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New precedent does not provide clear guidance on the boundaries of the Swiss blocking statute

In its decision 6B_216/2020 of 1 November 2021, the Swiss Federal Supreme Court confirmed the conviction of an asset manager for illegal acts on behalf of a foreign state. This asset manager had personally transferred client data from Switzerland to the US and handed it over to the US authorities in the context of the tax dispute between Switzerland and the United States. However, this new precedent on Art. 271 of the Swiss Criminal Code does not provide clear guidance on the boundaries of this blocking statute as regards the crucial question as to whether Swiss data can be used in connection with proceedings abroad.

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Background and facts of the case

In the context of the tax dispute between Switzerland and the United States, a Swiss asset management company (with subsidiaries on the Cayman Islands and in Liechtenstein) audited certain client relationships. It turned out that certain clients had potentially not complied with their tax obligations towards the United States.

The Chairman of the Board of Directors of the asset management company then filed a self-denunciation with the US Department of Justice (DOJ). The DOJ rejected the request to obtain the disclosure of client files from Switzerland via the means of international legal or administrative assistance. With a view of concluding a so-called *non-prosecution agreement,* the Chairman of the Board of Directors then travelled to the United States with a USB stick containing a total of 109 client files of the asset management company and its foreign subsidiaries and had this data handed over to the DOJ.

Based on a criminal complaint filed by the Swiss Financial Market Supervisory Authority (FINMA), the Chairman of the Board of Directors was indicted by the Office of the Attorney General of Switzerland for illegal acts on behalf of a foreign state pursuant to Art. 271(1) para. 1 of the Swiss Criminal Code (SCC). After a first-instance acquittal had been annulled by the Swiss Federal Supreme Court in its decision 6B_804/2018 of 4 December 2018, the Chairman of the Board of Directors was convicted by the Federal Criminal Court and sentenced to a fine of CHF 10,000. This sentence was confirmed by the Appeals Chamber of the Federal Criminal Court, whereupon the defendant appealed to the Supreme Court. In its decision of 1 November 2021, the Federal Supreme Court dismissed the appeal and thus confirmed the conviction of the defendant.

Criminal liability under Art. 271(1) SCC

According to Art. 271(1) SCC, anyone who performs acts on behalf of a foreign state on Swiss territory without authorisation, or who aids and abets such acts, is liable to punishment. The provision intends to prevent the exercise of foreign state authority in Switzerland and to protect both the state's monopoly on the use of force and Swiss territorial sovereignty. The prohibition of acts on behalf of a foreign state was enacted in 1935 as part of the so-called Spy Act ("*Spitzelgesetz*") to prevent foreign espionage activities. The provision was later transferred to the SCC.

According to Swiss scholars, acts are punishable under Art. 271(1) SCC if they qualify as "*official acts*" ("*Amtshandlungen*") with respect to their nature and purpose. This applies irrespective of whether a (foreign) authority or an official actually took action. However, the official act must be carried out in the interest of a foreign state. In addition, it is necessary that the criminal acts take place on Swiss territory (at least partially).

Considerations of the Supreme Court

In the present case, it was undisputed before the Supreme Court that the transfer of the client files to the DOJ had taken place in the interest of the United States and thus for a foreign state. It was also undisputed that the acts were initiated on Swiss territory without authorisation from the competent authorities. The Supreme Court therefore primarily examined whether the transfer of the client files to the DOJ qualified as a prohibited "*official act*". According to the Court, it is decisive whether the act in question is capable of endangering the "*sphere of authority*" *("staatliche Herrschaftssphäre"*) of the Swiss authorities. An act that involves a violation or circumvention of Swiss or international administrative and judicial assistance rules, or that is within the jurisdiction of a Swiss authority pursuant to the relevant provisions, qualifies as such prohibited act.

Direct transmission of data which cannot be freely disposed of is critical

The Supreme Court thus considers the disclosure of information and documents that can only lawfully be obtained in Switzerland pursuant to an order of a Swiss authority to be punishable under Art. 271(1) SCC. In this context, the Court held that "*in all constellations*" only files and information that can be freely disposed of may be handed over for purposes of foreign proceedings. This is not the case with respect to identifiable personal information regarding third parties which is not publicly accessible. Only administrative or judicial assistance procedures would ensure that secrecy and disclosure obligations could be balanced against each other and the principle of speciality would be guaranteed.

In the present case, it was established that the documents in dispute had originally been made available to the asset management company in Switzerland and had been entrusted to the company under clear contractual conditions. In the opinion of the Supreme Court, the Chairman of the Board of Directors was therefore not allowed to transmit documents relating to these third parties directly to the DOJ. The DOJ would rather have had to request the information from the asset management company via the means of legal or administrative assistance and via the competent Swiss authorities, respectively. The direct transmission of this information to the DOJ in circumvention of the international mutual legal assistance procedure was therefore qualified as an act for a foreign state that is prohibited under Art. 271(1) SCC.

The fact that such data is available in a third country does not exclude criminal liability

In the view of the Supreme Court, the fact that the data transmitted to the DOJ was, at least in part, already available in a third country at the time of the offence, does not exclude criminal liability. Since the purpose of Art. 271(1) SCC was, among other things, to preserve the state sovereignty, the Supreme Court qualified it rather as decisive that this data was at least also located in Switzerland and that the defendant had started his journey to transmit this data in Switzerland. In the view of the Supreme Court, the data originating from Switzerland could therefore only have been passed on from Switzerland in compliance with the rules of international legal or administrative assistance. The defendant has therefore violated Switzerland's sovereignty.

Accordingly, the Federal Supreme Court considered it being irrelevant whether it would have been possible or permissible to transmit the data located in a third state to the DOJ from there. According to the Supreme Court, the view held by legal scholars that data already located abroad can be made available without restriction for foreign proceedings, would only apply if such data are already located in the foreign state in which the proceedings in question are being conducted (but not for data located in a third state). Nevertheless, the decision leaves open whether Art. 271(1) SCC applies at all if such data, which is already located in a third state, is accessed in the course of a specific investigation abroad.

Practical considerations

Art. 271(1) SCC has long been the subject of controversy and a source of legal uncertainty. However, this does not affect foreign agents, against whom the provision was initially designed to protect. Art. 271(1) SCC today rather exposes persons acting on behalf of international companies in Switzerland to the risk of criminal prosecution should they decide or be required to use documents and data from Switzerland in connection with proceedings abroad. In these contexts, the facts are rarely clear-cut. It is therefore regrettable that the Supreme Court did not seize the

opportunity in this case to set clearer boundaries to the blurred scope of Art. 271(1) SCC. In any case, the Court's considerations in the new precedent, some of which are very general, do not increase legal certainty.

For instance, the Supreme Court categorically states that "*in all constellations*" only information a person can freely dispose of may be disclosed in connection with proceedings abroad, which would not apply to identifying personal information about third parties that is not publicly accessible. This very general consideration does not take into account that, for example, in the context of civil proceedings it may well be necessary for the protection of a party's interests to judicially submit data which a party cannot freely dispose of. This is common practice in (civil) proceedings in Switzerland. It is not convincing why the same act should be punishable as an act on behalf of a foreign state if a party to the proceedings submits such data in a foreign (civil) proceeding. It would therefore have been helpful if the Supreme Court had focused its considerations on the specific case and not in such general manner.

The same applies to the Supreme Court's statements that the fact that data is already stored in a third country in accordance with its intended purpose does not exclude criminal liability if such data is handed over to a (different) foreign country. This conclusion seems again sensible in the specific case at hand. However, it would not have been necessary for the Supreme Court to explicitly exclude from the scope of Art. 271(1) SCC data that is already located in the state in which the foreign proceedings are pending. In doing so, the Federal Supreme Court casts doubt on the presumption applied by certain legal scholars, according to which the use of data that already sits abroad (and is not merely transferred abroad for the purpose of circumvention) does not affect Swiss sovereignty or Art. 271(1) SCC.

The new precedent therefore does not reduce the existing legal uncertainties regarding the transmission of non-public information to foreign authorities. However, more specific guidance is provided in part by special legislation in certain areas that permits such transfers under specific conditions and thus excludes them from the scope of Art. 271(1) SCC. Such rules include Art. 42c of the Financial Market Supervision Act (FINMASA) and the related FINMA Circular 2017/6 (revised in 2021), which permit the transmission of certain information to foreign supervisory authorities, provided that the rights of clients and employees are preserved. To the extent that no special regulation is applicable and the channels of legal or administrative assistance are not available, it is also possible to apply to the competent federal department for an exemption authorization, which would exclude criminal liability pursuant to Art. 271(1) SCC. In practice, such applications are usually dealt with pragmatically and, if necessary, at short notice.

Please do not hesitate to contact us in case of any questions.

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