CENTRE DE DROIT
BANCAIRE ET FINANCIER

Transfer of client data to the United States

Conviction of an asset manager

Par Katia Villard le 26 November 2021

The direct transfer of client data across the Atlantic by an asset manager in the context of the tax dispute between Switzerland and the United States constitutes an act performed without right for a foreign state, punishable within the meaning of Article 271(1) of the Swiss Criminal Code. The Federal Supreme Court ruled as such in a judgement of 1st November 2021 intended for publication (6B_216/2020).

This is the second time that the judges of Mon Repos have considered this case. The 'first round' focused on the question of the subjective constituent element, respectively the error on unlawfulness (art. 21 CP), insofar as a legal opinion from a university professor and a legal opinion from a law firm had assured the manager of the legality of the planned transfer. At first instance, the Federal Criminal Court, having accepted that the objective elements constituting the offence had been fulfilled, acquitted the defendant for lack of intent (cf. cdbf.ch/1022/). Ruling on an appeal by the Office of the Attorney General of Switzerland, the FSC rightly found that the issue did not relate to the subjective element but to the error of illegality (art. 21 CC). Taking what we consider to be a rather harsh position, it nevertheless considered that the error was avoidable (art. 21 para. 2 CC). The appeal was therefore admitted and the case referred to the Criminal Affairs Court of the Federal Supreme Court. The latter then convicted the manager for violating art. 271 ch. 1 PC, a judgement confirmed by the Court of Appeal of the Federal Supreme Court.

In this 'second round', the FSC considered the fulfilment of the objective constituent elements of the offence, an issue that it had not analysed in its first decision, as the question had not been referred to it.

The facts underlying the FSC's ruling can be summarised as follows.

B. AG is a Zurich-based wealth management company. In the context of the tax dispute between Switzerland and the United States, it carried out internal checks which revealed that certain clients, either of B. AG itself or of one of its subsidiaries, had defrauded the US tax authorities. The company compiled files on the clients concerned. In October 2012, the manager in question, who is chairman of the board of directors of B. AG, filed a self-report with the United States Department of Justice (DoJ). The TF notes in its statement of facts that the DoJ refused to use mutual assistance to obtain information on the clients.

In November 2013, the manager travelled from Switzerland to the United States with a USB

stick containing more than a hundred files. Without authorisation within the meaning of Article 271(1) of the Swiss Criminal Code, he handed the object over to the DoJ through a lawyer with a view to concluding a Non-Prosecution Agreement.

A number of these files were also apparently available from abroad (Cayman Islands and Principality of Liechtenstein).

In its reasoning, supported by numerous doctrinal references, the FSC recalls that art. 271 CC aims to prevent a foreign state power from exercising its power on Swiss territory and thus protects Swiss sovereignty. Processes that aim to circumvent the channels of criminal and administrative mutual assistance typically fall under the scope of this provision. As a result, the handing over, from Switzerland, of information and documents which, according to our law, can only be transmitted abroad by order of a Swiss authority, undermines the legal interest protected by art. 271 ch. 1 CP. Only information that is freely available to the person handing it over may be transferred without prior authorisation. This is not the case for data concerning third parties, as in this case, the company's customers.

Access to the information transmitted, including from abroad, does not alter the criminal nature of the behaviour. The question of whether the transfer of data from a third country to the United States would have been lawful is irrelevant since that is not what happened in this case : it was from Switzerland, data in hand, that the manager left to hand the USB key to the DoJ. According to the opinion of some authors, it could have been different if the data had also been available in the State of the proceedings – i.e. the United States – which was not the case here.

It should be noted that, in its judgement, the Federal Court again outlines the difference between the collection of evidence on Swiss soil and its handing over abroad, but without really ruling on the fate of the former from the perspective of Article 271(1) of the Swiss Criminal Code.
