

White Collar Crime - Switzerland

Swiss criminal prosecution authorities may share secret personal data

Contributed by **CMS von Erlach Henrici Ltd**

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Introduction

A December 2012 Federal Supreme Court decision⁽¹⁾ illustrates the extent to which Swiss criminal prosecution authorities may informally exchange secret information (eg, information covered by banking or professional secrecy) with foreign peers, with potentially significant consequences for the persons affected.

Considering that similar information sharing provisions exist in other law enforcement areas (eg, the Cooperation Agreement in Competition Matters⁽²⁾ signed by the European Union and the Swiss Confederation on May 17 2013 (ratification procedure pending)) this decision may set a new standard for the informal transmission of secret data by Swiss authorities.

Facts

On July 9 2002, upon notification of Bank C, the Federal Public Prosecutor opened a preliminary investigation against eight Brazilian individuals (all of whom were officers at the Brazilian Tax Authority) for suspected money laundering activities. Officer A was among those eight suspects, but not officer X. On August 29 2002 the Swiss prosecutor filed a request for judicial assistance with the Brazilian general prosecutor.

On October 7 2002 the Swiss prosecutor met the Brazilian prosecutor and gave him information regarding the preliminary investigation, including a detailed list of the bank accounts frozen at Bank C (including account numbers, the date the accounts were opened and when first payments made, frozen amounts and the identity of holders of powers of attorney). Officer X was mentioned on that list as power of attorney for one of the accounts.

In December 2002 the Swiss prosecutor opened an additional investigation against a ninth Brazilian tax officer, officer B.

On February 2 2003 the Swiss prosecutor filed an addendum to his previous request for judicial assistance relating to officers A and B. The request was accompanied by a list detailing the transactions made to and from all suspicious accounts. The Brazilian prosecutor opened an investigation against the eight tax officers on February 4 2003 and filed a request for judicial assistance with the Swiss prosecutor based on the information obtained from the latter. The Swiss investigation against officer B was extended from May 2 2003, so that it would also target officer X.

On October 1 2003 the Rio de Janeiro Criminal Court convicted 22 persons, among them officers A, B and X. The latter was convicted of money laundering and passive corruption, and was sentenced to 15 years in prison and deprived of his status as a public servant. Officer X sued the Swiss confederation for damages, claiming that the information exchange between the Swiss and the Brazilian prosecutor was illegal.

Secret information exchange

Article 67a of the Federal Act on International Mutual Assistance in Criminal Matters permits a Swiss prosecutor to transmit to a foreign peer information and evidence gathered in his or her own investigation if he or she determines that such transmission may permit the opening of criminal proceedings or facilitate an ongoing criminal investigation. According to Article 67a(4), this does not apply to "evidence that is subject to the rules on secrecy", such as banking documents. However, pursuant to Paragraph

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5, "information that is subject to the rules on secrecy may be transmitted if it may enable the foreign State to present a request for mutual assistance".

In this case, the information which the Swiss prosecutor transmitted to his Brazilian colleagues was related to Swiss bank accounts and was hence clearly "subject to the rules on secrecy". The issue of contention was whether the lists transmitted on October 17 2002 and February 12 2003, in the context of Article 67a, were considered secret information – which "may be transmitted if it may enable the foreign State to present a request for mutual assistance" – or rather as secret evidence – which may not be exchanged under Article 67a.

Although the Federal Supreme Court refrained from providing general definitions of the terms 'information' and 'evidence', in this case it interpreted the term 'secret information' broadly.

Bank account statements and correspondence with the bank are secret evidence and must not be transmitted to foreign authorities based on Article 67a(5). The same is true for official documents of a Swiss prosecutor or any other public authority – for example, documents that carry a seal, signature or any other sign giving them official character.

In contrast, internal case summaries, memoranda or tables prepared by a Swiss prosecutor for internal purposes are secret information and can thus be forwarded to foreign authorities under Article 67a(5), even if they contain detailed information regarding the Swiss investigation (eg, case number, name of each accused person, birth date, profession, marital status or number of identity card) or bank accounts (eg, account number, date account opened, names and personal details of all persons with a power of attorney for the account and balance). This information can be transmitted orally as well as in writing.

A Swiss prosecutor acting on the basis of Article 67a must:

"at least endeavour not to transmit data or official documents which due to their nature, official character or very detailed content could be directly used as evidence in a national proceeding by the foreign state."

Further, the Swiss prosecutor must inform his or her foreign peers about the special purpose of the information exchange based on Article 67a. If a person affected by the transmission of information considers that the foreign prosecutor has used the information in an excessive manner (eg, using it as actual evidence rather than mere information), it must object to such use in the foreign proceeding. The Swiss confederation cannot be held liable for an excessive use of the transmitted information by the foreign authorities if the Swiss prosecutor has at least endeavoured not to transmit evidence and if he or she has informed the foreign prosecutor about the limited purpose of an information transmission based on Article 67a(5).

It is not inappropriate or disproportionate to transmit to a foreign criminal prosecutor information on a person holding a power of attorney for a bank account of a person suspected of a tax crime. The holder of the power of attorney is *prima facie* involved to a sufficient degree in the matter under investigation so as to justify the sharing of this data with the foreign authority.

As a result, the Federal Supreme Court ruled that the Swiss prosecutor acted in conformity with Article 67a(5) by sharing the information regarding officer X with the Brazilian prosecutor.

'Informal' information exchange?

Considering the international trend towards increased information exchange cooperation between government authorities, it seems reasonable to perceive the Federal Supreme Court's decision as proof that the Swiss authorities and courts are more willing than ever to take an accommodating stance over international information exchange in the future.

This should also be kept in mind in other areas of law enforcement – for instance, in competition law, where a new bilateral cooperation agreement between Switzerland and the European Union will establish a liberal information exchange regime between competition authorities.

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Endnotes

(1) Federal Supreme Court 139 VI 137, available at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm.

(2) Cooperation Agreement in Competition Matters (Press Release of the European Commission, May 17 2013), available at http://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf.

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