

Data protection

Violation of the principle of speciality : ex post obligations for Switzerland ?

Par Yannick Caballero Cuevas le 29 June 2023

If the principle of speciality is violated as a result of administrative assistance, does the person concerned have a right to have the Federal Council intervene with the requesting state ? In a ruling 2C_236/2022, intended for publication, the Federal Supreme Court clarifies whether positive obligations against Switzerland can result from arts. 8 and 13 ECHR.

In 2011, FINMA granted administrative assistance to the French Autorité des marchés financiers (AMF), which requested the transmission of documents relating to transactions carried out by Albert, in order to verify that they did not contravene French stock market regulations. In its decision to grant the request, FINMA pointed out that the information was to be used exclusively for regulatory purposes, and that any transmission for other purposes could only take place with its prior agreement. Albert appealed against this decision to the Federal Administrative Court, which dismissed his grievances. This ruling became final.

Albert lodged a complaint against France with the Federal Council. In particular, he complained that the principle of speciality had been violated, as the AMF had allegedly passed on information to the Paris Tribunal de Grande Instance in connection with criminal proceedings against him. The Federal Department of Finance informed him that there was no reason for the Confederation to intervene after examining the documents submitted. Albert then requests a formal decision from the Federal Council or its delegated authority. The Federal Council informs Albert that no further action will be taken on his denunciation against France, nor on a possible complaint against FINMA. After Albert's appeal to the Federal Administrative Court was dismissed as inadmissible, he appealed to the Federal Supreme Court.

Firstly, the Federal Court examines whether art. 32 para. 1 let. a LTAF applies to the case in point. Appeals are inadmissible against decisions relating to external affairs. This provision applies in particular to acts of government or administration whose purpose is to defend Switzerland's interests at both national and international level. The Federal Court finds that the request falls within the scope of external relations within the meaning of art. 32 para. 1 let. a LTAF, as it enjoins the Federal Council to intervene with France in order to establish the violation of the principle of speciality and to return the data transmitted to FINMA.

Secondly, the Federal Court analyzed whether the counter-exception of art. 32 al. 1 let. a in fine LTFA – which admits an appeal if international law confers a right to have the case judged by a court – applies. The Federal Court examines, firstly, whether Albert benefited from an effective

remedy within the meaning of art. 13 ECHR in the context of administrative assistance, and secondly, whether positive obligations arise from art. 8 ECHR. He points out that the purpose of art. 8 ECHR is to protect individuals against arbitrary interference by public authorities in their private lives. Accordingly, Switzerland has a duty to take reasonable and appropriate measures to guarantee the right to privacy of individuals subject to the law, so that it must preserve a balance between the general interest and the interests of the individual subject to the law. It is recognized that banking data is protected by art. 8 ECHR.

Before granting administrative assistance, Switzerland must ensure that the data will be used in accordance with the guarantees of art. 8 ECHR. This obligation was embodied in art. 38 para. 2 aLBVM, which stipulated that assistance was granted if the foreign authority used the data exclusively for the implementation of stock market regulations, and if it was bound by official and professional secrecy. In addition, FINMA must ensure that there are no serious and proven grounds for believing that the requesting authority would not respect the principle of speciality. If this is not the case, FINMA must request additional guarantees, or even refuse the request.

Once the request has been granted, art. 8 ECHR does not impose any obligation to take diplomatic measures, as the Federal Council has discretionary powers in this respect. In the event of a violation of the principle of speciality by the requesting state, it is within its competence to examine the alleged violation.

The Federal Court found that the alleged breach of the principle of speciality had been committed outside Swiss territory, since the AMF's decision to transmit elements of the case file to the Paris Tribunal de Grande Instance was a sovereign decision taken by France. Furthermore, in 2012 Albert benefited from an effective remedy within the meaning of art. 13 ECHR, which led to a final ruling by the Federal Administrative Court that the conditions of art. 38 aLBVM had been met. Consequently, a right to obtain, a posteriori, that Switzerland enjoin France to comply with its commitments does not derive from the ECHR, and the Federal Council was right to refuse to act on Albert's complaint.

This ruling shows that once data has been transmitted to a foreign authority, it is difficult to ensure that it will not be used in proceedings other than those covered by the administrative assistance. Moreover, violation of the principle of speciality in the requesting state does not oblige the requested state to take diplomatic measures. As a result, the individual concerned will have to defend his or her rights in the administrative assistance procedure, and in particular assess – on his or her own behalf – whether there is a risk of invasion of privacy by the requesting state in order to oppose the transmission of information. In the event of a breach of the principle of speciality by the requesting state, the individual will have to refer the matter to the courts of that state.