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Theft of bank data and money laundering

Conviction of a former bank employee

Par Katia Villard le 23 June 2022

In a ruling 6B_45/2021 of April 27, 2022, the Swiss Federal Supreme Court confirms the conviction (in absentia) of a former bank employee – whom we shall refer to as Albert – for economic intelligence services (Art. 273 StGB) and money laundering (Art. 305bis StGB).

In short, Albert was accused of having, between 2005 and 2012, collected and stolen customer data before selling it to the German authorities in summer 2012. Then, in August 2012, he opened an account in a bank in Spain and, on an unspecified date, another account in Germany to deposit the proceeds of his crime (i.e. the money obtained from the German authorities). The funds – amounting to at least EUR 1,147,000 – were used to purchase a property in Spain on October 15, 2012, which Albert then sold on October 14, 2013, before transferring the proceeds to his German account. He did everything in his power to conceal the existence of the bank accounts and the property in Spain. No transactions relating to these assets were (obviously) carried out via his Swiss bank accounts. Albert hid, wrapped in a blanket in the trunk of his mother's car – which he used – notes containing details of the lawyer involved in Spain in the purchase of the property and the Spanish bank account. During a search of his home, he also attempted to destroy the SIM card on his cell phone, which contained information relating to the case.

Having "validated" the appellant's conviction in relation to the conditions and conduct of the proceedings in absentia, the Federal Court now turns to the offence of money laundering under art. 305bis of the Swiss Criminal Code.

Firstly, the Mon Repos judges accepted the territorial jurisdiction of the Swiss courts with regard to this offence. For once, the criterion for territorial jurisdiction was not the presence of the proceeds of the crime in Switzerland (and, therefore, the transactions constituting an act of concealment). On the other hand, the concealment of the notes and the deterioration of the SIM card, which contained information on the proceeds of the crime, constituted acts likely to hinder the confiscation of the said proceeds and had been committed in Switzerland.

The question then arose as to whether the funds should be considered "confiscable", since they were not – and indeed had never been – located in Switzerland, and Switzerland could not rely on mutual criminal assistance with the German authorities to obtain them. Indeed, in the absence of confiscable assets, there can be no question of an act likely to impede confiscation, and hence of money laundering.

The Federal Court interprets the notion of “confiscability” (“Einziehbarkeit”) in the abstract. It is sufficient that Switzerland has a claim to confiscation and can theoretically request mutual assistance from Germany. Germany’s willingness to comply is not required. The assets deposited in Germany are therefore confiscable.

In a final complaint, Albert contested the dual punishability (in Germany and Switzerland) of the offence of economic intelligence services. On this point, and insofar as it is not clear from the contested judgment whether the prior offence had been committed in Switzerland or Germany, the Federal Court ruled pro reo in favor of Germany, so that, in accordance with art. 305bis ch. 3 of the Swiss Criminal Code, Albert’s conduct must be punishable under German law. In this case, according to the Mon Repos judges, he was caught by art. 17 of the German law on unfair competition, which, in summary and at the time of the alleged facts, was aimed at a company employee who had betrayed a business secret. The fact that this standard does not protect the same legal asset as art. 273 of the Swiss Criminal Code has no bearing on the double punishability. Nor, according to the Federal Court, is it relevant that Albert was no longer an “employee of the company” within the meaning of art. 17 of the German Unfair Competition Act at the time the data was transmitted. Nor is it necessary for the bank data actually involved in this case to constitute business secrets within the meaning of German law. It is sufficient that, under both Swiss and German law, customer data in principle constitutes a business secret.

In our view, this very broad interpretation of the concept of double criminality, in particular as regards the lack of consistency between Swiss and German law as regards the status of the perpetrator targeted by the criminal provision, is in line with the trend of the Federal Court, which generally interprets the condition of double criminality generously.

The reasoning is also noteworthy insofar as the Mon Repos judges point out that, contrary to the basic concept of art. 305bis ch. 3 of the Swiss Criminal Code, which extends criminal protection to the administration of foreign criminal justice and, therefore, to confiscation claims by foreign criminal authorities, it is not a question (here) of defending foreign interests, but rather national interests, insofar as the prior offence is directed against the Swiss state. This is why, in accordance with Art. 4 of the Swiss Penal Code, the Swiss judge is competent to apply Art. 273 of the Swiss Penal Code, irrespective of the place where the data was transmitted and of any double criminality.
