

Selling Swiss bank customers' confidential data – Switzerland claims worldwide jurisdiction

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Facts

Federal Tribunal Comment

On February 25 2015 the Federal Tribunal⁽¹⁾ provided guidelines to resolve the controversial question of whether and in what circumstances the sale of Swiss bank customer information to foreign tax authorities is punishable under Swiss law, even if the perpetrator acts abroad. The tribunal held that the conduct at issue in this case qualified as economic espionage and was thus an offence against the state's interests. As such, it was subject to Swiss jurisdiction, regardless of where the offence had been committed.

Facts

An Austrian citizen, X, purchased confidential data from a bank employee about numerous German taxpayers who maintained accounts with a Swiss bank. X resold the data to German tax authorities against payment of €2.5 million. The Swiss federal attorney initiated a criminal investigation in early 2010 against X and further suspected perpetrators. X passed away while the penal investigation was pending. The federal attorney thus closed the proceedings against X, but ordered the confiscation of funds of the estate equal to the amount paid by the German authorities as consideration for the data sold. X's heirs appealed the confiscation order, arguing, among other things, that confiscation of the proceeds from an offence committed abroad is not permissible unless Switzerland has jurisdiction over the offence pursuant to Articles 3 and following of the Penal Code.⁽²⁾ In this case, all acts involved in X's alleged offence had occurred in foreign territory. The heirs accordingly concluded that X's suspected conduct was not punishable in Switzerland, and that consequently Switzerland had no right to confiscate the proceeds. The tribunal rejected this, confirming the lower-court decision.⁽³⁾

Federal Tribunal

The tribunal first clarified that, pursuant to Article 4 of the code, offences against the state are subject to Swiss penal law regardless of where they are committed, and that such provision expressly refers to economic espionage, among other things, as defined in Article 273 of the code. It further made the point that the prohibition against economic espionage, which involves the unlawful obtaining and disclosure of (private) manufacturing and trade secrets, primarily aims to protect Swiss sovereignty and prevent spying for secrets to the detriment of the national economy.

The tribunal acknowledged that information acquired through spying which is disclosed to a foreign governmental agency, foreign organisation or business undertaking must have sufficient nexus to Switzerland, and recognised that Article 273 should apply with restriction according to prevailing doctrine. As a result, the tribunal analysed the controversial question of whether the use of a Swiss bank account by a foreign taxpayer is a fact connected closely enough to Swiss interests to justify the provision's application.

The tribunal considered that the disclosure of personal data of a significant number of customers would not only interfere with the interests of the customers concerned to maintain the privacy of

AUTHOR

**Bernhard
Lötscher**



their financial situations, but also infringe on the bank's interest to preserve secrecy regarding its own business. The tribunal further noted that the duty of Swiss bankers to keep secret all information about customers imparted to them in their professional capacity (known as bank secrecy) is not only meant to shield the privacy of Swiss banks' customers, but also has an institutional component, in that it protects the interests of Switzerland as a financial centre.

The files which X had disclosed to the German authorities were extensive, detailed and concerned a large number of customers. The tribunal held accordingly that, in the case at hand, the application of Article 273 was justified.

Comment

The tribunal's decision has clarified that people trading in confidential data of Swiss bank customers are not safe from prosecution when acting abroad. Moreover, the tribunal emphasised that bank customer data confidentiality is not an outdated concept, despite ongoing challenges. Data theft for the benefit of foreign authorities or organisations continues to be considered an offence against not only the individual bank affected and its customers, but also the interests of the Swiss financial centre as a whole.

For further information on this topic please contact [Bernhard Loetscher](#) at CMS von Erlach Poncet Ltd by telephone (+41 44 285 11 11) or email (bernhard.loetscher@cms-vep.com). The CMS von Erlach Poncet Ltd website can be accessed at www.cms-vep.com.

Endnotes

(1) Case 6B_508/2014, published as ATF 141 IV 155.

(2) Articles 3 and following of the Penal Code define the territorial scope of the Swiss penal law and thus the jurisdiction of Swiss penal authorities.

(3) Federal Criminal Court decision, April 16 2014, Cases BP.2013.63 and BP.2013.64.

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