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# Defending U.S. Discovery Requests in Switzerland

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## The Swiss Perspective

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## Companies between the Rock and the Hard Place

### U.S. sanctions and penalties

### Swiss sanctions and penalties

- Article 271 Swiss Criminal Code
- Article 273 Swiss Criminal Code
- Swiss data privacy law

# Article 271 Swiss Criminal Code

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## Article 271

### Unlawful activities on behalf of a foreign state

1. Any person **who carries out activities on behalf of a foreign state on Swiss territory without lawful authority**, where such activities are **the responsibility of a public authority** or public official,

[...]

any person **who encourages such activities**,

is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.

# Article 271 Swiss Criminal Code

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- Approx. 30 convictions between 1960 and 2011
- Activities that can fall under Article 271 SCC:
  - Collecting and producing documents
  - Questioning witnesses, e.g.:
    - Depositions;
    - Written witness statements;
    - Affidavits by enquirers about statements made by witnesses (ATF 114 IV 128 of 1988)
  - Service of court orders

# Article 271 Swiss Criminal Code

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- Does Swiss law characterize the activity, by its nature and purpose, as an act that is assigned to a public authority?
  - (-) if witnesses voluntarily answer questions and such answers are not used directly or indirectly as evidence
  - (-) in case of voluntary affidavit about own knowledge (FDPJ, 2016)
  - (-) in case of voluntary production of documents as evidence
- Does the activity circumvent judicial assistance by the U.S. court?
  - Is judicial assistance required at all? Who is the party in the U.S.?
  - Is the Swiss company free to cooperate? Only procedural consequences?
  - (-) in a case where the Swiss defendant answered to a U.S. subpoena by searching for relevant documents and informing the U.S. court how many and what types of relevant documents it found (FDPJ, 2014)

# Article 271 Swiss Criminal Code

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- How to prevent Art. 271 problems?
  - Collect and transfer documents on a voluntary basis prior to any subpoena
  - Ask witnesses to voluntarily travel abroad to be questioned – but carefully check foreign law
- How to respond to U.S. subpoena and avoid Art. 271 problems?
  - Request an exemption from the competent authority (FDPJ for civil and criminal matters; Federal Finance Department for tax matters and financial market supervision)
  - Inform the Department of Foreign Affairs and request that it instruct the Swiss embassy in the U.S. to intervene
  - Pave way for accelerated judicial assistance (e.g., commissioner)

# Article 273 Swiss Criminal Code

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## Article 273

### Industrial espionage

Any person who **obtains a manufacturing or trade secret in order to make it available** to an external official agency, a foreign organization, a private enterprise, or the agents of any of these, or, any person who **makes a manufacturing or trade secret available to an external official agency, a foreign organization, a private enterprise, or the agents of any of these,** is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year. Any custodial sentence may be combined with a monetary penalty.

# Article 273 Swiss Criminal Code

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- 60+ convictions between 1960 and 2011
- Prohibited: Disclosure of any facts related to commercial life if there is a legitimate interest in keeping them secret:
  - Interest of the Swiss federation / Swiss economy as a whole
  - Interest of a third party (e.g., Swiss companies, Swiss employees of the disclosing party)
- Disclosure of information is permissible if:
  - only the disclosing party is interested in its secrecy
  - Disclosure in the context of judicial assistance
- Nexus to Switzerland required:
  - (+) for information concerning a Swiss bank account held by a foreign client (ATF 141 IV 155)



# Article 273 Swiss Criminal Code

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- How to prevent or overcome Art. 273 problems?
  - Redact the information
  - Obtain the third party's waiver of secrecy
  - Obtain contractual safeguards and protective orders to ensure that the information will only be used in the civil proceedings at issue? Risky. There is no settled case law that would exclude a risk of prosecution even in such circumstances

# Data Privacy Law

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- Sources:
  - Data Privacy Act (“DPA”) and Ordinance to the DPA
  - special provisions (e.g., Art. 328b CO for employee data)
- Assessment necessary of:
  - Disclosure of data, and
  - Transfer of data to the U.S.
- Sanctions:
  - Criminal penalties in certain cases
  - Claims by data subject (incl. cease and desist order, interim relief, damages)
- Problems can be prevented by redacting data

# Data Privacy Law

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- Under DPA, disclosure does generally not need any justification if:
  - Disclosure is done in accordance with the law;
  - Disclosure is done in good faith and limited to what is necessary;
  - Disclosure of data was indicated to the data subject, or was evident to the data subject from the circumstances, at time of collecting the data;
  - Data is correct; and
  - Disclosure does not concern sensitive personal data
- Requirements for justifying disclosure (Art. 13 DPA):
  - Consent by data subject (sensitive personal data: express consent);  
or
  - Justification by overriding private interest (but: risky)

# Data Privacy Law

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- Under DPA, data can only be transferred to the U.S. for production as evidence if one of the following applies (Art. 6 DPA):
  - Guarantees are obtained that the data is protected in the U.S. according to Swiss standards (guarantees to be notified in advance to the Swiss Federal Data Privacy Commissioner, under threat of criminal penalty);
  - Consent by data subject (sensitive personal data: express consent);  
or
  - Transfer is essential in the specific case for the establishment, exercise, enforcement or defense of legal rights and/or claims before the courts

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