Switzerland hosts a sizeable number of multinational enterprises. Many of them have the headquarters of the ultimate parent company in Switzerland and their affiliated companies are located throughout the world. As a consequence these multinational enterprises are subject to or, sometimes more accurately put, are exposed to more than one jurisdiction. This can be the case even if a multinational enterprise is structured as a group of legally separate and independent companies, since the jurisdictional reach of some of the countries crosses borders can affect a parent company which does not do any business in such country. Thus, different jurisdictions and different legal systems can be on collision course with regard to individual legal provisions, proceedings or even views or attitudes of courts and government agencies.

A particularly excruciating example of such a collision of different obligations is the dilemma facing a Swiss company with independent US affiliates, where the Swiss company is asked for documents or witnesses by parties to litigation or government agencies for use in US proceedings.

**US Proceedings**

With increasing frequency multinational affiliates in the US, Swiss parent companies or their Swiss affiliates have been asked or compelled to produce documents and material held by a Swiss parent or affiliate or take depositions of employees of a Swiss affiliate in US proceedings before courts or government agencies, (criminal or civil). These requests serve the purpose of obtaining evidence and are made pursuant to pre-trial discovery provisions in US civil litigation and under subpoenas in US criminal and regulatory investigations.

There are generally three types of requests.

1) The US affiliate of a Swiss company is a defendant in a civil litigation or the subject or target of a US governmental investigation.

   The plaintiffs’ or governments’ request is addressed to the US affiliate and seeks documents, which are located in Switzerland, in the possession of the Swiss parent company, a Swiss affiliate or of a third party.

2) The Swiss parent company or a Swiss affiliate is a defendant in a civil litigation or the subject or target of governmental investigation.

   The request seeks documents which are located in Switzerland, in possession of the Swiss parent company, a Swiss affiliate or a third party and is presented directly to the Swiss company.

3) The request is addressed to the Swiss parent company or a Swiss affiliate in an informal way, i.e. without a subpoena or a court order, seeking documents located in Switzerland in the possession of the Swiss company or a third party.

   All of the above request can also relate to the taking of a deposition of an employee of a Swiss company.

   The common theme in all cases is that US parties, either civil plaintiffs or government agencies, are trying to obtain evidence which is located in Switzerland in connection with a US proceeding. As long as these parties avail themselves of the appropriate formal means to do so - although the Swiss company may still not like the fact that it will likely have to produce documents or witnesses pursuant to the conditions and limitations of the appropriate authorities - it will at least have the benefit of a formal procedure, which protects its rights under Swiss law and due process.

   These formal procedures consist among others of

   (i) the “Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (“The Hague Evidence Convention”), which entered into effect for Switzerland as of January 1, 1995). The convention codifies the taking of evidence abroad pursuant to a letter of request. Under the convention, a judicial authority in the United States sends a letter of request to the appropriate Swiss Central Authority in accordance with the convention.

   (ii) The Swiss-American Treaty on Mutual Assistance in Criminal Matters of 25 May 1973 (Mutual Legal Assistant Treaty). The treaty covers all proceedings for international cooperation in the enforcement of criminal law. The treaty was implemented in Swiss federal law that governs the Swiss procedure for executing requests made under the treaty.

   Unfortunately, in many cases US plaintiffs, courts or government agencies in the US give insufficient attention to the fact that their government has agreed pursuant to bilateral or multilateral agreements to certain “rules of the game” in dealing with Swiss companies. If these parties put pressure on the affiliate in the US to provide documents located in Switzerland, or if they directly address the company in Switzerland with or without a court order or a subpoena, without using the formal administrative channels described above, this can create grave difficulties for the Swiss companies given the requirements of Swiss law.

**Switzerland's Position**

The Government of Switzerland has a strong interest in the preservation of the integrity of its laws and puts a high value on sovereign independence and the individual autonomy and economic privacy of its citizens. Following the general principle of international civil law, judicial sovereignty has been an important concept in Switzerland. Generally stated the concept acknowledges that the sovereignty of any state extends to its national borders and a state exclusively exercises its powers within its borders.

Switzerland has enacted two important sections of the Penal Code (PC) in the 1930s in times of utmost political tensions and threats to the sovereignty of Switzerland. The Sections 271 PC and 273 PC are still in effect in order to protect the Swiss sovereignty and economic privacy of its citizens. Neither are they “blocking statutes”, invented to counter far reaching efforts by US plaintiffs or US government agencies to obtain evidence in Switzerland nor are they toothless
window dressing\(^3\). The legitimate needs of parties in the US or other foreign countries proceedings have been evaluated and met through multilateral and bilateral agreements, like the Hague Conventions and the Mutual Legal Assistance Treaty. Switzerland has adopted while preserving its judicial sovereignty\(^4\).

When US plaintiffs or US government agencies disregard the administrative channels provided through the Hague Convention and the Mutual Legal Assistance Treaty, and put pressure on the Swiss company in order to obtain evidence in a US proceeding, the company faces the dilemma of being non-compliant with legal provisions of the US if it fails to provide the information and being subject to criminal sanctions under Swiss law if it does. Given this dilemma it is important to have an understanding of Articles 271 PC and 273 PC and to also present an interpretation of what can and cannot be done under these provisions. Below follows a description of key issues related to Articles 271 PC and 273 PC.

### Article 271 PC

![Art. 271 Collection](Swiss Documents in US Procedures – March 2009 Dr. M. Henrich\(^5\))

- 271 PC deals with acts on Swiss territory, which are in the competence of authorities and which are performed for or on behalf of a foreign government. The collection of evidence on the Swiss territory in US proceedings generally falls under this provision.
- The gathering of evidence ordered by and for use in foreign proceedings (whether criminal, civil or administrative) is considered to be an official act within the meaning of Article 271 PC and may, as a rule, be performed only by Swiss authorities\(^10\). A Swiss company must therefore not collect evidence which is in possession of a third party.
- Article 271 PC does not apply if the Swiss company collects and voluntarily presents documents in its possession to substantiate a defense or a claim in US proceedings as this is deemed also under Swiss law a task of the parties and not of the authorities\(^11\). However, once a court order or a subpoena is issued and addressed to the Swiss company the collection for the purpose of complying with the court order or subpoena is no longer allowed.
- Under Article 271 PC, third parties are usually customers, suppliers and other business partners. When it comes to employees, a distinction can be made between former employees that are considered third parties, while current employees are not considered third parties\(^12\).
- Only under exceptional circumstances will permission be given by the respective Swiss Federal Department for its area of competence allowing the foreign authority or litigants and their attorneys to take evidence in Switzerland themselves (practical reasons impede the gathering of evidence by way of judicial assistance)\(^13\).
- No sanctions under Articles 271 PC will be applicable if the evidence is taken through the channels of judicial assistance\(^14\).
- Depositions of witnesses for use in US proceedings must not take place in Switzerland.
- Even if the document collection and provision is possible under Art. 271 PC, careful consideration needs to be given to the restrictions contained in Art. 273 PC.

### Article 273 PC

- Like Article 271 PC, Article 273 PC protects Swiss sovereignty and in addition the Swiss economy and the economic privacy of Swiss citizens, by prohibiting the disclosure of trade or business secrets to foreign authorities and or private persons.
- A triage is required under Article 273 PC. Under this provision a Swiss company may produce the following documents without redacting them:
  - Documents containing business and trade secrets of the Swiss company (the Swiss company being the master of its own secrets)\(^15\).
  - Documents containing information relating to third parties if such third parties (that are the masters of the secrecies) explicitly agree that the information be disclosed, since the third parties are the masters of their own secrets.
- Customers, suppliers and other business partners of the Swiss company are typical third parties. With respect to employees both former and current employees are third parties to the extent that they have an own proprietary right and/or interest to keep information secret.
- In the light of legal precedents, however, it can be stated that when the information includes names of third parties, such as customers, suppliers and other business partners, the names together with other information can, in a wider context, constitute a secret under Article 273 PC\(^16\). The name of a third party alone does not qualify as a secret under Art. 273 PC\(^17\).
- Documents relating to third parties, who did not explicitly agree that the information be disclosed may not be produced or, if so, only if such third party information is redacted.
- Article 273 PC applies to all document productions for use in US proceedings, whether criminal, civil or administrative\(^18\).
- Article 273 PC applies only if there is a sufficient inland-nexus of the information to Switzerland. This is typically the case if the third party has a Swiss domicile\(^19\). If the third party has its domicile outside of Switzerland Article 273 PC will not apply\(^20\).
- No sanctions under Articles 273 PC will be applicable if the evidence is taken through the channels of judicial assistance\(^21\).
About the author:
Dr. Martin P. Henrich is Head Global Litigation at Novartis International, Basel.
The author is grateful to Dr. Peter C. Honegger, Partner at Niederer Kraft & Frey, Zurich, for his contribution to this article. Dr. Honegger is also a member of the Legal Committee of the SACC.

1) SR 0.274.132
3) SR 0.351.933.6
5) Federal Act on International Mutual Assistance of Criminal Matters on March 20, 1981, SR 351.1
6) Amicus Brief of Government of Switzerland in USA vs. UBS AB in the US District of the Southern District of Florida, Miami Division, Case No.: 09-20423-CIV-GOLD/MCALILEY, April 30, 2009, at 1
8) According to the federal office for statistics there have been 29 and 26 convictions re. Art. 271 PC and 273 PC respectively between 1984 and 2006, http://www.bfs.admin.ch/bfs/portal/de/index/themen/19/22/lexi.topic.1.html
9) Sic Prof. Isabelle Romy in: Declaration of Professor Romy on Swiss Law in the United States District Court for the Southern District of Florida, Miami division in the USA v UBS AG, Case No. 1:09-CV-20423 GOLD/MCALILEY, April 28, 2009
10) Lionel Frei, see supra note 3, at 191-192. Peter Honegger, Swiss Banking Secrecy, Butterworth Journal of International Banking and Financial Law, August 1990, at 348
11) Thomas Hopf, see supra note 1, art. 271 note 15. Lionel Frei, Discovery, see supra note 3, at 193. Curt Markees, Die Vornahme von Prozeßhandlungen auf schweizerischem Gebiet zuhanden eines ausländischen Verfahrens im Lichte des Art. 271 StGB, Schweizerische Juristen-Zeitung 1969, at 36. Peter Honegger, see supra note 2, at 137
12) Thomas Hopf, Basler Kommentar, Strafgesetzbuch II, Basle/Geneva/Munich 2007, art. 271 note 15
13) Lionel Frei, Discovery, see supra note 3, at 192. Peter Honegger, see supra note 4, at 352, footnote 78
15) Thomas Hopf, see supra note 1, art. 273 notes 7 and 9. Lionel Frei, Discovery, see supra note 3, at 189. Peter Honegger, see supra note 2, at 141
16) Rudolf Gerber, Einige Probleme des wirtschaftlichen Nachrichtendienstes, 93 Zeitschrift für Strafrecht 257, at 280-284 (Berne 1977). Peter Honegger, see supra note 4, at 348
17) This may be different in a case where the name of a bank's customer appears in a bank document without any further context provided
18) Thomas Hopf, see supra note 1, art. 271 note 15. Peter Honegger, Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten, Schweizer Schriften zum Handels- und Wirtschaftsrecht, vol. 89, Zurich 1986, at 137
19) Thomas Hopf, see supra note 1, art. 273 note 11. Lionel Frei, Discovery, see supra note 3, at 189. Peter Honegger, see supra note 4, at 348
20) Thomas Hopf, see supra note 1, art. 273 note 11. Lionel Frei, see supra note 3, at 189. Peter Honegger, see supra note 4, at 348. See also footnote 17.