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Banking secrecy

A breach committed by a lawyer through potential malice

Par Fabio Burgener le 21 March 2023

In a ruling 6B_899/2021 of January 26, 2023, handed down after a public hearing but not intended for publication, the Federal Court ruled that a lawyer who produces a six-page document containing a large amount12of information subject to banking secrecy in civil proceedings, without having taken full cognizance of it, commits a breach of banking secrecy (art. 47 al. 1 let. c LB) by possible fraud (art. 12 al. 2 phr. 2 CP).

A banking establishment and one of its former employees are involved in industrial tribunal proceedings. In order to prove one of his allegations, the employee submitted a document entitled “US-Exit-Report” to his legal counsel. The document is six pages long. The lawyer assumes that his client has already redacted any data covered by banking secrecy, and produces the document without examining it in its entirety. Wrongly, pages 4 and 5 do indeed contain information subject to banking secrecy, including customer names, account numbers and account balances, and the principal has not redacted them.

The principal became aware of the “US-Exit-Report” in his capacity as an employee of a banking institution. After the end of the employment relationship, he remains bound by banking secrecy (art. 47 al. 4 LB). By transmitting the document containing data subject to banking secrecy to his legal advisor, he therefore intentionally revealed this information to a third party (art. 47 al. 1 let. a BL).

The criminal proceedings under review relate exclusively to the lawyer’s subsequent actions in connection with the disputed document. Art. 47 al. 1 let. c BL punishes, with a custodial sentence of up to three years or a pecuniary penalty, anyone who intentionally discloses a secret entrusted to him in the sense of let. a or exploits this secret for his own benefit or for the benefit of a third party. If the perpetrator acts negligently, he or she is liable to a fine of up to 250,000 Swiss francs (para. 2).

In June 2020, the Swiss Federal Supreme Court overturned the acquittal of the lawyer by the Zurich Cantonal Court. It denied the justification for the intentional breach of banking secrecy : the lawyer’s production of the document in its entirety, i.e. with the data subject to banking secrecy, was not necessary for the defense of the client’s interests (art. 14 CP in conjunction with art. 12 let. a LLCA ; cf. 6B_247/2019, commented in cdbf.ch/1143).

Following referral of the case in June 2021, the Zurich Cantonal Court ruled that the lawyer had acted negligently (cf. art. 47 al. 2 LB). Noting the absence of any description of such conduct in

the indictment and the statute of limitations on criminal proceedings for the offence committed through negligence, it acquitted the legal counsel (cf. SB200301-01).

Following an appeal by the Zurich Public Prosecutor's Office, the Federal Supreme Court considered the case a second time.

In their reasoning, the federal judges immediately noted the difficulty, in certain cases, of distinguishing possible fraud (art. 12 al. 2 phr. 2 CP) from conscious negligence (art. 12 al. 3 phr. 1 hypo. 2 CP). These two forms of subjective constitutive element are similar in terms of awareness : the perpetrator considers it possible to achieve the objective constitutive elements of the offence. On the other hand, they are distinct in terms of intent : the perpetrator accepts to carry out the objective constituent elements of the offence (possible fraud) or the perpetrator does not want (expects not) to carry out the objective constituent elements of the offence (conscious negligence). In the absence of a confession by the perpetrator, the question must be decided on the basis of external circumstances, including the extent of the breach of the duty of care and the probability, known to the perpetrator, of the risk being realized. The higher the latter, the more likely it is that the judge will conclude that the perpetrator accepted the possibility of the objective constituent elements of the offence.

In the case in point, with regard to the cognitive component, our High Court found that the lawyer produced the "US-Exit-Report" as evidence without taking full cognizance of it, even though he knew that this document could (originally) contain information covered by banking secrecy. The lawyer thus at least considered it "possible" that he was producing a document containing protected data.

With regard to the volitional component, in connection with the criterion of the importance of the breach of the duty of care, the federal judges once again rely on the fact that the defendant failed to read the "US-Exit-Report" in its entirety before producing it, even though he knew that this document could (originally) have contained protected information. Reading a six-page document in its entirety required little effort. The lawyer therefore seriously violated his duty to exercise his profession with care and diligence (art. 12 let. a LLCA).

With regard to the criterion of the probability – known to the author – of the risk being realized, the Federal Court notes that the lawyer did not ask his client whether he had in fact redacted all the data subject to banking secrecy. On the contrary, he "blindly" relied on his client by producing a largely unverified document as evidence. The lawyer thus created a particularly high risk of a breach of banking secrecy.

The Federal Court therefore considers that the lawyer acted out of malice, and not out of conscious negligence. It accepted the appeal and sent the case back to the previous authority for a new decision.

On a different note from the judgment under review, but still related to art. 47 para. 1 let. c BL, in February 2023 the National Council accepted a motion instructing the Federal Council to examine "whether current legislation should be amended to guarantee freedom of the press in matters relating to the financial center and, if necessary, to propose an amendment to the relevant laws, taking into account the balance of interests involved". Three standards are concerned : art. 47 LB, art. 69 LEFin and art.147 LIMF.

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