



Data protection v corruption compliance in Germany

On 18 February 2010, the Berlin Employment Tribunal held that Deutsche Bahn's former Head of Anti-Corruption had been wrongfully dismissed for alleged breaches of data protection law. The former Head of Anti-Corruption allegedly authorised monitoring and surveillance measures to be implemented for employees and third party service providers suspected of corruption. These measures allegedly included cross-checking of employee data, such as bank account details and personal addresses.

In coming to its decision, the tribunal had to carry out a difficult balancing act between the obligations placed on companies to combat corruption and the right of their employees and third party service providers to privacy. Key findings included:

- surveillance and monitoring of personal data of this type may be justified. However,

this is more likely to be the case where such measures have been implemented on a one-off basis; and

- where personal data cannot be separated from other data, such as in circumstances where an employee is permitted to make personal use of employer supplied telephones and email accounts, in the absence of any agreement to the contrary between employer and employee, any review of such data is likely to be unlawful. Even reviews which are restricted to ancillary information, such as date and time an email was sent, may be unlawful.

This important issue is likely to continue to be the subject of much public and legal debate - not least because Deutsche Bahn has recently indicated that it intends to appeal the decision of the tribunal.

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Switzerland – Draft Federal Act on the Return of Assets of Illicit Origin

On 24 February 2010, the Swiss Government issued a Draft Act on the Return of Assets of Illicit Origin (Draft Act on Illicit Assets) aimed at regulating the freezing, confiscation, and return of assets of potentates. Potentates – or so-called *klepotcrats* – refer to heads of state, high public officials, or other politically exposed peoples (PEPs) who illegally enrich themselves through state funds. Such diverted assets are frequently sent out of the country and harboured in international financial centres.

In order not to become, or be perceived as, a safe haven for potentates' assets, Switzerland has over the past decades implemented several acts and procedures to combat money laundering, corruption, and the financing of terrorism such as the Federal Money Laundering Act of 10 October 1997, and the Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981 (IMAC). Yet and in spite of these measures, certain potentates' assets found their way into, or remained held in, Swiss bank accounts.

As a result, with a view to protect the reputation both of its financial centre and the country as a whole, Switzerland has made the identification of looted assets and their return to their country of origin a

priority, as illustrated by high profile cases such as Montesinos (Peru, 2002, US\$77.5m), Marcos (the Philippines, 2003, US\$684m) and Abacha (Nigeria, 2005, US\$700m). It is worth pointing out that these cases have been solved through mutual legal assistance in criminal matters either on a treaty or a non-treaty basis.

Swiss treaty-based mutual legal assistance, on the one hand, is governed by the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, including Additional Protocols I and II, and, as of 24 October, 2009, also by the United Nations Convention against Corruption. Moreover, Switzerland has entered into bilateral agreements on mutual legal assistance in criminal matters with a number of foreign jurisdictions among them Algeria, Australia, Ecuador, Egypt, and the US. Non-treaty based mutual legal assistance, on the other hand, is provided in accordance with the IMAC, allowing competent Swiss authorities to seize and forfeit the proceeds of criminal acts such as corruption, money laundering, and other forms of organised crime. The current legal framework further ensures an effective deterrent to profit-motivated crime by allowing the opening of a domestic criminal investigation in response

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to foreign mutual legal assistance requests. In such cases, Swiss authorities can open a separate criminal investigation relating to the laundering in Switzerland of the proceeds of criminal conduct on foreign soil.

This notwithstanding, the current legal regime remains ineffective to solve certain particularly complex matters, as shown by cases such as *Mobutu* (Democratic Republic of Congo) and *Duvalier* (Haiti). These matters involve so-called ‘failing’ (or ‘failed’) states, ie, countries which among other flaws prove unable or unwilling to file a request for mutual legal assistance for the recovery of looted assets, primarily because of dysfunctional governmental institutions – be it for reason of chronic corruption or endemic poverty.

In the *Mobutu* case, the mutual legal assistance proceedings which started in 1997 were rejected in December 2003 by the Swiss authorities for lack of evidence. Nevertheless, in light of the instability prevailing in Congo, the Swiss Government decided to maintain the freezing of Mobutu’s assets based on its constitutional authority to issue temporary ordinances and decrees for the safeguard of the country’s interests in foreign affairs matters. Concrete measures were then expected from the Congolese Government to recover Mobutu’s assets through the filing of an improved request of mutual legal assistance. Yet, unwilling to initiate criminal proceedings in Congo and to ask for mutual legal assistance, the Congolese Government instead decided in January 2009 to file a criminal complaint in Switzerland for money laundering. The Office of the Attorney General of Switzerland (OAG) however decided not to prosecute the matter considering that any possible acts of money laundering committed in Switzerland were barred from prosecution by the statute of limitation. Following the decision of the OAG, the Swiss Government lifted the freezing of Mobutu’s assets and returned them to the heirs of the late Congolese head of state.

In the *Duvalier* case, the Haitian authorities submitted a first request for mutual legal assistance in 1986, requesting Switzerland to freeze Jean-Claude Duvalier’s assets. Since then, approximately CHF 6 million (US\$5.4m) has remained frozen in Switzerland either on the basis of the above mutual legal assistance request or on the constitutional powers entrusted to the Swiss Government.

On 11 February 2009, the Federal Office of Justice (FOJ) decided that the Duvalier assets should be returned to Haiti. An appeal was lodged against this decision but on 12 August 2009 the Federal Criminal Court upheld the decision of the FOJ. Finally, on 12 January 2010, the FOJ’s decision to return the assets to Haiti was overruled by the Federal Supreme Court primarily on the ground of the statute of limitation. Unsatisfied with this result, the Swiss Government once more invoked its constitutional powers to freeze the Duvalier assets again.

In the light of the *Mobutu* and *Duvalier* precedents, the Swiss Government now wishes to address the issue of potentates’ assets by means of a specific act, and has thus proposed the Draft Act on Illicit Assets. In a nutshell, the key elements of the Draft are the following

- the Act will only apply in cases where a request for legal assistance was lodged but could not be executed;
 - in such cases, the Swiss Government will be allowed (but not obliged) to initiate confiscation proceedings before Swiss courts, provided the following four conditions are satisfied:
 - (1) The relevant assets are frozen in connection with a mutual legal assistance request;
 - (2) These assets are in the hands of a PEP or of his/her entourage;
 - (3) The foreign state requesting mutual legal assistance is unable to satisfy the Swiss procedural requirements on mutual legal assistance because of the collapse of its entire judicial apparatus – or a substantial part of it; and
 - (4) Safeguarding the interests of Switzerland commands that such assets be frozen.
 - the burden of proof regarding the origin of the assets is reversed, making the alleged potentate liable to demonstrate the licit origin of his/her assets. Failing such proof, the assets can be confiscated;
 - the statute of limitation as regards the underlying criminal conduct cannot be invoked against confiscation of the assets.
- The Draft is an important development in the fight against corruption. It nevertheless raises several questions as to the political nature of the decision process and the victims’ position in the confiscation proceedings. The Draft is subject to consultation procedure ending on 16 April 2010 before being debated in the Federal Parliament.



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