

Navigating cross-border investigations involving Switzerland

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Companies and individuals are increasingly confronted with the challenge of navigating Swiss blocking statutes when trying to provide US enforcement authorities with materials based in Switzerland. Gibson Dunn & Crutcher's F. Joseph Warin, Jason H. Smith and Susanna G. Schuemann examine how practitioners can work with US authorities to address these situations.

When a foreign enforcement authority requests materials or information located in Switzerland, companies often face a challenging risk calculus: comply with the request at the risk of violating Swiss privacy laws and blocking statutes or jeopardise valuable cooperation credit. Although failure to cooperate with international enforcement authorities can result in stiff corporate penalties and the loss of cooperation credit and advantageous resolution vehicles, the prospect of violating Swiss law introduces its own set of problems. Sanctions for a violation of Switzerland's blocking statute can include both stiff monetary penalties and imprisonment of up to three years. The gravity of Switzerland's blocking statute first made waves in 1988, when a Swiss lawyer was imprisoned for 10 days after helping to draft meeting notes that he knew would be used in an Australian criminal proceeding. More recently, in 2017, Swiss authorities imposed a fine of 274,000 Swiss francs (\$270,000) and a two-year probation on an in-house lawyer for providing information to the US Department of Justice (DOJ). In both cases, the Swiss Supreme Court concluded that the lawyers violated Switzerland's blocking statute.

Navigating the requirements of Swiss law and conflicting expectations from international enforcement authorities is therefore critical for any company contending with a cross-border investigation with Swiss touch points. It is critical to consult with experienced Swiss counsel to identify possible touchpoints with Swiss requirements and how to comply with them. Against this backdrop, we identify some of the more common roadblocks that can arise in an investigation involving Switzerland and how companies can best position themselves to address them.

International enforcement authorities incentivise fulsome investigations and disclosures

It is no secret that enforcement authorities in the United States and elsewhere expect robust internal investigations leading to candid disclosures of factual findings. Using a carrot-and-stick approach, companies that truncate an investigation (or fail to conduct one altogether) or withhold relevant information often face higher penalties and burdensome post-resolution requirements, such as an independent compliance monitor. Cooperation, by contrast, can result in drastically reduced fines and open the door to favourable remedies, including deferred prosecution agreements, non-prosecution agreements or even declinations.

For example, as a prerequisite for any cooperation credit whatsoever, corporate criminal defendants resolving charges with the DOJ “must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct.” The Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy contains a presumption in favour of declination if the company voluntarily discloses FCPA-related misconduct, cooperates fully in the ensuing investigation, and appropriately remediates the misconduct. Even if a declination is unavailable due to aggravating circumstances, such as pervasive misconduct, up to a 50% reduction off the low end of the US Sentencing Guidelines range is available to companies that cooperate.

Because Switzerland’s blocking statute can stand as a significant impediment to comprehensive investigations and disclosures, enforcement authorities are willing to reward companies that find workarounds, as underscored by the DOJ’s April 2019 non-prosecution agreement with Zurich Life Insurance Company Ltd. In reaching a non-prosecution agreement, the DOJ noted that the company cooperated fully by working with Swiss authorities “to waive Article 271 of the Swiss Criminal Code, which restricted the disclosures that Zurich Life could make to the Department, thereby facilitating Zurich Life’s production of certain information that would have otherwise been prohibited.”

The DOJ is not the only enforcer that is willing to offer favourable resolution vehicles and penalty discounts to companies that cooperate fully. In considering whether to enter into a deferred prosecution agreement, the UK’s Serious Fraud Office (SFO) gives “considerable weight” to companies that adopt a “proactive approach” in their cooperation, including by identifying witnesses and the documents shown to them, disclosing account information, making witnesses available for interviews, and providing a report of any internal investigation with underlying source documents. The SFO will also seek significantly reduced penalties for cooperating companies. For example, in resolving bribery charges against

Rolls-Royce, the SFO agreed to a fine of nearly £498 million (\$605 million) after a 50% discount owing in part to the company's cooperation.

Potential obstacles to cooperation under Swiss law

Cooperation in the eyes of an overseas enforcer may amount to liability under the laws of Switzerland. Indeed, notwithstanding the strong expectations from international enforcers to provide full disclosures, Swiss law can hinder companies that wish to do so. Article 271 of the Swiss Penal Code (SPC) is Switzerland's primary blocking statute – it broadly prohibits taking or facilitating activities on Swiss territory on behalf of a foreign authority, where such activities are the responsibility of a public official.

In a decision issued in December, Switzerland's Federal Supreme Court reaffirmed that article 271 prohibits the furnishing of information to foreign enforcers, even if pursuant to a non-prosecution agreement with US authorities. In that case, a Swiss-based asset management company reached a resolution with the DOJ in a dispute regarding allegations that some of the company's clients evaded US taxes. In response to a request from the DOJ to provide a list of clients who may be subject to US taxes, the company asked the DOJ to seek the information through official channels with the Swiss authorities. Declining to do so, the DOJ pressed the asset management company to provide the client information directly, citing obligations under the company's non-prosecution agreement. After obtaining two opinions affirming, albeit with reservations, the legality of furnishing the information, a lawyer for the company met with the DOJ in the US to provide the information on a USB stick. The Swiss Federal Prosecutor's Office imposed a fine of \$270,000 and a two-year probation on the lawyer who provided the information to the DOJ. On appeal, the Federal Criminal Court acquitted the lawyer under a defence available in Switzerland to those who are plainly unaware of the act's unlawfulness. The Swiss Supreme Court rejected the lower court's decision on the grounds that soliciting the experts' legal advice, coupled with the equivocal nature of that legal advice, were evidence that the lawyer harboured doubts as to whether delivering the data to the DOJ violated Article 271.

A host of other statutes further limit collection, use, and disclosure of information gathered in Switzerland. Article 273 of the SPC prohibits disclosure, or investigation for purposes of disclosure, of industrial and business secrets to a foreign government. Article 162 of the SPC penalises disclosure of third-party business and industrial secrets if doing so breaches a statutory or contractual duty of confidentiality to a third party. Article 328b of the Swiss Code of Obligations imposes a duty of care on employers to protect an employee's data.

Escaping the catch-22

While the demands of an overseas enforcer and countervailing requirements of Swiss law may seem like a Catch-22, companies can navigate these challenging waters through a combination of careful analysis and planning, input from experienced Swiss counsel and open communication with enforcement authorities.

First, when an enforcer seeks documents located in Switzerland, companies should consider whether duplicate documents are available in another jurisdiction that permits their

production. For example, if the DOJ requested a report that was generated in Switzerland, it may be possible to avoid Article 271 restrictions if that same report had previously been shared with employees in the US in the regular course of business.

Second, companies should be mindful that a compulsory request, such as a document subpoena, can trigger Switzerland's blocking statute. A voluntary request, however, reduces the specter of Article 271 restrictions as a non-compulsory production may not be considered an official act of a foreign jurisdiction. In our experience, US enforcers are aware that subpoenas can implicate Article 271 and are often willing to work with companies to ensure their request is voluntary. Nevertheless, there is no bright line distinguishing between a voluntary and compulsory request. It would therefore be prudent to seek the advice of experienced Swiss counsel to ensure that a request is not construed as compulsory in the eyes of Swiss authorities.

Third, companies can seek waiver of Article 271 with the relevant Swiss authority. As discussed above, the DOJ credited Zurich Life's cooperation in part because it obtained a waiver from the Swiss government. Waivers, however, are granted on a case-by-case basis and may be disfavoured if mutual legal assistance, discussed further below, is available to the requesting authority.

Fourth, companies should openly communicate with enforcers when it is not possible to satisfy a request absent a violation of Swiss law. Indeed, companies must do so to qualify for cooperation credit from the DOJ. The Justice Manual acknowledges that while "there may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government . . . the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor." The FCPA Corporate Enforcement Policy further states that under such circumstances a company "should work diligently to identify all available legal bases to provide such documents[.]"

Fifth, even if a company cannot fulfil an overseas enforcer's request directly, the company may be able to provide the requested materials through Swiss authorities. The foreign enforcer must formally request mutual legal assistance from the relevant Swiss authority, which then manages document production between the company and the requesting enforcer. Swiss authorities should be viewed as another participant in the investigation. They have their own requirements on what kind of information can be forwarded to the requesting enforcer, and they can reject requests for mutual legal assistance based on those requirements. If the requesting authority is a financial regulator, such as the US Securities and Exchange Commission or the US Federal Reserve Board, mutual legal assistance can be sought through the Swiss Financial Market Supervisory Authority (FINMA). In 2018, FINMA received 371 requests for assistance. If the foreign entity, such as the DOJ, is conducting a criminal investigation, mutual legal assistance may be provided through the Swiss Federal Office of Justice (FOJ), which is Switzerland's central supervisory authority for mutual legal assistance in criminal matters. The FOJ may, and frequently does, delegate requests to Switzerland's Office of the Attorney General (OAG), which has authority to prosecute complex financial crimes, such as money laundering and bribery. As of year-end 2018, the OAG was overseeing 313 ongoing mutual assistance proceedings.

Finally, whether responding to a request directly or through mutual legal assistance, companies should manage expectations around the timing of productions as early as possible. Companies should collaborate with the requesting authority – and, in the case of mutual legal assistance, the Swiss regulator – to establish a realistic timetable to satisfy production requests that factors for the mutual legal assistance process, waiver, and various other, time-intensive document production requirements, such as redactions to protect client identifying data.