

LALIVE



Dr Marc Henzelin:

*Protection of Clients' Information in the
Age of IT*

20/04/2017

Attaques informatiques en série contre des avocats genevois - Le Temps

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Marc Henzelin: «Les défenseurs de la famille Khrapunov font systématiquement l'objet de hacking.»

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AFFAIRES KAZAKHES

Attaques informatiques en série contre des avocats genevois

Plusieurs études travaillant pour la famille Khrapunov, des oligarques kazakhs en exil, ont été ciblées par des «chevaux de Troie» envoyés par des inconnus. Une plainte a été déposée

3 minutes de lecture

et Agathe Duparc

Publié mardi 7 juillet 2015 à 16:53.

“Series of cyber attacks against Geneva lawyers

Several law firms working for the Khrapunov family, Kazakh oligarchs living in exile, were targeted by “Trojan Horses” sent from unknown sources. A criminal complaint was filed”

“The attack shows a spectacular escalation in cyber attacks against holders of economic secrets and legal privileges who thought they had found a safe haven in Switzerland”.

“More and more, hacking attempts become the norm in cases where financial stakes are high and the parties are at loggerheads”.

TagesAnzeiger

Landeten UBS- und Wegelin-Gelder bei der Bank Frey?

Ein Zürcher Anwalt und ein Geschäftsleitungsmitglied der Bank Frey sind in den USA wegen Beihilfe zu Steuerhinterziehung angeklagt. In einem Fall soll Geld in Form von Schmuck in die USA zurückgebracht worden sein.



Hat es auf zwei Schweizer abgesehen: Der New Yorker Staatsanwalt Preet Bharara. (Archivbild)
Bild: Keystone

“Did UBS and Wegelin’s funds end up in the Bank Frey?”

“An attorney-at-law from Zurich and a management member of the Bank Frey are charged with tax evasion in the US. In one case, money in the form of jewellery had been brought back to the US.”

TagesAnzeiger

Der Datendieb der Panama Papers hat wohl einen Nachahmer

In Genf wurde ein Informatiker der Kanzlei Mossack Fonseca verhaftet. Er hat mutmasslich versucht, weitere Daten der Anwaltsfirma zu entwenden.



Kam es in der Genfer Filiale der Anwaltskanzlei zu einem weiteren Datendiebstahl?
Bild: Martial Trezzini/Keystone

“The data thief of the Panama Papers probably has a copycat”

“In Geneva a member of the IT staff of the firm Mossack Fonseca was arrested. He is suspected of attempting to steal more data from the law firm.”

BUSINESS DAY

Whistle-Blower Awarded \$104 Million by I.R.S.

By DAVID KOCIENIEWSKI SEPT. 11, 2012

Sometimes, crime does pay.

Bradley C. Birkenfeld, a former banker at UBS, recently served two and a half years in prison for conspiring with a wealthy California developer to evade United States income taxes.

But Mr. Birkenfeld, 47, has a lot to show for his time and effort: The Internal Revenue Service acknowledged on Tuesday that information he had provided was so helpful that he would receive a \$104 million whistle-blower award for revealing the secrets of the Swiss banking system.

By divulging the schemes that UBS used to encourage American citizens to dodge their taxes, Mr. Birkenfeld led to an investigation that has greatly diminished Switzerland's status as a secret haven for American tax cheats and allowed the Treasury to recover billions in unpaid taxes.



Clients' Lawyers Privilege: What is protected by privilege?

- Role of attorney: acting *qua* lawyer or *qua* business / commercial capacity?

Cf. Decisions by the Swiss Federal Supreme Court BGE/ATF 135 III 410 of 7 April 2009 para. 3.3, 114 III 105 of 6 June 1988 para. 3 and No 1B_380/2012 of 20 August 2012 para. 3.1 in general and Decision No 1B_85/2016 of 20 September 2016 with respect to internal investigations in particular

Non Clients' - Lawyers Communications

- Who is the client? The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)
- Communities of interest: Sharp v Blank [2015] EWHC 2681 (Ch)
- Selective waiver & confidentiality agreements: Property Alliance Group Limited v The Royal Bank of Scotland PLC [2015] EWHC 1557 (Ch)
- In principle, lack of protection under Swiss law: Cf. Decision by the Swiss Federal Supreme Court No 2C_900/2010 of 17 June 2011 para. 1.3 in general and Decision BGE/ATF 140 III 6 of 11 December 2013 para. 3 with respect to letters sent “sous les réserves d’usage”
- Privilege and debt collection proceedings against the client: Decision by the Swiss Federal Supreme Court BGE/ATF 142 II 307 of 9 May 2016 para. 4

Lawyers' Internal Investigations: are they privileged or not?

- Who is a 'lawyer' for these purposes?

- In-house counsel?
- Tax advice from accountants?

Cf. R (Prudential plc) v Special Commissioner of Income Tax [2013] UKSC 1

Cf. Decisions by the Swiss Federal Supreme Court Nos 1B_85/2016 of 20 September 2016 and 1B_101/2008 of 28 October 2008, para. 4.4.1 (for in-house counsel)

- Internal investigations:

- What is their purpose?
- Who conducts the investigation? Internal lawyers? Outside counsel? Does it matter?

Cf. Decision by the Swiss Federal Supreme Court No 1B_85/2016 of 20 September 2016

Fruit of Poisonous Tree: Art. 141 Swiss Criminal Code of Procedure : Admissibility of Unlawfully Obtained Evidence

- ¹ Evidence obtained in violation of Article 140 is not admissible under any circumstances. The foregoing also applies where this Code declares evidence to be inadmissible.
- ² Evidence that criminal justice authorities have obtained by criminal methods or by violating regulations on admissibility is inadmissible unless it is essential that it be admitted in order to secure a conviction for a serious offence.
- ³ Evidence that has been obtained in violation of administrative regulations is admissible.
- ⁴ Where evidence that is inadmissible under paragraph 2 has made it possible to obtain additional evidence, such evidence is not admissible if it would have been impossible to obtain had the previous evidence not been obtained.
- ⁵ Records relating to inadmissible evidence shall be removed from the case documents, held in safekeeping until a final judgment has concluded the proceedings, and then destroyed

Perquisition chez HSBC à Genève

Mercredi 18 février à Genève, la filiale suisse de la banque privée britannique HSBC est sous le coup d'une enquête pour blanchiment aggravé après les révélations de SwissLeaks.



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Au centre de Genève et au cœur d'un scandale financier international, HSBC aurait soustrait des milliards aux fiscs étrangers, selon les données publiées le 9 février dernier par les médias sous le nom de SwissLeaks. Le Ministère public genevois a passé ce mercredi matin 18 février la porte de la banque pour une perquisition. Image: Keystone

► **Un article est lié à cette galerie**

Perquisition chez HSBC pour «blanchiment aggravé»

🖼 **Toutes les galeries de photos**



“Search at HSBC in Geneva

Wednesday 18 February in Geneva, the Swiss branch of the private British bank HSBC is being investigated for aggravated money laundering after revelations from Swissleaks.”

“In the centre of Geneva in the heart of an international financial scandal, HSBC would have subtracted billions from foreign tax administrations, according to data published on 9 February last year by the press under the nickname SwissLeaks. This Wednesday morning, 18 February, the Geneva Prosecutor’s Office entered the bank for a search.”



Perquisitions chez HSBC: Genève frappe, Berne dort

Berne juge qu'il serait «illégal» d'enquêter sur la base des données soustraites par Hervé Falciani. Ce qui n'empêche pas la justice genevoise d'ouvrir sa propre enquête – à grand renfort de mise en scène médiatique

Recent case law by the Swiss Courts includes the following decisions :

Administrative Federal Court (AFC):

- With several decisions dated late 2015, the AFC ruled that Switzerland could not grant administrative assistance to the French authorities on the basis of stolen data, in that case data stolen from a French Branch of UBS by an *ex-employé*, considering in particular that such information was obtained through a criminal offence under Swiss law and thus against the principle of good faith.

[see decisions A-6843/2014 of 15 September 2015 – repealed by the SFC, A-6707/2014 of 24 November 2015 – challenged ; A-6337/2014 of 21 October 2015 – challenged ; A-6307/2014 of 2 November 2015–challenged].

- In a decision dated 22 October 2015 (A-6849/2014), the AFC dismissed a request based on data stolen on Swiss territory (and where the author was punished therefore), with regard to the theft of HSBC data by Hervé Falciani. The AFC held in particular that even if French authorities gathered additional data through subsequent proceedings, such proceedings were initiated on the basis of the stolen data.

Swiss Federal Supreme Court (SFC):

- By decision of 16 February 2017 (2C_893/2015), the SFC has interpreted the expression “*information obtained through a criminal offence under Swiss law*” contained in Art. 7 let. c TAAA as meaning criminal offences **effectively punishable under Swiss law**, which entails that (a) objective conditions of the relevant criminal law are fulfilled and (b) those offences are within the territorial scope of Switzerland. The SFC repealed the AFC decision according to which Swiss authorities could not grant administrative assistance to France on the basis of data stolen from a French Branch by an ex-employé, as there was in fact no criminal offence under Swiss law.
- By decision of 17 March 2017 (2C_1000/2015), the SFC had to rule on a French request based on HSBC data stolen by Hervé Falciani in Switzerland. The SFC dismissed the said request and expressly distinguished this case from the one where the theft of data was not punishable under Swiss law (e.g. for lack of criminal conduct on Swiss territory). This last decision confirms that Swiss authorities, as a rule, cannot grant assistance to foreign tax authorities when the data on which the request relies were stolen in Switzerland. Furthermore, the SFC made it clear that further evidence obtained based on stolen data cannot heal the exception. In other words, the Court upheld the so-called theory of the poisonous tree, according to which evidence gathered through legal means such as independent investigations, which were however initiated on the basis of illegal evidence, is unacceptable. The SFC emphasized that the decisive criterion is the existence of a causal relationship between stolen data and the request. However, the court left the question open whether this limitation would also apply when the requesting state has obtained the stolen data only indirectly, as this is the case of certain states that have acquired the Falciani List indirectly from France.

Affaire HSBC-Falciani: le Tribunal fédéral refuse au fisc français une entraide basée sur des données volées



Hervé Falciani avait été condamné en 2015 à 5 ans de prison (archives).

KEYSTONE

“Case HSBC-Falciani: The Federal Supreme Court denies to the French tax administration a request for mutual legal assistance based on stolen data”

“Switzerland will not help the French tax administration to search for fraudsters exposed in documents stolen by Hervé Falciani from HSBC.”

“The Federal Supreme Court emphasises that the French request is based on data obtained because of acts which are criminally punishable under Swiss law.”

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Questions?

Contact Lalive

35, Rue de la Mairie
P.O. Box 6569
1211 Geneva 6
Switzerland
Tel +41 58 105 2000
Fax +41 58 105 2060
mhenzelin@lalive.ch

Stampfenbachplatz 4
P.O. Box 212
8042 Zurich
Switzerland
Tel +41 58 105 2100
Fax +41 58 105 2160
mhenzelin@lalive.ch