious metals



Switzerland received a total of around CHF 37 million from international sharing arrangements in 2016. The total amount shared was around CHF 70 million. Considerable variation has been observed in recent years. In 2015, Switzerland received around CHF 5 million (of a total of around CHF 28 million). In 2014 it received approx. CHF 32 million (of around CHF 97 million), in 2013 the figure was around CHF 6 million (of a total of around CHF 12 million) and in 2012 around CHF 8.5 million (of a total of around CHF 17 million).

International sharing arrangements by state
assets expressed in CHF, rounded to the nearest 100



2016	Total	Active	Passive
United States of America	54 910 700	4 803 900	50 106 800
Monaco	7 478 700	7 478 700	0
Spain	4 219 100	0	4 219 100
Italy	2 158 900	0	2 158 900
Liechtenstein	720 000	720 000	0
Netherlands	202 100	0	202 100
Gemany	177 100	15 800	161 300
United Kingdom	69 900	0	69 900
Number of states n=8	**69 936 500**	**13 018 400**	**56 918 100**

In 2016, the DILA concluded a total of 16 active and passive sharing agreements with eight different foreign states. Most of these were with Germany (four) and the USA (three), followed by Italy, the Netherlands and Spain, with two each. The highest sums were shared between Switzerland and the USA. Of a total amount of around CHF 55 million, Switzerland received around CHF 26 million.

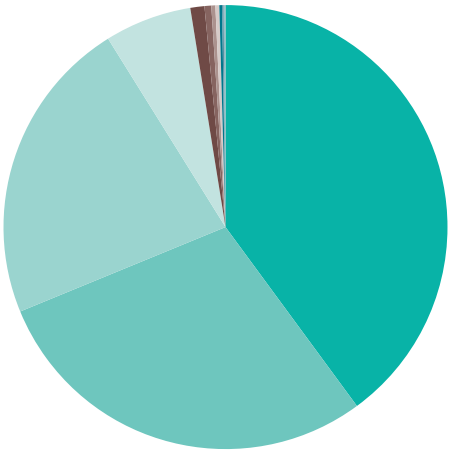
The international sharing process is triggered by federal or cantonal authorities notifying the Federal Office of Justice as soon as they begin to consider sharing forfeited assets with a foreign state. The FOJ grants the authorities of the cantons concerned and the federal government a hearing, and then enters into negotiations with the foreign authorities to conclude a sharing agreement. As a rule, Switzerland and the foreign state will receive equal shares of the assets. If there are injured parties – which may also include a national government – Swiss practice is to hand the assets over in full to the state or injured parties in question. Where the assets are located in a foreign state, the Swiss government will request that the assets be paid in full to the injured parties.

National sharing

The DFAA also governs sharing arrangements at the national level between the federal government and the cantons. It sets out simple sharing rules to create a financial balance between the public authorities involved in the case, and thereby avoid conflicts of interest. Sharing like this at the national level may result from an international sharing arrangement. The DFAA does not provide for any minimum amount in such cases. That said, where Switzerland does not benefit in advance from an international sharing agreement, national sharing arrangements are subject to certain conditions. Under the terms of the DFAA, sharing proceedings between the cantons and the federal government may be instigated only if assets have been confiscated under federal criminal law, and the assets in question amount to a minimum of CHF 100,000 (gross).

Under the DFAA, the cantons are required to surrender any assets they hold to the federal government. Cantonal or federal authorities must notify the FOJ within ten days of legally enforceable forfeiture orders where the gross value of the assets is not evidently less than CHF 100,000. The FOJ will then open proceedings for the cantons or federal authorities concerned, and instruct them to transfer the seized assets to the federal government, if they are not already held with the FOJ. At the same time, the FOJ gives the public authorities concerned the opportunity to state the costs that they incurred for the criminal proceedings from which the assets originate. The DFAA allows such costs to be deducted from the assets if it is unlikely that they can be reclaimed by other means. The resulting net amount will then be divided between the public authorities concerned in accordance with a certain algorithm: 5/10 goes to the public authority (whether cantonal or federal) which led the criminal investigation and ordered the forfeiture, and thus bore the greatest share of the work. The cantons in which the seized assets were located receive a share of 2/10 in return for their cooperation in the criminal proceedings. The remaining 3/10 always goes to the federal government in return for its support to the cantons in the fight against crime, its support with international legal assistance, and the expenses it incurs operating various central offices involved in the fight against organised crime, as well as electronic databases, etc. The FOJ draws up a draft sharing order, and then submits this to the public authorities concerned for comment before it issues the final order. An appeal against the final sharing order may be lodged with the Federal Administrative Court. The DFAA does not require assets received under sharing arrangements to be used for any specific purpose. Rather, they may be allocated at the recipient's discretion. Assets received by the federal government go into the general government coffers.

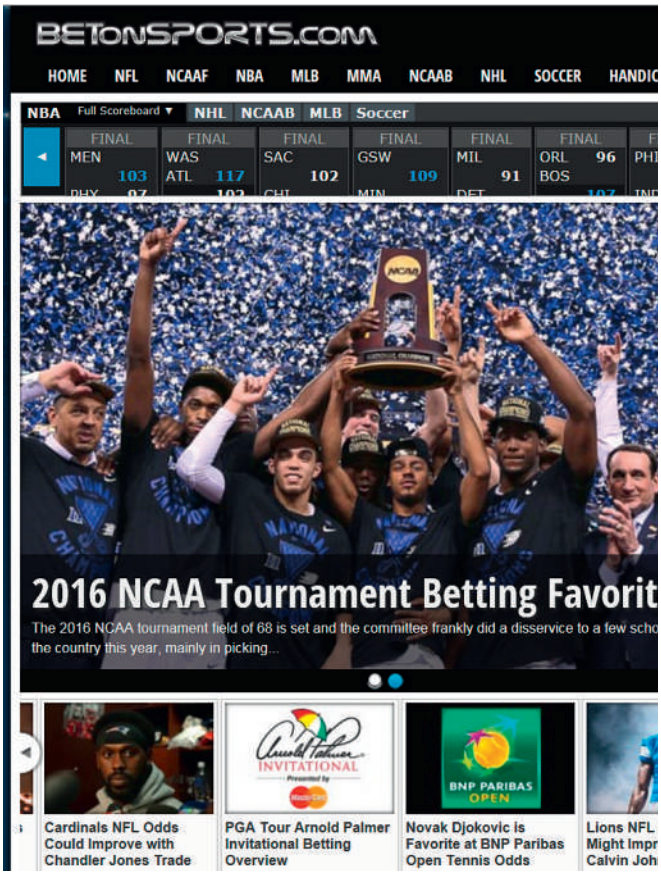
Division of assets between the federal government and the cantons
assets expressed in CHF, rounded to the nearest hundred



2016	Amount	Number
Federal government	32 837 000	42
ZH	23 754 100	13
GE	18 374 700	5
TI	5 211 000	15
AG	842 800	3
ZG	404 800	2
SG	239 600	2
BS	233 900	2
BE	165 600	4
SH	89 100	1
FR	63 000	1
LU	48 800	1
JU	1 200	1
Fed. gov. and 12 cantons	82 265 600	–

The DILA concluded a total of 42 national sharing proceedings in 2016. Some CHF 82 million was divided between the cantons concerned (which received approx. CHF 49.5 million) and the federal government (including the federal authorities which had seized the assets, which received around CHF 32.5 million). These national sharing arrangements most often concerned the canton of Ticino (15 cases/total amount of around CHF 5 million), followed by the canton of Zurich (13 cases/total amount of around CHF 24 million) and the canton of Bern (4 cases/total amount of around CHF 165,000). At around CHF 24 million, the canton of Zurich received the most assets overall.

Sharing cases often involve a great deal of money. The DILA handled a particularly large case in 2016, in which USD 25 million was shared out nationally. Naturally, it attracted the corresponding level of media interest.



Illegal sports betting is a billion-dollar business. Image: BetonSports

'BetonSports'

On 1 February 2008, the USA submitted a request for mutual legal assistance to support criminal proceedings against a number of natural persons suspected of illegal betting on sport. The US authorities sought the freezing of a number of accounts in the canton of Geneva, which was then entrusted with carrying out the specific details of the request. Once Switzerland had handed the relevant documents over to the USA, the US authorities negotiated a plea deal with the accused. The bosses of the 'BetonSports' online betting platform agreed to the frozen assets being transferred to the US Treasury, whereupon the FOJ released the frozen USD 49.65 million and wired it to the US government. The USA then offered Switzerland a 50:50 split in return for its legal assistance. The DILA signed the proposed US sharing agreement on behalf of the Swiss government, and the money was transferred in late 2015. In February 2016, around USD 25 million was then divided between the federal government and the canton of Geneva as part of a national sharing arrangement under the DFAA.

2.5 'Dynamic' legal assistance measures

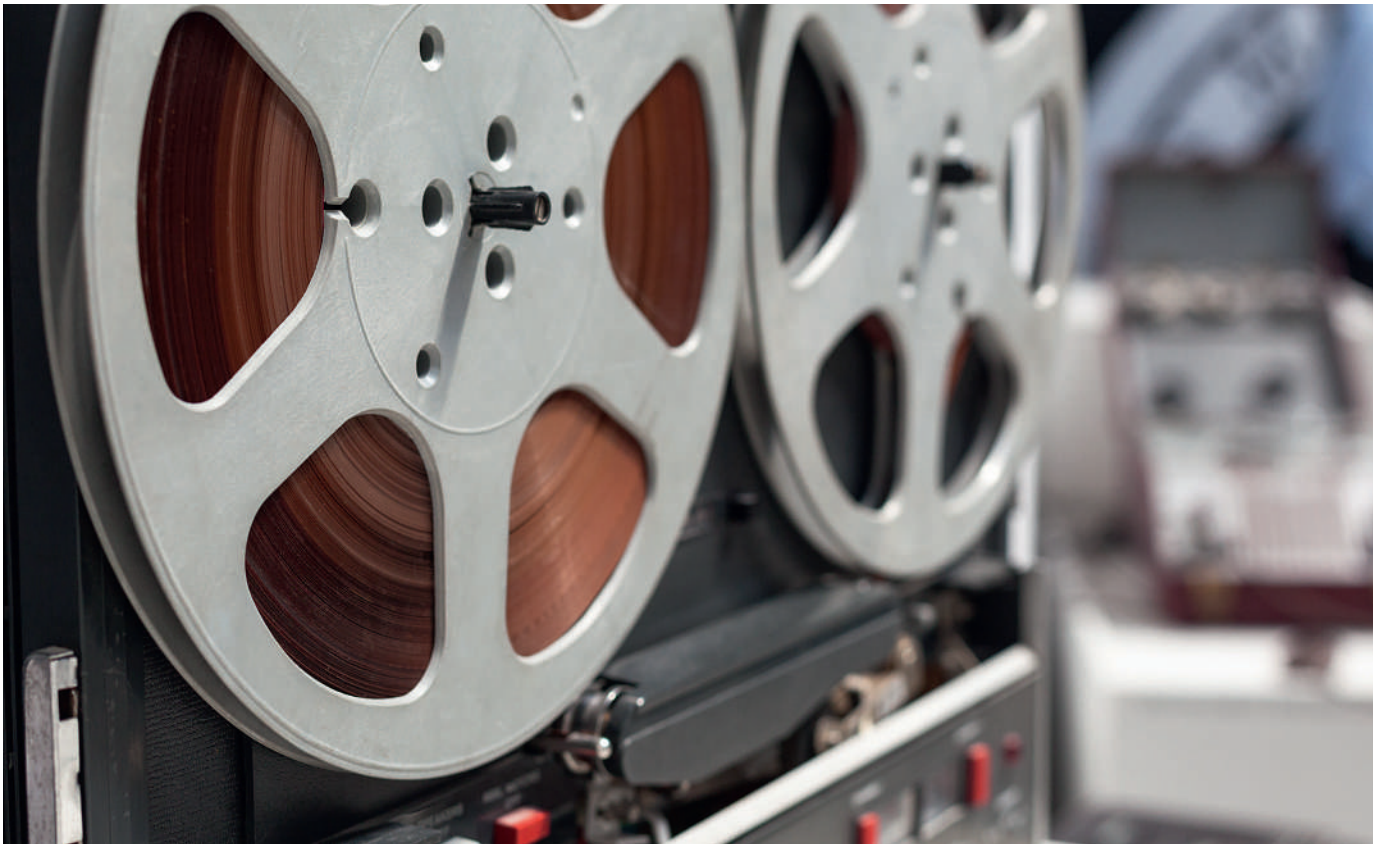
To avoid defeating the very purpose of legal assistance, certain measures must be undertaken in secrecy. Furthermore, in some cases findings must be handed over to the requesting foreign authority quickly and continually so that they can immediately be fed into the investigation. Cases like these are referred to as 'dynamic' legal assistance. Often, these findings are the result of covert telecommunications surveillance. The risk of collusion means that those concerned should not initially be aware of what is going on, but this creates a certain conflict with the right to a legal hearing provided for in the IMAC. Part of this right is that the person concerned must give their consent for confidential information and evidence to be passed on to foreign authorities, unless a final and legally enforceable ruling has been issued against them. In recent years, the Swiss legal assistance authorities and the FOJ in particular have made a great effort to ease this difficult relationship between the criminal prosecution interests of the requesting state and Switzerland's obligations to provide assistance, on the one hand, and the grant of party rights in the legal assistance proceedings, on the other.

In its most recent guidelines, published in 2009, the DILA proposed a specific procedure in such cases which takes account of both criminal prosecution interests and party rights: the mutual legal assistance authority reviews the request for assistance and issues a decree accommodating it. This also orders the early, and in some cases, ongoing handover of information and evidence. The person concerned is not yet made aware of the decree. Once any necessary authorisation proceedings have been conducted before the court responsible for coercive measures, an assurance is obtained from the requesting state that the information will initially be used only for investigative purposes, and not as evidence. The legal assistance measures are then carried out, the information and documents that have been gathered are filtered out, and then handed over to the foreign authority for investigative purposes. As soon as the foreign proceedings permit, the persons concerned are notified of the legal assistance measures concerning them. They are sent the decree and granted a legal hearing. The subsequent final ruling is subject to appeal. Once it has become legally enforceable, the foreign authority will be informed that the information and documents that have already been handed over may now also be used as evidence.

The Federal Criminal Court implicitly upheld this approach for the first time in a ruling of 22 April 2015, in which it referred to the FOJ guidelines. However, this particular case concerned the handover of records from telephone surveillance that had taken place as part of criminal proceedings in Switzerland (FCC, 22.4.2015, RR.2015.20, specifically E. 5.2.2 and 6.4). In a further ruling, of 30 October 2015, the Federal Criminal Court declared that the FOJ-recommended procedure followed by the previous instance was permissible (FCC, 30.10.2015, RR.2015.142, E. 6.4). In this latter case, however, the handover of telephone surveillance records was ordered, but ultimately never completed.

In 2016 the Federal Criminal Court made a statement for the first time on a pattern of events to which the procedure described in the FOJ guidelines relates directly: the handover of telephone surveillance data for investigative purposes, without a legal hearing being granted. Here, too, the Court concluded that findings can be handed over without notifying the person concerned if the foreign authority has undertaken to use those findings for investigative purposes only, but not as evidence (FCC, 21.12.2016, RR.2016.174, as well as RR.2016.175-176). The appeals against this decision were still pending before the Federal Supreme Court at the end of 2016. In the meantime, in its rulings of 27 March 2017 1C_1/2017 and 1C_2/2017, the Federal Supreme Court admitted the two appeals and upheld them. In its decision, the Court considered that neither Swiss law nor any treaty provides a legal foundation for the early handover of telephone surveillance data without the persons concerned being granted a legal hearing. It ruled that, while such an approach might be useful in the case of investigations which must be kept secret for a certain time, it could be permitted only after the corresponding changes to the law.

Prior to the latest rulings by the Federal Supreme Court, developments in practice and legal precedent had been satisfactory from the FOJ perspective in terms of facilitating international cooperation. That said, even if the Federal Supreme Court had upheld the aforementioned approach, with a view to legal certainty it would have been useful to see development in the law. Indeed, the procedure described above for dynamic legal assistance measures should have been codified expressly into the International Mutual Assistance Act. In view of the Federal Supreme Court's decision, such an amendment to the law is more necessary than ever to allow Switzerland to cooperate efficiently with other countries on such measures.



Difficult balance between prosecution interests and party rights: 'dynamic' legal assistance measures such as the ongoing handover of covert telecommunications surveillance data. Image: Thinkstock, Mihajlo Maricic

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

'Operation Soccer' or 'the FIFA case'

There was a new chapter in the 'Operation Soccer' extradition story in 2016. Raids in Zurich on 27 May 2015 and 3 December 2015 resulted in the arrest of a total of nine FIFA officials. By the end of that year four individuals had already been handed over to the USA. In January 2016, one further person agreed to simplified extradition proceedings. Two further individuals could be handed over to the US authorities after the Federal Criminal Court had rejected their appeal against extradition in the spring of 2016. In this cluster of cases, that left the Federal Supreme Court having to address just one single extradition. Switzerland's highest court attached particular importance to this case, because the matter had shaken FIFA, the world's largest sporting body, to its core, it had attracted a great deal of media attention world-wide, the USA also thought it very important – as illustrated by the personal commitment of the US Attorney General – and the whole affair had the potential to affect relations between Switzerland and the USA. The Federal Supreme Court upheld the key points of the decision made by the DILA and the Federal Criminal Court. It ruled that the conduct of which the person concerned was accused could be considered private-sector bribery under the Federal Act of 19 December 1986 on Unfair Competition (UCA; SR 241), and that the facts in question were sufficiently closely linked to the USA to uphold the jurisdiction of the US prosecuting authorities. The ninth and final FIFA official was subsequently handed over to the USA on 18 May 2016.

The DILA nonetheless continued to provide accessory legal assistance in connection with Operation Soccer. Indeed, this is still ongoing: after various bank accounts were frozen and evidence collected in May 2015 at the request of the US authorities, in 2016 a large number of the banking documents that had been obtained could be handed over to the US authorities. The number of documents involved was enormous, and posed a considerable challenge – also in staffing terms – to the DILA owing to the complexity of this priority case during the year under review.

In addition to the banking documents, the DILA had to obtain and review comprehensive criminal files from a cantonal public prosecutor's office. These files concern a now-concluded criminal case involving FIFA officials. The DILA is examining the relevance of the files to the criminal proceedings in the USA and will order its handover to the US authorities if the corresponding conditions are met.

The assets that are frozen in Switzerland, which are worth in the high double-digit millions, remain frozen, in other words the account holders have had their powers of disposal over them withdrawn. The freeze will remain in place until a decision on their forfeiture has been made in the USA, or if the conditions for the freeze are no longer fulfilled.

Although a large part of the proceedings could be completed in 2016, certain individual aspects are still pending. In soccer terms, the DILA is in the last third of the second half. It cannot be ruled out, however, that further findings on the part of the US authorities once they have analysed the evidence they have received will result in additional requests for legal assistance. This match may well go into extra time.

Ukraine – the Yanukovych affair

In the spring of 2015, the DILA decided to consider the first Ukrainian request. Subsequently, the assets of a high-ranking member of the previous regime were frozen, the issue of banking documents ordered and further assets and banking records were seized on the basis of a supplementary request. In 2016, the DILA was able to issue its first final rulings on the cluster of cases surrounding former Ukrainian president Viktor Yanukovych. These rulings upheld the seizure of assets and ordered the handover of the banking documents in question as evidence.

The final rulings have since attained legal effect and the evidence in question has been transmitted to Ukraine.

The assets which are located in Switzerland will now remain frozen until a legally effective and enforceable forfeiture order has been issued in Ukraine.

During the year under review the DILA was also able to make progress with further requests for assistance from Ukraine that had been submitted in the wake of the political upheaval there. Here, too, it has been able to issue final rulings.

2.7 Building bridges between Eurojust and the Swiss prosecuting authorities: the Swiss liaison prosecutor

Appointed in the spring of 2015, the Swiss liaison prosecutor at Eurojust has become an important link between criminal prosecution and legal assistance authorities in Switzerland and those in the EU. The Eurojust head office in The Hague brings together public prosecutors (most of them long-serving) from all Member States of the EU, as well as Norway, Switzerland and the USA, together under one roof. This physical proximity is a major factor in efficiently coordinating the authorities from the different states involved in cross-border cases.

The following case illustrates the added value of targeted, direct collaboration between individual prosecution authorities with Eurojust's support, especially where rapid action is crucial.

The Public Prosecutor's Office of the canton of Geneva is investigating the vice president and son of the president of a central African country in a case involving corruption, money laundering and the embezzlement of public funds. The proceedings have already resulted in 11 luxury cars, destined for transport abroad and worth more than USD 10 million, being seized at Geneva airport in November 2016. A short time later, a luxury yacht worth around USD 100 million, at anchor in the Netherlands, was also to be seized. On 2 December 2016 the public prosecutors in Geneva contacted the liaison prosecutor to tell her that they had information that the yacht was to be moved that same day via Gibraltar to Equatorial Guinea, and thus out of the grasp of the Swiss and Dutch prosecuting authorities. They wanted to submit a request for legal assistance to have the yacht seized while it was still in Dutch waters. Thanks to immediate support from the representative in charge on the Dutch desk at Eurojust, and the swift reaction of the competent Dutch public prosecutor and the police, the yacht was seized that day. Switzerland's liaison prosecutor and the Dutch representative have since continued to support the criminal prosecution authorities in both states. In a video conference at Eurojust's offices a few days later, the Dutch prosecuting authorities responsible for executing the Geneva request for assistance, and the Geneva public prosecutors themselves, were able to hold direct talks to clarify the most urgent questions surrounding the yacht's seizure.

However, there are also cases such as the following, in which cooperation proves rather more complex, and thus takes longer:

Back in 2015, the liaison prosecutor opened a file in a case involving organised raids by a Lithuanian gang on jewellers' and watch shops throughout Switzerland and in many other EU countries. In December 2015 she then organised an initial coordination meeting at Eurojust, involving the competent public prosecutor from the canton of Vaud, and representatives of the prosecuting authorities involved from a number of EU Member States. The aim of the meeting was to determine with the Lithuanian authorities how best to cooperate, and to discuss the opening of a criminal investigation against the organisers of these raids, who were operating out of Lithuania. In July 2016, the liaison prosecutor organised a further coordination meeting, which this time took place in Lausanne. Representing Lithuania at the meeting were the competent public prosecutor from the Office of the Attorney General of Lithuania, two senior police investigators, and the representative of the Lithuania desk at Eurojust. Switzerland was represented by the public prosecutors of the cantons of Zurich, Neuchâtel, and Geneva in charge of the relevant proceedings, as well as representatives of the Coordination department at the Federal Criminal Police FCP, and of the FCP's Lausanne branch. The participation of the senior federal prosecutor in charge of organised crime at the Office of the Attorney General also proved important. One of the main issues for the investigating cantonal public prosecutor's offices was whether or not the case in question could be deemed organised crime, thus meaning that it would fall under the jurisdiction of the federal, rather than cantonal, authorities. Against this backdrop, a coordinated investigation strategy in Switzerland could be formulated, and the matter at hand discussed effectively with the competent Lithuanian prosecuting authorities.

3 Treaties as the basis of international cooperation on criminal matters

3.1 The treaty strategy: principles for negotiating instruments of cooperation

Switzerland's International Mutual Assistance Act already allows it to cooperate closely with other states to gather evidence and to serve documents, as well as where extraditions are concerned. However, it is not always possible in other countries to cooperate without a formal treaty basis. Switzerland therefore attaches great importance to extending its already comprehensive treaty framework. The treaty strategy of the Federal Department of Justice and Police FDJP determines the criteria on which the DILA will begin negotiations, and sets out points of focus and objectives when concluding such treaties. This is intended to ensure that bilateral relations are expanded on a coherent basis, using the available resources as effectively as possible. The strategy is reviewed at regular intervals to establish whether or not any amendment is needed, and priority lists are used to define medium-term objectives, in particular. The last review took place in 2016, with the updated strategy approved by the FDJP in December 2016.

A number of criteria determine whether or not Switzerland will enter into negotiations on an instrument of cooperation. Should these contradict each other, the interests at stake in the case at hand must be weighted and weighed up against each other.

The decision as to the states with which Switzerland would like to negotiate is driven primarily by the interests of the Swiss prosecuting authorities. These may rest, for example, on another state being unable or unwilling to cooperate with Switzerland without a special, internationally agreed foundation, or such cooperation being hampered significantly by the absence of such a formal basis. The number of legal assistance cases involving a given state, and experience with such cases, are also regularly taken into account when assessing interests. Furthermore, in some cases Switzerland's interests in other fields of law, or more general interests of a foreign policy nature, for instance, may result in negotiations with another country being considered. More specifically, Switzerland needs to formalise the way in which it cooperates with other major centres of finance and business, as well as with emerging economic powers. Where content is concerned, increasing emphasis is placed on the common effort to fight transnational corruption, as illustrated in Section 2.2 above.

The principles of the rule of law and respect for human rights are absolutely key to Switzerland, and other states' compliance with them is an important criterion in deciding whether or not to enter into treaty negotiations. However, to fight international crime effectively, it can also be important to cooperate with states whose understanding of democracy and the rule of law (still) differ from our own. A gradual approach may be helpful in such cases, reflecting the practical need to establish or to strengthen this type of cooperation with these states, as well as in general with states with which Switzerland has had little experience of cooperation to date. An agreement between governments, in the form of a declaration of political intent or a memorandum of understanding (MoU) is a good first step towards formalising cooperation.

The memorandum of understanding – a useful introduction to bilateral cooperation

While not legally binding, the memorandum of understanding offers specific, practical added value in a number of respects:

- It permits an initial approach, and enables the states concerned to gather practical experience.
- It can be concluded quickly, as the Federal Council has independent authority to do so, and does not need to submit it to parliament for approval.

The conditions on which legal assistance can be provided continue to be governed by the relevant national legislation of the countries concerned. The memoranda of understanding nonetheless contain a variety of provisions designed to dismantle barriers to cooperation. In the interests of targeted and efficient cooperation where legal assistance is concerned, they make it easier to gain access to the competent authority in the other state, and encourage better mutual understanding.

Memoranda of understanding may include the following elements:

- Nomination of central authorities responsible for cooperation, as a direct point of contact
- Consultations in advance of a formal request for legal assistance, thereby making it more likely to succeed
- The provision of information on the individual systems of law and legal assistance and/or the organisation of meetings at expert level
- The agreement of a model request, which makes it clear which requirements must be fulfilled for certain key legal assistance measures to be undertaken.

Instigated over the past few years, this gradual approach with the memorandum of understanding as the first step was continued during the year under review. Indeed, Switzerland negotiated two further legal assistance MoUs in 2016, with Nigeria and Kenya. The MoU with Nigeria and a previously negotiated memorandum with Tanzania were also signed in 2016 (the MoU with Kenya subsequently in April 2017), and thus entered into effect. All of these cases concern countries in which the time had come to make an initial approach in order specifically to fight corruption or the drugs trade.

3.2 New extradition-related instruments and their effect

The 1957 European Convention on Extradition is a real success story. This legal foundation underpins more than 80% of all Swiss extradition proceedings. Relations – and trust – between the states of Europe have become much closer since its inception. Ways and means of communication have also changed over time. To ensure that the Convention remains fit for purpose, and to preserve its importance as the basis for intergovernmental cooperation, amendments were urgently needed to reflect developments in the real world. The Council of Europe thus drafted a third, and then a fourth Additional Protocol to the Convention (Third Additional Protocol to the European Convention on Extradition of 10 November 2010 and the Fourth Additional Protocol of 20 September 2012; SR 0.353.13 and SR 0.353.14). Both instruments entered into force for Switzerland on 1 November 2016.

The Third Additional Protocol contains a simplified procedure for extradition. This means that an individual can be extradited more quickly and more informally to another state party if they agree to their extradition. The person concerned is now able to renounce their entitlement to the rule of speciality, which states that they may not be prosecuted, convicted or subject to any restriction of liberty on the grounds of a different offence committed prior to their extradition.

The Fourth Additional Protocol brings certain provisions of the Convention up to date. It amends a number of articles in line with current needs, specifically: refusal of extradition owing to the person's prosecution or punishment having become statute-barred (extradition may now be refused only if the prosecution of an offence has become statute-barred under the law of the requesting state; Art. 1); the transmission of requests and documents (Art. 2); the principle of speciality in the case of follow-up requests (Art. 3); and onward extradition (Art. 4) and transit (Art. 5). In particular, the related deadlines have been shortened, or new ones introduced. The Additional Protocol also provides for extradition requests and documents to be transmitted electronically under certain conditions (Art. 6). These measures are intended to speed up proceedings while also simplifying the work of the authorities concerned – and ensuring that the legal questions that are raised are examined with the same degree of rigour as in the past.

With these two Additional Protocols, the Council of Europe and its member states have succeeded in creating an instrument of extradition which is, in certain respects, more modern than the original. It is particularly important in the context of the European Arrest Warrant (EAW). Rooted in the principle of the reciprocal recognition of judicial decisions, to some extent the EAW has replaced traditional extradition proceedings between EU member states with a simple, swift and informal handover procedure. The changes instituted by the two Additional Protocols cannot be compared with the degree of cooperation achieved with the EAW, especially in view of the shorter proceedings achieved by handovers on the basis of EAWs. That said, the new option of a person consenting to their extradition (simplified extradition), the swifter and more straightforward extradition of offenders to Switzerland can be expected in some cases. This should reduce the length of individual proceedings and make Swiss criminal prosecutions more efficient. Simplified extradition from Switzerland to a foreign country has been possible for some considerable time now, but now Switzerland itself will be able to benefit from the procedure when it requests an offender's extradition from another state.

4 The DILA as a service-provider

4.1 2016 Legal Assistance Conference: focus on the transfer of sentenced persons

The DILA's annual Legal Assistance Conference, or 'Rechtshilfetagung', took place in Bern on 18 November 2016. On the agenda were the transfer of sentenced persons to their home state, and sentence enforcement on behalf of another state. In view of the very specific nature of these topics, most of the attendees at the conference were representatives of Switzerland's cantonal sentence execution authorities. The conference began by setting out the theoretical basis for voluntary and forced transfer, as well as for sentence enforcement on behalf of another state. Real-life examples illustrated this theoretical input. The second part of the conference involved a series of workshops in French and German. These addressed practical challenges when conducting the related proceedings, identified possible solutions, and answered questions.

The productive discussion generated by the workshops, and the positive feedback from attendees, are evidence of the need on the part of the cantonal authorities for experience-sharing with the DILA.

One point which comes up time and again is the low number of transfers that are actually effected in practice. This is despite the statistics of recent years showing an increase in the number of individuals sentenced in Switzerland applying to the FOJ to serve their sentence in their home country. The reasons given at the conference were primarily the fact that transfer proceedings take a long time, the uncertain outcome of those proceedings, and the associated costs – for translating the transfer documents, for example. In addition, there might be confusion within the cantons themselves about where authority lies and what procedures must be followed.

Ways must be found of supporting transfers as a means of enabling sentenced persons to serve their prison term in their home country. Image: Thinkstock, Allanswart

There is justified political pressure to increase the number of transfers that actually take place. The DILA is therefore planning in 2017 to follow up the Legal Assistance Conference by establishing a working group composed of representatives from the DILA and the competent cantonal authorities. The group will be tasked with drawing up recommendations for the cantonal authorities on how to support the transfer process still further.

During the year under review, the Council of Europe, too, looked into issues concerning sentence enforcement on behalf of another state. Practical problems in this area prompted it to begin reworking its instruments in this area, the aim being to close the gaps in existing arrangements.

Protocol amending the 1997 protocol to the Convention on the Transfer of Sentenced Persons

In June 2016, the European Committee on Crime Problems (CDPC) passed an amendment to the 1997 protocol and submitted a draft of the amending protocol to the Committee of Ministers for approval. The amendments are intended to extend the scope of the 1997 protocol. For example, they set out rules for the transfer of sentence execution not only if the sentenced person flees to their home state but also travels there by legal means and does not return to the sentencing state, and thus avoids serving their sentence. This reflects a real-world concern which, in a case involving Switzerland and France, gave rise to a parliamentary procedural request (15.3510 – the Feller motion: closing the gaps in the execution of sentences passed in Switzerland in member states of the Council of Europe).

Once the new instrument has been approved by the Committee of Ministers, it cannot enter into force until it has been ratified by all states parties to the 1997 protocol. These states parties may nonetheless declare that they will apply the new protocol on a provisional basis, i.e. prior to its official entry into force.

The DILA closely supported work on the amending protocol and brought it to a successful conclusion under Swiss leadership, with a representative of the DILA chairing the CDPC's competent PC-OC, the Committee of Experts on the Operation of European Conventions in the Penal Field.

4.2 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>Security>International Mutual Legal Assistance>International Mutual Legal Assistance in Criminal Matters)

- General information: contact address and contact form, activity report, statistics
- Legal basis
- Overview of the individual processes involved in international legal assistance in criminal matters, including links to fact sheets, checklists and models, as well as to the guide to legal assistance (see below)
- State treaty framework and legislative projects

In addition, specifically for accessory legal assistance:
The Legal Assistance Guide (in German, French and Italian – www.rhf.admin.ch)

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

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

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

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

5.1 Extradition and transfer

- Decisions of the Federal Criminal Court RR.2015.298 of 12 January 2016 and RR.2016.199 of 29 December 2016: risk of an imminent violation of human rights; need for credible evidence;
- Decision of the Federal Criminal Court RR 2015.280 of 27 January 2016: lack of fitness to withstand detention is not an obstacle to extradition;
- Judgment of the Federal Supreme Court 1C_53/2016 of 8 February 2016: Federal Criminal Court dismissal ruling stands; no appeal permitted;
- Decision of the Federal Criminal Court RR.2015.292 of 3 March 2016: both parties bear criminal liability for a special offence;
- Decision of the Federal Criminal Court RR.2015.315 of 7 March 2016: judgment in absentia; applying Art. 37 para. 2 IMAC where the ECE is applicable?;
- Decision of the Federal Criminal Court RR 2015.297 of 16 March 2016 and ruling of the Federal Supreme Court 1C_143/2016 of 2 May 2016: the principle of territoriality; criminal law jurisdiction;
- Judgment of the Federal Supreme Court 1C_268/2016 of 6 July 2016: transfer to Romania against the individual's will; question of release on parole in connection with a transfer;
- Decision of the Federal Criminal Court RR.2016.236 of 21 December 2016: freezing of assets in connection with extradition to Italy.

5.2 Accessory legal assistance

- Decision of the Federal Criminal Court RR.2015.246 of 14 January 2016: penal sanctions under the Cartel Act; grounds for exclusion in the case of foreign exchange offences;
- Decision of the Federal Criminal Court RR.2015.310 of 27 January 2016: presence of non-Swiss parties to proceedings;
- Decision of the Federal Criminal Court RR.2015.253 of 16 February 2016: seizure of assets; criminal nature of the foreign seizure proceedings;
- Judgment of the Federal Supreme Court 1C_46 /2016 of 11 March 2016: penal sanctions under the Cartel Act; civil seizure proceedings abroad;
- Decision of the Federal Criminal Court RR.2015.318 of 1 June 2016: status of a legal entity accused of an offence abroad when the Chairman of its Board of Directors is being interviewed for legal assistance purposes;
- Decisions of the Federal Criminal Court RR.2016.65 of 14 July 2016 and RR.2016.66 of 15 July 2016: criminal jurisdiction of requesting state;
- Decision of the Federal Criminal Court RR.2016.64 of 29 July 2016: no restrictions on the use abroad of evidence gathered by a private claimant in criminal proceedings in Switzerland;
- Judgments of the Federal Supreme Court 1C_344/2016 and 1C_345/2016 of 8 August 2016: case not deemed particularly important simply because criminal proceedings attract considerable media attention;
- Decision of the Federal Criminal Court RR.2016.61 of 10 August 2016: claim of denial of the right to a legal hearing rejected; legal entities may not claim a breach of Art. 2 IMAC;
- Decision of the Federal Criminal Court RR.2016.128 of 28 September 2016: authorisation for the cantonal executing authority to appeal;
- Judgment of the Federal Supreme Court 1C_376/2016 of 5 October 2016: ruling that legal entities cannot invoke Art. 2 IMAC upheld;
- Decision of the Federal Criminal Court RR.2016.159 of 16 November 2016: authorisation to appeal against the handover of Swiss criminal records;
- Decision of the Federal Criminal Court RR.2016.77 of 13 December 2016: appeal against a Swiss request for legal assistance to another state;
- Decisions of the Federal Criminal Court RR.2016.174 and RR.2016.175-176 of 21 December 2016: handover of telephone surveillance records prior to issue of final ruling.

6 Important statistical information on international legal assistance, 2012–2016

Action group	Type of action	2012	2013	2014	2015	2016
Extradition requests to foreign countries		186	216	259	257	**282**
Extradition requests to Switzerland		358	413	364	397	**372**
Search requests to foreign countries		202	251	289	278	**312**
Search requests to Switzerland		19 999	21 862	24 940	29 664	**33 401**
Prosecution transfer requests to foreign countries		171	225	220	199	**164**
Prosecution transfer requests to Switzerland		55	65	113	110	**117**
Sentence execution requests to foreign countries	Custodial sentences	16	6	4	5	**10**
Sentence execution requests to Switzerland	Custodial sentences	2	2	6		**2**
	Fines			2		**5**
Prisoner transfer abroad	At the request of the sentenced person	31	51	47	48	**48**
	Under Additional Protocol	1		2	3	**4**
Prisoner transfer to Switzerland	At the request of the sentenced person	18	18	14	13	**18**
Suspect search for international tribunals		2	1		1	
Legal assistance requests to Switzerland	Gathering of criminal evidence	987	1 088	1 173	1 180	**1 268**
	Gathering of criminal evidence: supervision	1 091	1 089	1 033	1 113	**1 171**
	Gathering of criminal evidence: own case	35	24	33	43	**46**
	Handover of assets	10	15	13	16	**13**
	Handover of assets: own case	4	8	4	2	**4**
	Gathering of civil evidence	74	61	44	43	**57**
Legal assistance for international tribunals	International Criminal Court	5	1	2		**3**

Legal assistance requests to foreign countries	Gathering of criminal evidence	853	869	1 052	900	**982**
	Handover of assets	5		5	5	**6**
	Gathering of civil evidence	44	29	23	13	**34**
Secondary legal assistance	For use in criminal proceedings	7	10	11	10	**9**
	For forwarding to third country	4	7	3	10	**7**
Unsolicited legal assistance	To foreign countries (Art. 67*a* IMAC)	118	133	88	105	**114**
	To Switzerland	3	8	2	3	**2**
Document service requests to Switzerland	Criminal law	227	257	368	306	**264**
	Civil law	8 190	577	579	586	**777**
	Administrative law	79	79	50	59	**55**
Document service requests to foreign countries	Criminal law	606	744	629	549	**552**
	Civil law	981	952	990	924	**855**
	Administrative law	258	673	587	588	**602**
Sharing	International sharing (Swiss forfeiture ruling)	10	3	6	1	**9**
	International sharing (foreign forfeiture ruling)	3	5	8	5	**7**
	National sharing				120*	**33**
Instruction to the FDJP	Limitation of cooperation (Art. 1*a* IMAC)			1		
	Authorisations under Art. 271 of the Swiss Criminal Code		1	6		

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

Judicial decisions

Court	2012	2013	2014	2015	2016
Federal Criminal Court	208	257	265	242	195
Federal Supreme Court	50	61	50	67	56
Total	**258**	**318**	**315**	**309**	**251**