

To Buy, or Not to Buy: Germany's Quest Against Tax Evasion

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FEATURED PERSPECTIVES

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Wolfgang Kessler is the director of the tax department of the business and economics faculty at the University of Freiburg and a partner with Ernst & Young in Freiburg, Germany. Rolf Eicke is his assistant at the tax department of the University of Freiburg and is with Ernst & Young in Freiburg. The views expressed here are entirely their own. E-mail: Wolfgang.Kessler@tax.uni-freiburg.de and Rolf.Eicke@tax.uni-freiburg.de.

The tax issue causing uproar in Germany and Switzerland has all the ingredients for a good story. It is about tax law, those who break it, and the ultimate question whether the government itself is infringing on the law when buying stolen data. Moreover, it is about the opinion of the vast majority regarding the conduct of a few. May, or even must, the government purchase stolen bank data for €2.5 million with the prospect of collecting €400 million in additional revenue from 1,300 potential German tax evaders who used Swiss banks as a way to escape from their tax liabilities?¹

The debate is highly controversial. Whereas the opposition parties in the German Bundestag, in particular the Social Democrats, literally forced the government to buy the data, some legal experts as well as the business-friendly factions of the governing parties, Christian Democrats and Liberals, were against such a measure.

Reportedly, the data were stolen from banks in Switzerland. Rumors are being spread with two bank names, but they have not materialized yet. For this analysis the name of the bank does not matter. It is likely that the data were stolen by an employee as in the cases before.²

¹See *Süddeutsche Zeitung*, Feb. 5, 2010, p. 1.

²See *Financial Times Germany*, Feb. 1, 2010, p. 1.

Switzerland's Reaction

The latest case of stolen data and the potential purchase by Germany created new conflicts between Germany and Switzerland. A member of the Swiss national assembly, Pirmin Bischof, criticized the German conduct as “a modern type of bank robbery.”

Switzerland feels hassled by the German government for the second time in two years. The former German government with Peer Steinbrück as finance minister initiated an unprecedented upheaval against Germany by Switzerland, when Steinbrück let loose with his much-cited Wild West rhetoric. Reportedly, Steinbrück said at the April 2009 G-20 meeting in London that the OECD gray list of tax havens is like the 7th Cavalry at Yuma in that it need not necessarily go into battle, but it is important that “the Indians know that it is there.” Steinbrück’s statements caused much anger in Switzerland. Steinbrück also said in a speech later in the Bundestag that the “tax evasion phenomenon was not widespread with the Indians.” (See *Tax Notes Int'l*, July 6, 2009, p. 51, *Doc 2009-13703*, or *2009 WTD 126-13*.)

Also, Germany applied a lot of pressure with the enactment of the Anti-Tax-Evasion Act (*Steuerhinterziehungsbekämpfungsgesetz*), which was to include a blacklist of uncooperative countries, which would trigger negative tax consequences for those that have business relationships with blacklist countries. Yet, in the

course of the lawmaking process, all countries in jeopardy to be blacklisted pledged more cooperation and information.

Eventually, the blacklist never materialized due to quickly negotiated stipulated cooperation and transparency in tax matters with all countries that were about to be blacklisted. As a consequence, the Anti-Tax-Evasion Act was repealed, putting the German government and other countries in the same group on a winning streak in their battle against countries that provide a home for tax evaders.

And more measures are on the way. If the European Union manages to speak with one voice against tax evasion, it could put even more pressure on Switzerland, threatening to restrict access to the internal market, which would be very painful for the Swiss economy.

Treaty Tactics

And yet Switzerland has one token to play with and to counteract the latest measures of Germany, France, and Italy: pending treaty negotiations. These countries are attempting to stipulate treaty amendments in their treaties with Switzerland that include a wider scope for mutual assistance. In fact, Switzerland stopped negotiations with France and Italy, and it might do the same with Germany. The main beneficiary of an amended treaty would be Germany, and thus any postponement of an amendment would not be in the interest of Germany. Yet according to Swiss government officials, a negotiation stop is not a serious option.

The Liechtenstein Case Revisited

Purchasing stolen data is becoming a popular tool against tax evasion. In 2008 the German government, assisted by German Intelligence (Bundesnachrichtendienst), bought data on a DVD for €5 million from a former employee of a major Liechtenstein bank. (See *Tax Notes Int'l*, Mar. 10, 2008, p. 871, *Doc 2008-3969*, or 2008 *WTD 52-9*.) In the aftermath, Klaus Zumwinkel, CEO of Deutsche Post AG, had to resign and was later convicted and sentenced to two years with parole and a fine of €1 million for €1 million of evaded taxes. The highest amount of evaded taxes by one person found on the DVD was €8 million. These criminal proceedings were fairly short and ended in a deal between prosecution and the defendant. Accordingly, the case did not merit the question whether stolen bank data can be used in criminal proceedings.

The answer to this crucial question will be given by the Constitutional Court (Bundesverfassungsgericht, or BVerfG). The case is pending with the docket number 2 BvR 2101/09. In an earlier decision, the BVerfG dismissed a constitutional complaint (Verfassungsbeschwerde) stating that stolen data cannot be denied admission to the court solely on the grounds that the data have been bought by German Intelligence and later

given to the tax authorities (BVerfG No. 2 Qs 2/09). In fact, there is no general rule in German criminal law prohibiting the use of stolen evidence in court. At the end of the day, the admission is always subject to a weighting of the interests in question.

Legal Background

The ultimate question will be the usability of stolen bank data in criminal proceedings against tax evaders.

There is no “fruit of the poisonous tree” doctrine in German (tax) criminal law. In the United States, the fruit of the poisonous tree doctrine is an offshoot of the exclusionary rule. The exclusionary rule states that if the source of evidence is tainted, anything gained from it cannot be used as evidence, except in three restrictive situations. The purpose of the doctrine is to deter law enforcement from violating the Fourth Amendment protections against unreasonable searches and seizures. However, the fruit of the poisonous tree doctrine cannot be adopted at large in German criminal tax law because the roles of the parties participating in the criminal proceedings are different from those in the United States.

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In Germany, major crimes can justify the use of information derived from an illegally obtained source. Moreover, the question is whether it is justified to use stolen data in the courtroom given that Switzerland has not shown much willingness to cooperate in the past. German tax investigators claim that buying bank data is the only measure to effectively fight tax evasion. Buying stolen data as a last resort to fight tax evasion? As an action of self-defense when all measures such as mutual assistance are exhausted? Is this really the last resort to enforce equal taxation? In fact, Germany has tried other measures before that are not as critical as buying stolen data. In 2004 the government built a “bridge to tax honesty” to all those who evaded taxes. The Tax Exemption Declaration Act (Steuerbefreiungserklärungsgesetz) established an amnesty tax of 25 percent for any tax-evaded income. In turn, no criminal proceedings were started.

In practice the attempt failed, as only €318 million of additional taxes was collected — an amount far beyond the €5 billion of additional taxes predicted in the lawmaking process. However, the reason for failure was mainly the high burden the law put on tax evaders, so

most of them did not want to meet the requirements. Despite the amnesty initiative successes of other European countries (for example, Italy just repatriated €10 billion), a new amnesty attempt is not on the German agenda. It is widely believed that there is no need for another amnesty law, as German tax law grants a kind of “permanent amnesty” for those who file a self-accusation (*Selbstanzeige*) with the tax authorities. The latest developments support this view, because several hundred taxpayers filed a self-accusation just in the last few weeks, enabling the government to collect hundreds of millions of euros of additional revenue. This window of opportunity will close as soon as the data are actually in the hands of the tax authorities.

Mutual assistance at the current level is no solution for the problem either, as Switzerland does not assist in cases of tax evasion. Only in cases of tax fraud is information sent from Bern to Berlin. As the definition of tax evasion is hard to grasp, the subtle distinction between tax evasion and tax fraud requires several volumes of analysis. A common distinction is that tax fraud is equal to tax evasion with an additional falsification of documents.

Another legal issue is whether the purchase of data breaches the law. Paragraph 259 of the German Criminal Act punishes the concealment of stolen goods. Because data are not tangible, many legal experts argue that the provision is not applicable, with the consequence that the government is not breaching the law. Other legal experts, however, maintain that the provision was enacted in a time when “data” as known today did not exist and thus the provision has to include data. However, this approach infringes on the principle of prohibition of analogy and cannot be justified by arguing that the protection of privacy has become more important in times of proliferation of IT usage and services.

However, a very problematic point about this conduct of dealing with stolen data — whether legally or illegally — is that the government provides an official and explicit demand base for future stealing of data and thereby potentially incites bank and insurance employees in charge of sensitive data to copy and pass on the data for more money than a normal person can ever earn in one lifetime.

Yet an undercover agent or a police informer (in German, *V-Mann*), sometimes even acting as an agent provocateur, is in a similar role, and evidence gained from his actions is in most cases usable in court.

Is there a “state of tax emergency” justification against an offense that deprives countries and communities from obtaining the funds they are legally entitled to claim? If so, such a notion could constitute the bursting of a dam, provoking the question of how illegal the supply of information must be to be inadmissible in criminal tax proceedings.

In the end, the conflicting interests of the government regarding millions in additional revenue and maintaining social justice on the one side and protection of privacy on the other side must be taken into consideration. The damage to society for the budget and for justice caused by tax evasion has a considerable weight. And how much protection does the right of privacy deserve when the right is abused for a wrong cause?

Also, the upcoming legal evaluation of the data purchase will have to explain similarities and differences regarding leniency programs (*Kronzeugenregelung*) and whistleblower policies. The underlying purpose of both instruments can be used to justify even the purchase of stolen data, because in other criminal areas, such as drugs and organized crime, illegally received evidence can generally be used in court.

Switzerland might be even a step ahead toward admission of stolen data in criminal proceedings. The Swiss Federal Court in Lausanne found on October 2, 2007, that stolen data can be used by the Swiss tax authorities in court (Case 2C_514/2007). Switzerland received the data from Germany on the Liechtenstein DVD described above. The Swiss government tries hard to distinguish the present case and the Swiss landmark court case, arguing that the Swiss case dealt with data stolen from a trustee (*Treuhänder*) and not from a bank, implying that a trustee deserves less protection. Yet this contention can only be seen as the very last resort for the Swiss government to uphold its policy in the present case.

The formerly unthinkable has become reality, creating an atmosphere of deterrence for all current and future tax evaders.

The legal background of purchasing stolen data aside, the German government will not risk its winning streak in the tax evasion battle. The impact on future tax evaders is massive because they lost the most important component: trust in the secrecy of their operations and their data. No bank in the world can seriously guarantee that the data are safe. Most dangerous for potential clients and banks is that the data were not stolen from external persons but from bank employees knowing that there are countries willing to purchase a CD for millions of euros or dollars.

The formerly unthinkable has become reality, creating an atmosphere of deterrence for all current and future tax evaders. Bank secrecy, formerly a symbol of Switzerland, has been severely damaged.

Another consequence is the immense increase in self-denunciations to avoid harsh fines. This psychological pressure put on targeted taxpayers is the most essential impact of the stolen bank data. On February 3, 2010, German Finance Minister Wolfgang Schäuble urged all tax evaders to file a self-denunciation to escape severe fines and to discharge the tax investigators from time-consuming and difficult research.

Along with the wave of self-denunciations, another notion became popular with leading German politicians, namely the abandonment of this soft legal exit from tax evasion as it seems unfair to not punish tax evaders when they file their amended return in time.

Moreover, not conducting the data purchase would have another negative consequence: The goal of equal taxation would be abandoned and the tax authorities would be risking committing a crime themselves if they refuse to attempt everything they can to prosecute tax evaders. In fact, an expert opinion of the Finance Ministry of the state of North Rhine-Westphalia came to the conclusion that not buying the data could be committing an obstruction of punishment in office.

Political Calculus

Despite the different views across the lines of political parties, Chancellor Angela Merkel eventually decided to buy the data, potentially sparked by political calculus. The government loses much more from not buying the data. The majority of voters would not understand why a little fraction of society can take advantage of an obscure system that eventually hurts everybody, without facing any repercussions. In the event that the Constitutional Court finds that stolen data cannot be admitted to criminal proceedings, the government does not have the burden of explaining this issue and could blame it on the court.

The only serious way out of this dilemma is a comprehensive mutual assistance agreement, including an automatic data exchange, to overcome the Wild West rhetoric and purchase of stolen data on the one hand and a system of obscurity and opacity that promotes tax evasion and money laundering on the other hand.

To put it in a very optimistic way: Europe has never come further in its endeavor to reach a genuine level playing field on which taxes are distributed fairly. ♦