Articles

Walking a Fine Line – A Contextual Perspective on the Purchase of "Stolen" Banking Data by German Authorities

By Valentin M. Pfisterer[*]

A. Zumwinkel's Legacy

On 14 February 2008, German prosecutors and investigative authorities made a sensational catch. That day, it became public that they had initiated criminal investigations against Klaus Zumwinkel, then head of the DAX-listed corporation Deutsche Post. Additionally, the top manager's villa in Cologne was searched in a dawn raid and, as the media apparently had been tipped off, TV cameras could film the corporate executive while accompanied out of his home by prosecutor Margit Lichtinghagen.[1] About one year later, Zumwinkel, no longer head of Deutsche Post, was convicted of tax evasion to two years of prison placed on probation.[2] Although hailed by many as a triumph for the prosecution of white-collar crimes and the fight against corporate executives' recklessness, some already questioned the approach of prosecutors and investigators in the early stages.[3] This criticism first and foremost referred to the fact that important information used as evidence in the investigations as well as the subsequent criminal court proceedings stemmed from banking data "stolen" by a Liechtenstein banker from his (former) employer Liechtenstein Global Trust, a bank based in Liechtenstein, and subsequently purchased by

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[1] *See* for an example, *Deutscher Postchef von Polizei aus dem Haus geführt* (Deutsche Post chief executive marched off his house by police*)*, NEUE ZÜRCHER ZEITUNG (NZZ, 14 Feb. 2008), available at: www.nzz.ch/aktuell/wirtschaft/uebersicht/ermittlungen-gegen-deutschen-post-chef-zumwinkel-1.670960 (last accessed: 27 June 2013).

[2] LG Bochum, 12 KLs 350 Js 1/08, available at: www.justiz.nrw.de/nrwe/lgs/bochum/lg_bochum/j2009/12_KLs_350_Js_1_08urteil20090126.html (last accessed: 27 June 2013).

[3] Holger Steltzner, *Staat, Steuer und Moral* (State, taxation and ethics), FRANKFURTER ALLGEMEINE ZEITUNG (FAZ, 21 Feb. 2008), available at: www.faz.net/aktuell/wirtschaft/wirtschaftskriminalitaet-staat-steuer-und-moral-1512742.html (last accessed: 27 June 2013): "defeat for the rule of law" (translation by the author); Bernd Schünemann, *Die Liechtensteiner Steueraffäre als Menetekel des Rechtsstaats* (The Liechtenstein tax affair as a warning to the rule of law), 27 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 305 (2008): "warning to the rule of law" (translation by the author); *also see* Rudolf Stahl & Ralf Demuth, *Strafrechtliches Verwertungsverbot bei Verletzung des Steuergeheimnisses – Ein Zwischenruf im Fall Zumwinkel* (Violations of tax secrecy bring along the inadmissibility of evidence - An interjection in the Zumwinkel Case), 47 DEUTSCHES STEUERRECHT (DStR) 600 (2008).

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German authorities. This phenomenon, the purchase of "stolen banking data by German authorities, was not unprecedented as the so called "Liechtenstein tax affair" ("*Liechtensteinische Steueraffäre*") had already been going on for some time.[4] Zumwinkel, however, was the first widely known defendant in that context.[5]

Although the first purchase of "stolen" banking data by German authorities dates back to 2006 or 2007, the debate on the legality and legitimacy of this approach is still ongoing. Whereas academics and practitioners coolly discuss the corresponding legal questions, the issue has also provoked heated debates on the political plane. Recent developments have again turned it into a matter of utmost importance and topicality: Only few months ago, it came to light that Uli Hoeneß, the Chairman of the soccer club Bayern München, has allegedly evaded taxes on earnings related to a Swiss bank account for years. Given the fact that Hoeneß is a public figure and has entertained close ties to influential politicians of both sides of the political aisle, his high profile case will further fuel the discussion on the means – and the limits – of the fight against tax evasion and maybe even influence the outcome of the elections of the Federal Parliament (*Bundestag*) in Germany in September 2013.

The present article, first, outlines the factual background of the purchase of "stolen" banking data by German authorities and gives an overview over the major legal questions related to this phenomenon (B.). Secondly, it presents the landmark decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) on the issue from 9 November 2010, sketches its perception in the academia and jurisprudence and offers some additional remarks by the author (C.). The article finally sets the BVerfG decision in the proper context and sketches its most significant legal and political consequences including recent developments in German criminal tax law, the impact on the Swiss "Financial Integrity Strategy" (*Weißgeldstrategie*) as well as the (failed) German-Swiss tax Agreement (D).

[4] As to the facts and selected legal aspects of the entire affair, s*ee* Ulrich Göres & Jens Kleinert, *Die Liechtensteinische Finanzaffäre – Steuer- und steuerstrafrechtliche Konsequenzen* (The Liechtenstein financial affair— consequences related to tax and criminal tax law), 62 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1353 (2008); Ulrich Sieber, *Ermittlungen in Sachen Liechtenstein – Fragen und erste Antworten* (Investigations concerning Liechtenstein – preliminary questions and answers), 62 NJW 881 (2008); Ralf Kölbel, *Zur Verwertbarkeit privat-deliktisch beschaffter Bankdaten – Ein Kommentar zur Causa "Kieber"* (On the admissibility of banking data obtained in breach of civil law - a commentary on the "Kieber" case), 27 NStZ 241 (2008); Uli Dönch & Alexandra Kusitzky, *Der Fall Liechtenstein: Strafen, Steuern, Skandale* (The Liechtenstein case – penalties, tax and scandals) 14 (22 Feb. 2008, FAZ).

[5] Specifically as to the Zumwinkel case and selected legal aspects, *see* Stahl & Demuth, *supra* note 3, at 600.

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B. The Purchase of "Stolen" Banking Data by Public Authorities: On a Questionable Public Private Partnership

I. Facts and Issues

German authorities purchased a CD containing data on financial assets undeclared to German tax authorities by taxpayers from a bank employee in Liechtenstein for the first time in 2006 or 2007. It can be assumed that the relevant bank employee, in doing so, committed an offense under German and/or Liechtenstein criminal law.[6] Since then, German authorities, state or federal, have repeatedly purchased such CDs from bank employees in Liechtenstein and Switzerland – and they continue to do so to the present day.[7] In some of the cases, the *Bundesnachrichtendienst* (BND), a major German intelligence agency, assisted the investigative authorities and actually executed the transaction.[8] As a fruit of the continued activity of this type, the German Government received extensive new information to serve as potential leads for (further or initial) investigations against potential tax evaders, Liechtenstein or Swiss banks as well as their employees.[9] Consequently, a significant amount of money formerly hidden from German tax authorities has been disclosed and made available to them; even more money has allegedly been paid by Liechtenstein or Swiss banks in the context of settlements with the

[6] Gerson Trüg, *Steuerdaten-CDs und die Verwertung im Strafprozess* (CDs containing fiscal data and their admissibility in criminal proceedings), 31 STRAFVERTEIDIGER (StV) 111, 111-112 (2011): LS-StGB as well as § 17 UWG and § 202a StGB; Michael Pawlik, *Zur strafprozessualen Verwertbarkeit rechtswidrig erlangter ausländischer Bankdaten* (On the admissibility of banking data illegally obtained abroad), 65 JURISTENZEITUNG (JZ) 693, 694 at fn. 21 (2010): §§ 122-124 and § 131a LS-StGB as well as § 14 BankG in junction with § 63 LS-StGB; Valentin Spernath, *Strafbarkeit und zivilrechtliche Nichtigkeit des Ankaufs von Bankdaten*(The Purchase of banking data - Criminal liability and invalidity under civil law) 29 NStZ 307, 307-308 (2010): § 17 UWG; Alexander Ignor & Matthias Jahn, *Der Staat kann auch anders – Die Schweizer Daten-CDs und das deutsche Strafrecht* (That's not all the State can do – Swiss CDs containing banking data and German criminal law), 50 JURISTISCHE SCHULUNG (JuS) 390, 391-393 (2010): § 17 UWG; Stahl & Demuth, *supra* note 3, at 600 (§ 17 UWG); Gerson Trüg & Jörg Habetha, *Die "Liechtensteiner Steueraffäre" – Strafverfolgung durch Begehung von Straftaten?* (The 'Liechtenstein tax affair' - Criminal prosecution by the commission of crimes?)*,* 62 NJW 887, 888-889 (2008): § 17 UWG or § 202a StGB; Evelyn Kelnhofer & Björn Krug, *Der Fall LGT Liechtenstein – Beweisführung mit Material aus Straftaten im Auftrag des deutschen Fiskus?* (The LGT Liechtenstein case – establishing facts through material illegally obtained on behalf of the German Government?)*,* 28 StV 660, 661-662 (2008): §§ 122-124 and § 131a LS-StGB and/or § 17 UWG, § 202a StGB, §§ 43, 44 BDSG; Schünemann, *supra* note 3, at 308 (§ 124 LS-StGB). As for the respective cases involving Switzerland, s*ee* Günter Stratenwerth & Wolfgang Wohlers, *Schwarzgeld - Strafbarkeitsrisiken für die Mitarbeiter schweizerischer Banken* (Illicit funds - criminal liability risks for employees of Swiss banks), 128 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT (ZStR) 429, 438 (2010): Art. 47 CH-BankG; Art. 273 CH-StGB.

[7] The last CD was supposedly purchased by Rhineland-Palatinate authorities in spring 2013.

[8] As to more details, *see again*, *supra*, note 4.

[9] As to potential criminal liability risks for Swiss bank employees dealing with the financial assets of foreign tax evaders, *see* Stratenwerth & Wohlers, *supra* note 6, at 429, 430-436.

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German Government.[10] Moreover, the public debate on the purchase of such CDs has apparently made a significant number of tax evaders file a voluntary declaration (*Selbstanzeige*) pursuant to § 371 AO (*Abgabenordnung*, general tax code).[11] Hence, from the perspective of law enforcement as well as from a fiscal perspective, the purchase of such CDs has certainly been a great success.

Nevertheless, the views on this practice are split – and as is often the case – along party lines: Representatives of the Social Democratic Party (SPD) and the Greens, both currently in the minority in the German Federal Parliament, favor the purchase of such CDs and keep pressing for more activity of this type. Norbert Walter-Borjans, Minister of Finance of North Rhine-Westphalia, has become the most distinguished supporter of this approach, calling it the "most effective means against tax evasion."[12] Others are less enthusiastic, namely, representatives of the majority parties in the Federal Parliament, the Christian Democratic Union (CDU) and the Free Democratic Party (FDP), as well as representatives of the Federal Government (*Bundesregierung*), first and foremost Minister of Finance Wolfgang Schäuble and Minister of Justice Sabine Leutheuser-Schnarrenberger.[13] The same holds true, e. g., for representatives of major business associations and the President of the Federal Tax Court (*Bundesfinanzhof*).[14] They have repeatedly aired their doubts

[10] The income is said to amount to a total of up to 3 billion euro, see Ministry of Finance of North Rhine-Westphalia, Press release, 24 September 2012, available at: www.nrw.de/landesregierung/steuer-cds-sind-das-wirksamste-instrument-gegen-steuerhinterzieher-13449 (last accessed: 27 June 2013).

[11] *See* the corresponding media coverage *e.g.,* Jens Tartler, *Welle von Selbstanzeigen nach CD-Kauf* (Wave of voluntary declarations after purchase of CD), FINANCIAL TIMES DEUTSCHLAND (FTD, 15 Aug. 2012), available at: www.ftd.de (last accessed: 27 June 2013); *Steuer-CD-Käufe lösen Welle von Selbstanzeigen aus* (Purchase of tax CDs causes wave of voluntary declarations), NZZ, 15 Aug. 2012, available at: www.nzz.ch/aktuell/wirtschaft/wirtschaftsnachrichten/steuer-cd-kaeufe-loesen-welle-von-selbstanzeigen-aus-1.17481546 (last accessed: 27 June 2013).

[12] Walter-Borjans, quoted from: Ministry of Finance of North Rhine-Westphalia, Press release, *supra* note 10 (translation by the author).

[13] *Schäuble kritisiert Ankäufe von Steuer-CDs* (Schäuble criticizes purchase of tax CDs), FAZ, 16 Jul. 2012, available at: www.faz.net/aktuell/politik/inland/bankkunden-in-der-schweiz-schaeuble-kritisiert-ankaeufe-von-steuer-cds-11821664.html (last accessed: 27 June 2013; *Schäuble: "Zufällige CD-Käufe immer nur eine Behelfskrücke"* (Schäuble: "Random purchases of CDs not more than auxiliary instrument"), DIE WELT, 127 June 2012, available at: www.welt.de/newsticker/news3/article108299850/Schaeuble-Zufaellige-CD-Kaeufe-immer-nur-eine-Behelfskruecke.html (last accessed: 27 June 2013).

[14] As to the first, *see* Dietmar Neure, Donata Riedel & Oliver Stock, *Wirtschaftsverband wirft NRW-Minister Hehlerei vor* (Business association accuses NRW Minister of receiving), HANDELSBLATT, 24 Aug. 2012, available at: www.handelsblatt.com/politik/deutschland/ankauf-von-steuer-cds-wirtschaftsverband-wirft-nrw-minister-hehlerei-vor/7049750.html (last accessed: 27 June 2013), as to the second, *see* the interview with Rudolf Mellinghoff *Steuergerechtigkeit: "Folter kann auch sehr erfolgreich sein"* (Fair taxation: "Torture can also be very effective"), SPIEGELONLINE, 15 March 2013, available at: www.spiegel.de/wirtschaft/interview-mit-finanzhof-praesident-mellinghoff-zu-erbschaftsteuer-a-888636.html (last accessed: 27 June 2013).

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regarding the legality and legitimacy of the purchase of such CDs and favor a political or else legally sound solution in cooperation with the Swiss Federal Government (*Bundesrat*).

Indeed, the exercise of public authority cannot be measured by criminal prosecution and fiscal standards alone. It has also to conform to legal and even moral standards – especially when directed against its constituency. By repeatedly purchasing such CDs, German authorities have dealt with criminals and, thus, themselves engaged in dubious business transactions. Moreover, by generously paying them for their contribution they have created a "business model" that might give – and has possibly already given – an incentive for bank employees to "steal" banking data from their employers in the future.[15] In doing so, the government has blurred the ethical difference between the commission and the prosecution of crimes thus running the risk to lose its moral superiority.[16]

II. The Scholarly Debate

This political and moral conflict culminates in the purely legal question of whether the data contained on such a CD itself or information gained from subsequent investigations based on such data are admissible as evidence in criminal proceedings against an alleged tax evader or whether the problematic attainment precludes its admissibility.[17]

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[15] Marcel Gyr, *Das Geschäft mit den Steuer-CD* (The trade with tax CDs), NZZ, 13 Dec. 2012, available at: www.nzz.ch/aktuell/wirtschaft/wirtschaftsnachrichten/das-geschaeft-mit-den-steuer-cd-1.17888569 (last accessed: 27 June 2013); Matthias Benz, *Die Kavallerie wird nicht ausgemustert* (The Cavalry is not being discharged), 14 Dec. 2012, NZZ, available at: www.nzz.ch/aktuell/wirtschaft/wirtschaftsnachrichten/die-kavallerie-wird-nicht-ausgemustert-1.17888615 (last accessed: 27 June 2013).

[16] *See* Winfried Hassemer, *Unverfügbares im Strafprozess* (The inaccessible in criminal proceedings), in FESTSCHRIFT FÜR WERNER MAIHOFER 183, 204 (René Bloy, Martin Böse, Thomas Hillenkamp, Carsten Momsen & Peter Rackow eds., 1988) although referring to a different context.

[17] As for the major contributions in this respect, *see* Trüg, *supra* note 6, at 111, 116-120; Ignor& Jahn, *supra* note 6, at 390, 394-395; Pawlik, *supra* note 6, at 693; Stratenwerth & Wohlers, *supra* note 6, at 436-444; Andreas Schwörer, *Schranken grenzüberschreitender Beweisnutzung im Steuer- und Strafverfahren* (The Limits to the crossborder use of evidence in fiscal and criminal proceedings), 28 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT (wistra) 452, 457-458 (2009); Günter Heine, *Beweisverbote und Völkerrecht: Die Affäre Liechtenstein in der Praxis* (Inadmissibility of evidence and public international law: The Liechtenstein affair in practice), 10 Online-ZEITSCHRIFT FÜR HÖCHSTRICHTERLICHE RECHTSPRECHUNG IM STRAFRECHT (HRRS) 540 (2009); Gerson Trüg & Jörg Habetha, *Beweisverwertung trotz rechtswidriger Beweisgewinnung – insbesondere mit Blick auf die "Liechtensteiner Steueraffäre"* (Use of evidence despite of illegal gathering – with a particular view to the "Liechtenstein tax affair"), 27 NStZ 481 (2008); Schünemann, *supra* note 3, at 305, 309-310; Trüg& Habetha, *supra* note 6, at 887, 890; Kölbel, *supra* note 4, at 241; Göres & Kleinert, *supra* note 4, at 1356-1357; Sieber, *supra* note 4, at 886; Stahl & Demuth, *supra* note 3, at 600, 603; Kelnhofer & Krug, *supra* note 6, at 660, 664-667. Finally *see* Valentin Pfisterer, *"Der Reformauftrag betrifft das Steuerrecht" – Lehren aus dem Ankauf „gestohlener" Bankdaten und dem Scheitern des deutsch-schweizerischen Steuerabkommens* ("The reforming mission concerns the tax law" – Lessons from the purchase of "stolen" banking data and the failure of the German-Swiss tax agreement),131 ZStR forthcoming (2013).

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Some scholars or practitioners are of the opinion that such evidence cannot be used in criminal proceedings against an alleged tax evader. They mainly follow three lines of reasoning: First, these scholars and practitioners argue that the official who personally carried out the transaction committed an offense under German law.[18] They secondly hold that the purchase, the way it was executed in some cases, namely with assistance of the BND, was against domestic public law. Pursuant to § 1 BNDG (*BND-Gesetz*, law governing the BND), the agency gathers and analyzes information on foreign countries which is relevant to the Federal Republic of Germany in terms of foreign and security policy. Accordingly, they argue that the BND exceeded its authority when it left the area of foreign and security policy and engaged in the prosecution of ordinary tax offenses.[19] In addition, they claim a breach of the division of authority principle (*Trennungsgebot*). This principle generally requires an organizational and functional separation between German intelligence services such as the BND on the one hand and the regular law enforcement authorities on the other.[20] In particular, it maintains that the intelligence services – as opposed to the regular law enforcement authorities – are not authorized to employ means of coercion but may only make use of investigative means.[21] Accordingly, they argue that the BND violated this principle when it referred the acquired data to the law enforcement

[18] Trüg, *supra* note 6, at 111, 112-115: § 17 UWG, §27 StGB; §§ 257, 266 StGB; Ignor & Jahn, *supra* note 6, at 390, 393-394: § 17 UWG, §§ 26, 27 StGB; §§ 257, 266 StGB; Spernath, *supra* note 6, at 307, 309: § 17 UWG, §§ 26, 27 StGB; Heine, *supra* note 17, at 540: § 17 UWG; Trüg & Habetha, *supra* note 17, at 481, 489: § 17 UWG, § 27 StGB and § 257 I StGB; Trüg & Habetha, *supra* note 6, at 887, 888-890: § 257 I StGB; § 17 UWG, § 27 StGB; Schünemann, *supra* note 3, at 305, 308 (§ 17 UWG, § 26 StGB and § 261 StGB); Sieber, *supra* note 4, at 883-885: § 17 UWG, § 27 StGB; Kelnhofer & Krug, *supra* note 6, at 660, 662-664: §§ 257, 266 StGB; § 17 UWG; § 44 BDSG.

As to the legal situation from a Swiss perspective, *see* Stratenwerth & Wohlers, *supra* note 6, at 429; Vera Delnon & Marcel Niggli, *Verkaufen und Kaufen von strafbar erlangten Bankkundendaten durch ausländische Behörden als schweizerisch-deutsches Tatgeschehen* (Sale and purchase of illegally obtained banking data by foreign authorities – a Swiss-German crossborder matter), JUSLETTER, 8 Nov. 2010, available at: www.jusletter.ch (last accessed: 27 June 2013); Andreas Eicker, *Zur Strafbarkeit des Kopierens und Verkaufens sowie des Ankaufens von Bankkundendaten als schweizerisch-deutsches Tatgeschehen* (On the culpability of the copying, sale and purchase of banking data – a Swiss-German crossborder matter), JUSLETTER, 30 Aug. 2010, available at: www.jusletter.ch (last accessed: 27 June 2013).

[19] Heine, *supra* note 17, at 540, 541; Schünemann, *supra* note 3, at 305-308; Trüg & Habetha, *supra* note 17, at 481, 489; Kelnhofer & Krug, *supra* note 6 , at 660, 664-665.

[20] As to the division of authority principle in general, *see* Fredrik Roggan & Nils Bergemann, *Die "neue Sicherheitsarchitektur" der Bundesrepublik Deutschland – Anti-Terror-Datei, gemeinsame Projektdateien und Terrorismusbekämpfungsergänzungsgesetz* (The "new security architecture" of the Federal Republic of Germany – Anti-terror database, shared project files and the law amending the law on the fight against terrorism), 61 NJW 876, 876-877 (2007); Kay Nehm, *Das nachrichtendienstliche Trennungsgebot und die neue Sicherheitsarchitektur* (The division of authority principle and the new security architecture), 58 NJW 3289 (2004). Also see the relevant remarks of the BVerfG in its recent decision on the anti-terror database, BVerfG, 1 BvR 1215/07, mn. 123 and 202-203, available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20130424_1bvr121507.html (last accessed: 27 June 2013).

[21] Roggan & Bergemann, *supra* note 20, at 876, 876-877; Nehm, *supra* note 20, at 3289.

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authorities thus passing the line between intelligence and law enforcement.[22] Finally, these scholars and practitioners claim a breach of international law and hold that the purchase of such CDs violates applicable law enforcement treaties or the sovereignty of Liechtenstein and the Swiss Confederation respectively.[23] As a consequence of these violations, they argue that at least the data immediately gained from such a transaction is not admissible in subsequent criminal proceedings.[24]

Other scholars and practitioners do not share this view. Firstly, they disagree with the criminal law analysis of their colleagues and are of the opinion that the purchase of such CDs does not constitute an offense under German law.[25] Secondly, as to the domestic public law perspective, these scholars and practitioners hold that the BND was very well authorized to take action outside its genuine area of authority (including for law enforcement purposes) and to refer the data to the law enforcement authorities. Most of them argue that the agency did not act on its own but rather lent administrative assistance (*Amtshilfe*) pursuant to § 116 AO.[26] Thirdly, these scholars and practitioners maintain that the purchase of such data neither constitutes a circumvention of applicable law enforcement treaties nor a breach of the sovereignty of Liechtenstein and the Swiss Confederation respectively. They mainly argue that the "theft" of the data cannot be attributed to the Federal Republic of Germany in the first place.[27] As a consequence, they are of the opinion that the information gained from such transactions, as well as information gained from subsequent investigations based on such data, is admissible in subsequent criminal proceedings.

To the present day, this major question – as well as other related issues – is not definitely resolved.[28]

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[22] Schünemann, *supra* note 3, at 305-308; Kelnhofer & Krug, *supra* note 6, at 660, 665.

[23] Heine, *supra* note 17, at 540, 541-544; Schwörer, *supra* note 17, at 452, 457; Trüg & Habetha, *supra* note 6, at 887, 890; Schünemann, *supra* note 3, at 307; Kelnhofer & Krug, *supra* note 6, at 660, 666-667.

[24] Trüg, *supra* note 6, at 111, 116-118; Heine, *supra* note 17, at 540, 546; Trüg, & Habetha, *supra* note 17, at 481, 491; Trüg & Habetha, *supra* note 6, at 887, 890; Ignor & Jahn, *supra* note 6, at 390, 394-395; Schünemann, *supra* note 3, at 309; differentiating *Sieber*, *supra* note 4, at 886.

[25] Stratenwerth & Wohlers, *supra* note 6, at 429, 441; Göres & Kleinert, *supra* note 4, at 1357.

[26] Pawlik, *supra* note 6, at 693, 695-697; Kölbel, *supra* note 4, at 241, 243-244; Göres & Kleinert, *supra* note 4, at 1356-1357; Sieber, *supra* note 4, at 885.

[27] Pawlik, *supra* note 6, at 693, 694-695; Stratenwerth & Wohlers, *supra* note 6, at 429, 443-444.

[28] As far as proceedings in fiscal courts and the admissibility of such evidence in these proceedings are concerned, this is certainly due to the fact that only few respective tax assessment notes have been judicially rescinded, *see* Joachim Jahn, *Kaum Klagen nach Kauf von Steuer-CD* (Only few lawsuits after purchase of tax CD), FAZ, 19 Feb. 2013, available at: www.faz.net/aktuell/finanzen/fonds-mehr/zahme-steuersuender-kaum-klagen-nach-kauf-von-steuer-cds-12086241.html. (last accessed: 27 June 2013).

C. Karlsruhe's Blessing

In November 2010, however, the BVerfG made an important contribution to this topic. Although the Court did not exactly address the question outlined above, it tackled the closely related question of whether information contained in such a CD could legally establish an initial suspicion (*Anfangsverdacht*) which in turn justifies the initiation of a criminal investigation (§§ 152 II and 160 StPO).[29]

I. The Facts and the Initial Legal Proceedings

The BVerfG decision goes back to a constitutional complaint (*Verfassungsbeschwerde*) which was directed against two court decisions of the Local Court (*Amtsgericht*) of Bochum of 10 April 2008 and the District Court (*Landgericht*) of Bochum of 7 August 2009 respectively.[30] These decisions were handed down in the context of criminal investigations against the complainants for alleged tax offenses.

By means of its decision on 10 April 2008, the Local Court of Bochum issued a search warrant pursuant to §§ 102, 105 StPO (*Strafprozessordnung*, code of criminal procedure). The former provision establishes that a search of the private premises of a person who is suspected of committing a criminal offence may be made for the purpose of his apprehension, as well as in cases where it may be presumed that the search will lead to the discovery of evidence. Beforehand, the investigative authorities had received information on two trusts set up in 2000 by a Liechtenstein escrow in favor of the complainants and unknown to German tax authorities. The relevant information had stemmed from a CD the BND had purchased in assistance of investigative authorities from an employee of a Liechtenstein bank. When the search was executed on 23 September 2008, the law enforcement authorities found documents related to the trusts and the subsequent investigations indicated a tax evasion which amounted to almost 100.000 €.[31]

The complainants rescinded the search warrant and appealed to the District Court of Bochum. On 7 August 2009, however, the District Court dismissed the complaint and confirmed the search warrant.[32]

[29] BVerfG, 64 NJW 2417 (2010).

[30] As to the latter, *see* LG Bochum, 29 NStZ 352 (2010).

[31] *Id.* at 351.

[32] *Id.* at 351.

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II. The Key Legal Questions

By means of their constitutional complaint, the complainants now alleged, amongst others, a violation of the inviolability of the home (Art. 13 Sec. 1 GG in conjunction with the rule of law principle, Art. 20 Sec. 3 GG).[33]

The complainants were of the opinion that the search warrant was illegal. They argued that the initial suspicion necessary to initiate criminal investigations and to issue a search warrant could not be legally based on information gained from such a CD. They maintained that the investigation had been initiated illegally and that, as a consequence, the search warrant was equally illegal.[34] In doing so, the complainants took up the arguments brought forward in the academia[35] and contested the constitutionality of the search warrant as well as the respective court decisions on three grounds.[36]

First, the complainants invoked the European Convention on Mutual Assistance in Criminal Matters of 1959 and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990.[37] The agreements both cover the cooperation between, amongst others, Germany and Liechtenstein in the area of law enforcement. The complainants argued that the "theft" of the data and the subsequent purchase of the CD had not conformed to these agreements and, thus, constituted a breach of international law.[38] The District Court of Bochum, however, doubted whether the abovementioned agreements had indeed been circumvented. It held that the original "theft" of the data could not be attributed to the Federal Republic of Germany in the first place as it had not been committed by a German official but rather by a private individual. The applicable requirements set out by the U.N. General Assembly Resolution 56/83 on the responsibility of states for internationally wrongful acts, in particular Art. 8 of the Resolution (attribution of conduct directed or controlled by a state) were not met. The District Court brought forward the additional argument that even if the agreements had been circumvented in the present case this would not result in the inadmissibility of the evidence. It argued that, according to the jurisprudence of the *Bundesgerichtshof* (BGH), the circumvention of an

[33] BVerfG, *supra* note 29, at 2417.

[34] *Id.* at 2417.

[35] See *supra*, notes 18 through 24.

[36] *See* BVerfG, *supra* note 29, at 2417.

[37] European Convention on Mutual Assistance in Criminal Matters, 20 April 1959; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1990, available at: www.conventions.coe.int/Treaty/EN/Treaties/Html/141.htm (last accessed: 27 June 2013).

[38] *See* BVerfG, *supra* note 29, at 2417; *cf.* the argument, *see supra* note 23.

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international agreement can indeed bring along the inadmissibility of evidence. This is, however, only the case if the use of the evidence itself constitutes a breach of the relevant agreement. In the present case, the District Court held that a possible infringement of the abovementioned agreements would have already been terminated and the subsequent use of the data in investigations would not constitute an independent violation.[39]

Second, the complainants claimed breaches of domestic public law. They first questioned the authority of the BND to take action in the present case: They argued that the BND, by purchasing the CD, had not acted within its field of authority.[40] Moreover, the complainants held that the BND had violated the division of authority principle.[41] With respect to these aspects, the District Court did not go into the subject and simply stated that it would not result in the inadmissibility of the evidence even if the BND had violated domestic public law.[42]

Finally, the complainants alleged that the BND official who personally carried out the purchase of the CD committed an offense under German criminal law (§ 17 Sec. 2 UWG).[43] The District Court did not go into this subject either and simply declared that the evidence was admissible even if it had been acquired in the way of an offense.[44]

III. The Decision of the Federal Constitutional Court

In its decision handed down on 9 November 2010, the BVerfG held the constitutional complaint partly inadmissible and dismissed it on the merits as regards the remaining aspects.[45]

1. Mapping the Scene

At the outset, the BVerfG emphasized that the search of private premises constitutes a manifest intervention in the inviolability of the home as guaranteed in Art. 13 Sec. 1 GG. Such an interference is only justified if the individual concerned is suspected of committing

[39] LG Bochum, *supra* note 30, at 352.

[40] *See* BVerfG, *supra* note 29, at 2417; *cf.* the argument, *see supra* note 19.

[41] *See Id.* at 2417; *cf.* the argument, *see supra* note 22.

[42] LG Bochum, *supra* note 30, at 352.

[43] *See* BVerfG, *supra* note 29, at 2417; *cf.* the argument, *see supra* note 18.

[44] LG Bochum, *supra* note 30, at 352.

[45] BVerfG, *supra* note 29, at 2417.

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a criminal offence and if this suspicion is based on palpable facts. This requirement, the BVerfG notes, was addressed to a reasonable extent in the contested court decisions. Then, it highlighted that the Basic Law (*Grundgesetz*) did not prohibit using the data in order to establish an initial suspicion in the case at hand.[46]

Following this, the BVerfG set the present case in the proper context of its jurisprudence and the jurisprudence of the BGH respectively and laid out its standard of review.[47] The case at hand did not directly raise the more familiar question whether facts that were gathered illegally can be used as evidence in criminal court proceedings (*Beweisverwertungsverbot*). It rather raised the – slightly different – question of whether such facts justify the lawful initiation of a criminal investigation in the first place (*Vorauswirkung von Beweisverwertungsverboten*). The BVerfG emphasized that there is no constitutional principle establishing that the unlawful collection of evidence necessarily brings along the inadmissibility of such evidence in subsequent criminal proceedings. It rather fell to the ordinary courts to determine the consequences of such illegal conduct in general and to decide whether it results in the inadmissibility of the evidence in particular. Pursuant to their established jurisdiction, the answers to these questions depend on the particular circumstances of the case, especially the character of the legal prohibition and the gravity of the infringement, as well as the interests involved. As a consequence, the admissibility of evidence is the rule whereas the inadmissibility is the exception. Accordingly, the latter is only applicable when explicitly provided for or when called for by superior reasons. The BVerfG has expressly accepted this jurisprudence as constitutional and shares its rationale. It added that evidence is to be held inadmissible on specifically constitutional reasons in two more sets of cases: First, in cases where procedural rules were disobeyed manifestly, intentionally and arbitrarily and constitutional safeguards have been disregarded systematically. The second, being in cases where the evidence or its use affects the absolute core area of private life.[48]

In light of the above, the BVerfG expressly refrained from extending its examination to the question of whether the courts had applied the ordinary law correctly in the present case. It rather restricted its review to the question of whether they misconceived the scope of protection of the procedural rule which was allegedly violated or whether they unduly raised the threshold that would have brought along the inadmissibility of evidence in the case at hand. In other words, an erroneous interpretation of the ordinary law is only relevant to the BVerfG if and as far as it results in the specific negligence of fundamental rights or if it is completely arbitrary.[49]

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[46] *Id.* at 2418.

[47] *Id*. at 2418-2419.

[48] *Id.* at 2419.

[49] *Id.* at 2419-2420.

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2. Applying the Yardstick to the Present Case

Having said this, the BVerfG maintained that the contested court decisions are not objectionable on constitutional grounds. Thereby, it expressly left open the question of whether the conduct of the BND constituted a breach of international or domestic public law or whether the relevant official committed an offense under German criminal law.[50]

With respect to the alleged violations of international law, the BVerfG held that the ordinary courts could legitimately assume that the requirements of attribution as laid out in the above mentioned agreements were not met in the present case. Moreover, it stated that the additional consideration made by the District Court that the use of the "stolen" data would not constitute an independent infringement even if it had been acquired in breach of the agreements was equally sensible. In any event, both violations neither specifically resulted in the negligence of a fundamental right nor were arbitrary.[51]

As regards the alleged violations of domestic law, the BVerfG reminded that the ordinary courts had imputed – in favor of the complainants – that the conduct of the BND and the relevant official in fact resulted in the alleged violations of domestic public law and the alleged criminal offense. Nevertheless, it held, the ordinary courts had correctly found that the evidence was admissible. In this respect, the BVerfG first addressed the nature of the data: As the relevant information concerns business rather than private matters, it stated, the complainants can not successfully invoke the right to respect for private life and argue that the disclosure of the data violated their core area of private life. Then, the BVerfG turned to the events before the purchase of the CD: It reminded that the StPO is applicable to law enforcement authorities only and that it does not cover the conduct of the private individual who actually "stole" the data. As a consequence, such data is generally admissible in subsequent investigations or court proceedings. Next, the BVerfG addressed the alleged violation of the division of authority principle: It first reiterated the findings of the ordinary courts that it was not the BND which made the private individual "steal" the data, but that the individual independently directed himself to the BND. In such a case, the BND was in fact allowed to receive the data and to refer it to the competent authorities as a measure of administrative assistance.[52]

Towards the end, the BVerfG found that all these considerations, arguments and conclusions as made by the ordinary courts were plausible and did not contain any constitutionally relevant misconception. In particular, it highlighted that the imputed

[50] *Id.* at 2419.

[51] *Id.* at 2420.

[52] *Id.*

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violations of law did not result in manifest, intentional and arbitrary infringements nor had constitutional safeguards been disregarded systematically. The BVerfG finally recalled the modest scope of the case at hand and its legal implications: The question to be resolved only concerned the mediate effects of a purchase of data imputed as illegal.[53]

IV. The Reception by the Academia and the Courts

To the major part of the academia, the decision most likely did not come as a surprise.[54] It definitely confirmed the position of those who hold that evidence gained from such CDs is very well admissible in criminal proceedings.[55] Thereupon, some of them have stood up to bring forward some additional arguments, to confer more depths to the reasoning as regards the ordinary law or to resolve the remaining legal questions.[56] Regarding those who favored the inadmissibility of the evidence, the decision does not seem to provide many reasons for attack from a methodical perspective.[57] Hence, they point out its limited scope referring – amongst others – to the last remark of the BVerfG[58] and air their discontent with the result and its potential consequences.[59]

In any event, it did not take long until the BVerfG decision of 9 November 2010 found its way into the jurisprudence of the ordinary courts. Only a few days after its release, the Tax Court (*Finanzgericht*) of Cologne handed down a decision that addressed – amongst other things – the question of whether evidence gained from "stolen" banking data and a purchased CD was admissible in fiscal proceedings.[60] The court found that the

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[53] *Id.*

[54] Wolfgang Wohlers, *Anmerkung* (Annotation), 66 JZ 252 (2011).

[55] *Supra* notes 25 through 27.

[56] *See*, amongst others, Ingo Kaiser, *Zulässigkeit des Ankaufs deliktisch erlangter Steuerdaten* (Legality of the purchase of illegally obtained tax data), 30 NStZ 383 (2011); Christoph Coen, *Ankauf und Verwertung deliktisch beschaffter Beweismittel in Steuerstrafverfahren aus völkerrechtlicher Sicht* (Purchase and use of illegally obtained evidence in criminal tax proceedings – a public international law perspective), 30 NStZ 433 (2011) specifically from a international law perspective.

[57] Critically Trüg, *supra* note 6, at 111: "Obviously no sound analysis of the relevant issues" (translation by the author).

[58] Björn Demuth, *Kein Freibrief für die Strafverfolgung* (No licence for the prosecution), LEGAL TRIBUNE ONLINE, 28 Dec. 2010, available at: www.lto.de/recht/hintergruende/h/bverfg-zu-steuersuender-cds-kein-freibrief-fuer-die-strafverfolgung (last accessed: 27 June 2013).

[59] Wohlers, *supra* note 54, at 252, 254: "ambiguous impression" (translation by the author).

[60] FG Köln, 49 DStR-E 1076 (2011).

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corresponding data was in fact admissible in the subsequent fiscal proceedings.[61] As to the yardstick, it first referred to the BVerfG and stated that it falls to the ordinary courts to determine whether illegally obtained evidence results in its inadmissibility or not.[62] Then, it invoked the standards laid out by the Federal Tax Court. According to its established jurisprudence, mere infringements of procedural rules generally do not bring along the inadmissibility of the evidence in fiscal procedures whereas manifest violations of substantive law (*qualifiziert-materiellrechtliche Verstöße*) can very well bring along the inadmissibility of evidence.[63] The Federal Tax Court qualifies two sets of cases in particular as manifest violations of substantive law: First, in cases where the investigation infringed the constitutionally protected area of the taxpayer; the second being cases where the evidence was received in the way of a criminal offense.[64]

As to the former, the Tax Court of Cologne extensively drew on the BVerfG decision of 9 November 2010.[65] It maintained accordingly that the complainant could not successfully claim that the purchase of the CD violated his constitutionally protected area.[66] As to the latter, the court held that the purchase of the CD did not constitute a criminal offense.[67] Neither did § 259 StGB nor § 17 UWG cover the relevant official's conduct, nor was he guilty of incitement as the individual who had actually "stolen" the data had himself contacted the German authorities.[68] For the same reason, the court added, the complaint could not be based on a violation of international law either as such conduct by private individuals cannot be attributed to the Federal Republic of Germany.[69]

V. Some Additional Remarks

As mentioned earlier, the decision of the BVerfG did not come as a surprise. As the BVerfG, according to its established jurisprudence, does not perceive itself as a superordinate appellate instance (*Superrevisionsinstanz*), it deliberately restricts its standard of review to

[61] *Id.* at 1076-1077.

[62] *Id.* at 1076.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 1076-1077.

[66] *Id.*

[67] *Id.*; *cf.* the arguments, *supra* note 25.

[68] *Id.* at 1077.

[69] *Id*. *cf.* the arguments, *supra* note 27.

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a mere constitutional examination and avoids looking too closely at the details of the ordinary law.[70] As regards the subject of admissibility of evidence in particular, the ordinary courts themselves, most notably the BGH, have consistently followed a fairly tolerant approach. According to their established jurisprudence, an infringement of the applicable law in the taking of evidence does not necessarily – and certainly not automatically – bring along its inadmissibility. The inadmissibility of evidence in such a case rather depends on a weighing of the interests and values concerned: The effective law enforcement and criminal prosecution on the one hand and the protection of the defendant on the other (*Vielfaktorenansatz/Abwägungslehre*).[71] As a consequence of this approach, the inadmissibility turns out being rather the exception than the rule and is only justified when expressly provided for or when superior reasons, tied to the individual case, call for it. There are certainly good reasons to question this approach in principle.[72] It lowers the significance and effectiveness of procedural requirements governing the criminal investigations in general and the taking of evidence in particular. This approach reduces them to annoying formalities and basically calls for their neglect. Their violation does not entail any significant consequence including the most obvious: the inadmissibility of evidence. And, as a consequence, it affects legal certainty and compromises the protection of the defendant in criminal proceedings. Finally, it raises the question of how far the Government should go to ensure compliance to its rules as well as the more general question in how far the Government itself is bound to moral – as opposed to legal – criteria.[73] With a view to the BVerfG decision at hand, it is particularly worrisome that not even a criminal offense committed by the relevant official shall automatically bring along the inadmissibility of the evidence. It is not acceptable for constitutional reasons that a government representative commits a criminal offense in order to prosecute another. The criminal law must rather be the upper limit of the permitted – for ordinary citizens as well as for officials. Anything else does not live up to the self-established dedication of the German government to honor the rule of law.[74] Irrespective of these points of criticism the BVerfG decision of 9 November 2010 is in line with its established jurisprudence and the established jurisprudence of the BGH respectively.

There is, however, one additional dimension to bear in mind in the present case. In this case, the defendant was accused of tax evasion (§ 370 AO). The legal interest to be protected by this provision is the public interest in the tax revenue.[75] Accordingly, in

[70] Wohlers, *supra* note 54, at 252.

[71] Leading decisions are *e.g*. BGH, BGHSt 38, 214 and BGHSt 52, 110. As for a more detailed account, *see* Lutz Meyer-Goßner, Einl, *in* KOMMENTAR ZUR STRAFPROZESSORDNUNG para. 55a (Lutz Meyer-Goßner ed., 55th ed., 2012).

[72] Wohlers, *supra* note 54, at 252, 253; Trüg & Habetha, *supra* note 17, at 481, 485-486.

[73] Wohlers, *supra* note 54, at 252, 254.

[74] Trüg, *supra* note 6, at 111, 117-118.

[75] Franz Klein, § 370, *in* KURZKOMMENTAR ZUR ABGABENORDNUNG para. 2 (Franz Klein ed., 11th ed., 2012).

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contrast to most of the other offenses, the injured of this offense is in a certain way the Government as representative of the public interest. In the long run, by evading taxation the defendant may indeed do harm to the entire community. For a start, however, the Government is being deprived of a portion of its funding which in some way makes it the primary injured of the offense. Now, in the case of tax evasion, the Government is not only the injured but also the one who is literally making the rules. It determines the taxes to be paid, establishes the legal and administrative framework on how they are being collected and lays out the rules on how those who do not live up to their tax liability are to be prosecuted. In other words, in the context of tax evasion and its prosecution, the Government does not protect one citizen from another but rather minds its genuinely own business. Hence, in this context, it makes sense to require a higher degree of compliance to the procedural rules that govern the criminal investigations in general and the collection of evidence in particular. To sanction non-compliance with the inadmissibility of evidence would therefore be an effective way to ensure this stricter standard of compliance.

D. What Came After?

I. Shaping of the Law and Practice of German Criminal Tax Law

The entire debate on the purchase and use of "stolen" banking data by German authorities has once again raised the public awareness towards criminal tax law.[76]

1. Justifying the Current Practice...

The BVerfG decision itself has effectively justified the dubious conduct of German authorities with retroactive effect and has enabled them to continue as before. Taking a tougher stance against alleged or convicted tax evaders, the decision fits in well to the recent jurisdiction of the BGH on related issues. In 2008, the BGH had held that a prison sentence – even though placed on probation – is essential if, in a case of tax evasion, the evasion amount exceeds 100.000 €.[77] Two years later, the BGH tightened the prerequisites for a voluntary declaration pursuant to § 371 AO and, thus, made tax evader's return to legality more difficult.[78] In 2012, the BGH added that a prison sentence can basically not be placed on probation anymore if the evasion amount exceeds 1.000.000 €.[79]

[76] Peter Bilsdorfer, Die Entwicklung des Steuerstraf- und Steuerordnungswidrigkeitenrechts (The development of the criminal tax law and the law of tax-related administrative offenses), 66 NJW 1413 (2012).

[77] BGH, 63 NJW 528 (2009).

[78] BGH, 64 NJW 2146 (2010).

[79] BGH, 66 NJW 1458 (2012).

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2. ...and Giving Way to a Debate on the Introduction of a New Statutory Offense

Neither the academic debate on the "Liechtenstein tax affair" and its legal implications nor the BVerfG decision has led to clear-cut answers to the question of whether German officials, by purchasing such CDs, commit an offense under German criminal law.[80] As a consequence, a debate has emerged amongst politicians and lawyers on whether it is appropriate – or even necessary – to establish a new provision designed to explicitly make such action a punishable offense.[81] Concretely, it has been suggested to structure such an offense as the "receiving of (illegally obtained) data" (*Datenhehlerei*) and to introduce it as § 259a into the StGB.[82] The most prominent supporter of this proposal was Federal Minister of Justice Leutheuser-Schnarrenberger who explicitly stated her support for the introduction of such a provision.[83] However, in doing so, she made herself object of severe criticism by representatives of the opposition parties and was discredited to pursue clientele politics for rich criminals.[84] The critics, in turn, suggested explicitly excluding the conduct of officials exercising public authority from its scope of application – in fact rendering the envisaged provision useless for its very purpose. As the discussion is still wearing on, for the time being, the waters remain uncharted.

II. Deteriorating the Relationship between Germany and Switzerland

The repeated purchase of "stolen" data by German officials – now backed by Karlsruhe's dictum – has not left untouched the political relations between the Federal Republic of Germany and the Swiss Confederation. Quite the contrary, it has caused rising tensions between the two countries and their political representatives.

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[80] See *supra* notes 18 and 25.

[81] Jürgen Klengel & Tobias Gans, *Datenhehlerei – Über die Notwendigkeit eines neuen Straftatbestands* (Receiving of data – on the necessity of a new statutory offense), 46 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 16, 17-19 (2013).

[82] *Id.* at 17-19.

[83] *Justizministerin will Kauf von Steuer-CDs unter Strafe stellen* (Minister of Justice wants to penalize the purchase of tax CDs), HANDELSBLATT, 1 Sept. 2012, available at: www.spiegel.de/politik/deutschland/justizministerin-will-ankauf-von-steuer-cds-bestrafen-schweiz-a-853315.html (last accessed: 27 June 2013); *Justizministerin will Ankauf von Steuer-CDs unter Strafe stellen*, FTD, 1 Sept. 2012, available at: www.ftd.de/politik/deutschland/:leutheusser-schnarrenberger-justizministerin-will-ankauf-von-steuer-c-ds-unter-strafe-stellen/70084449.html (last accessed: 27June 2013).

[84] Siehe Klengel & Gans, *supra* note 81, at 16, 17-19, fn. 19; SPD-Bundestagsfraktion, FDP-Klientelpolitik für kriminelle Reiche (FDP clientelism for rich criminals), Press release, 1 Sept. 2012, available at: www.spdfraktion.de/themen/fdp-klientelpolitik-für-kriminelle-reiche (last accessed: 27 June 2013).

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1. Undermining the Swiss "Financial Integrity Strategy"

For years, the Swiss authorities had only lent administrative assistance to other countries in cases of tax fraud (*Abgabenbetrug*) whereas it had denied its cooperation in cases of mere tax evasion. This resulted from the traditionally great significance banking secrecy (*Bankkundengeheimnis*) had and has had down to the present day in Switzerland. It has, however, certainly contributed to foster dubious conduct of Swiss banks in general and their helping wealthy foreigners to illegally evade taxation in their respective home countries in particular. In the wake of the 2008/09 financial crisis and under increasing pressure from other countries (Germany and the U.S.) as well as international organizations (EU and the OECD), the Swiss Government decided on 13 March 2009 to adopt the OECD standard on administrative assistance in tax matters in accordance with Art. 26 of the OECD Model Tax Convention.[85] In its report "Strategic directions for Switzerland's financial market policy" of 16 December 2009, the Swiss Government openly avowed itself to an increased international cooperation in the area of taxation and subsequently embraced its so-called "Financial Integrity Strategy" (*Weißgeldstrategie*).[86] The strategy is based on three pillars and aims to promote international administrative assistance, to advance the regularization of undeclared assets as well as to fight against money laundering.[87] As a consequence, the Swiss Confederation has concluded 30 double tax agreements that conform to the OECD standard so far including one with the Federal Republic of Germany in 2010.[88] As regards Germany, however, the process seems to have come to a halt. German authorities continue to purchase "stolen" data from (former) Swiss bank employees thus undermining the promising political strategy down to the present

[85] Switzerland to adopt OECD standard on administrative assistance in fiscal matters, Federal Department of Finance, Press release, 13 Mar. 2009, available at: www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=25863 (last accessed: 27 June 2013).

[86] Federal Department of Finance, Strategic directions for Switzerland's financial market policy (16 Dec. 2009), available at: www.efd.admin.ch/dokumentation/zahlen/00578/01622/?lang=en (last accessed: 27 June 2013), at 30 and 49-54; as to the Financial Integrity Strategy, *see* Monika Roth, *Schweiz: Tax Compliance und Weißgeldstrategie* (Tax compliance and Financial Integrity Strategy), 7 RISK, FRAUD & COMPLIANCE 37 (2012).

[87] Federal Department of Finance, Report on international financial and tax matters 2012 (January 2012), available at: www.sif.admin.ch/00714/index.html?lang=en (last accessed: 27 June 2013), at 20-23; Federal Department of Finance, Report on Switzerland's financial market policy, 19 December 2012, available at: www.efd.admin.ch/dokumentation/zahlen/00578/02679/index.html?lang=en (last accessed: 27 June 2013), 12-16 & 26-33; Federal Department of Finance, Report on international financial and tax matters 2013, January 2013, available at: www.efd.admin.ch/dokumentation/00737/00782/02690/index.html?lang=en (last accessed: 27 June 2013) at 29-31 and 32-35.

[88] Federal Department of Finance, Report on international financial and tax matters 2013, *supra* note 87, at 32; as to the revised German-Swiss double tax agreement, *see* Anton-Rudolf Götzenberger, *Die neue Steuer-Amtshilfe nach dem DBA Schweiz* (The new administrative cooperation in tax matters according to the DTA Switzerland), 66 BETRIEBSBERATER (BB) 1954 ff. (2011); as for the text of the protocol, *see* www.news.admin.ch/NSBSubscriber/message/attachments/20989.pdf (last accessed; 27 June 2013).

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day. Additionally, the "Agreement between the Federal Republic of Germany and the Swiss Confederation on the Cooperation in the Area of Taxation and Financial Markets" has drowned in German domestic politics.

2. The German-Swiss Tax Agreement was Initiated...

In reaction to the rising tensions, the federal governments of both countries had entered into negotiations in 2010 with the goal to draw up a bilateral agreement on the expansion of cross-border cooperation in tax matters and improved market access for banks.[89] Indeed, on 22 September 2011, both Governments concluded the respective Agreement.[90] Its primary goal was to ensure the effective taxation of undeclared assets held by German taxpayers in Swiss bank accounts (Art. 1 Sec. 1 of the Draft Agreement).[91] Accordingly, the Agreement provided for the global, retroactive taxation of so far undeclared assets (Art. 1 Sec. 2a, Art. 5 and 7 of the Draft Agreement) and established a mechanism for the proper taxation of future earnings (Art. 1 Sec. 2b and Art. 18 of the Draft Agreement).[92] It did however not require the banks keeping the accounts to disclose the identity of the depositors concerned and thus accommodated the Swiss request for the respect and the protection of the banking secrecy.[93] Moreover, the Agreement vastly restricted the

[89] Switzerland and Germany sign double taxation agreement and declaration on the initiation of negotiations on tax matters, Federal Department of Finance, Press release (27 Oct. 2010), available at: www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=de&msg-id=35927 (last accessed: 27 June 2013).

[90] Abkommen zwischen der Bundesrepublik Deutschland und der Schweizerischen Eidgenossenschaft über Zusammenarbeit in den Bereichen Steuern und Finanzmarkt (Agreement between the Federal Republic of Germany and the Swiss Confederation on the cooperation in the area of taxation and financial markets), 22 September 2011. The text of the Agreement can be found (in German) at: www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Schweiz/05-04-2012-abkommen-schweiz-anl2.pdf?__blob=publicationFile&v=3 (last accessed: 27 June 2013). As for contributions on selected legal aspects of the Agreement, *see* Matthias Gehm, *Das geplante Abkommen über Zusammenarbeit in den Bereichen Steuern und Finanzmarkt zwischen Deutschland und der Schweiz* The proposed Agreement on the cooperation in the area of taxation and financial markets between Germany and Switzerland), 45 ZRP 45 (2012); Christian Ebner & Tobias Ebel/Sebastian Hartrott, *Handlungsoptionen des "Schwarzgeldabkommens" zwischen Deutschland und der Schweiz* (Courses of action in view of the agreement on illicit funds between Germany and Switzerland), 67 BB 287 (2012); Erich Samson & Martin Wulf, *Steuerstrafrecht und deutsch-schweizerisches Steuerabkommen* (Criminal tax law and the German-Swiss tax agreement), 31 wistra 245 (2012); Wolfgang Joecks, *Das deutsch-schweizerische Steuerabkommen – verfassungsgemäß?* (Is the German-Swiss tax agreement constitutional?), 30 wistra 441 (2011). Finally *see* Pfisterer, *supra* note 17.

[91] Gehm, *supra* note 90, at 45, 46.

[92] *Id.* at 46-47. As to the retroactive taxation in particular, *see* Ebner, Ebel & Hartrott, *supra* note 90, at 287, 287-290.

[93] Ebner, Ebel & Hartrott, *supra* note 90, at 287, 287-288.

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prosecution of potential tax offenses committed in the past in cases where the retroactive taxation is duly satisfied (Art. 8 of the Draft Agreement).[94] Interestingly, the Agreement itself did not bar the German authorities to continue its practice of purchasing "stolen" banking data in the future. The German government, though, issued a respective statement in the context of the conclusion of the Agreement.[95]

3. ...and Failed in the German Federal Council

Supporters of the Agreement highlighted the fact that the Agreement and its proper execution would ensure effective taxation of so far undeclared assets while bringing to an end the infamous and legally questionable conduct of German authorities. And they pointed out the easing effect the Agreement would have on the German-Swiss relations.[96] Critics, however, highlighted the legal insufficiencies and flaws of the Agreement and some of them even challenged its constitutionality.[97] On the political plane, this criticism was shared and advanced first and foremost by the minority parties in the German Federal Parliament, SPD and Greens: Their representatives called the envisaged tax rate between 19% and 34% a "bargain rate" and criticized the "complete lack of transparency".[98] Nevertheless, the Agreement was adopted by the majority of the German Federal Parliament. For constitutional reasons, however, the Agreement was also required to be adopted by the Federal Council (*Bundesrat*) where SPD- and Greens-led state governments form a majority. In response to their pressure, the federal governments of Germany and Switzerland modified the Agreement and, amongst others, raised the applicable tax rate to 21% to 41%.[99] Nevertheless, the majority in the Federal Council eventually brought its influence to bear in the final vote and irrevocably stranded the Agreement.

4. Deadlock Due to Upcoming Federal Elections in Germany

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[94] Gehm, *supra* note 90, at 45, 46.

[95] *Id.* at 47.

[96] *Id.* at 48; Ebner, Ebel & Hartrott, *supra n*ote 90, at 287, 293-294.

[97] Samson & Wulf, *supra* note 90, at 245; Joecks, *supra* note 90, at 441.

[98] Bundestag, Protocoll of Session No. 17/130, 29 September 2011, available at: dipbt.bundestag.de/dip21/btp/17/17130.pdf (last accessed: 27 June 2013), at 15274 and 15279; also *see*, *Kritik an Steuerabkommen mit Schweiz lebt wieder auf* (Critique of the tax agreement with Switzerland resurges), REUTERS DEUTSCHLAND, 31 May 2012, available at: de.reuters.com/article/domesticNews/idDEBEE84U03L20120531 (last accessed: 27 June 2013).

[99] As for the text of the protocol (in German), also see www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Schweiz/05-04-2012-abkommen-schweiz-anl1.pdf?__blob=publicationFile&v=2 (last accessed: 27 June 2013).

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In the meantime, there are no prospects of improvement. The Agreement seems to be dead given the lack of willingness to compromise by the constitutional bodies as well as the respective political forces involved. Moreover, the tone towards Switzerland has become harsher in the light of the upcoming elections for the Federal Parliament: The unfriendly remarks made by Peer Steinbrück, former Federal Minister of Finance and actual candidate for chancellor, may already date back a while.[100] SPD-head Sigmar Gabriel, however, only recently accused Swiss banks of collaborative tax evasion and organized crime.[101] Finally, Stephan Weil, today Prime Minister of Lower Saxony, advanced a proposal to withdraw their license to do business in Germany.[102] Against this backdrop, there is certainly not much hope that any significant steps ahead will be made on the political level during the months to come. Consequently, it might be the courts that once again have to step in to resolve the remaining questions and uncertainties related to the purchase of "stolen" banking data by German authorities.

III. A Brief Glance over the Atlantic

Apart from Germany, however, there seems to be at least one other country that takes an equally tough stance against Switzerland in this respect – the U.S. Under massive pressure from the U.S. Federal Government and U.S. courts, Swiss banks finally disclosed banking data regarding U.S. citizens holding undeclared assets in Swiss bank accounts as of late 2011.[103] Only recently, the Swiss Confederation and the U.S. entered into an agreement

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[100] Ulrich Schmid, *Peer Steinbrück oder die Lust am Brüskieren* (Peer Steinbrück or the lust for the snub), NZZ, 18 March 2009, available at: www.nzz.ch/aktuell/startseite/peer-steinbrueck-oder-die-lust-am-brueskieren-1.2216591 (last accessed: 27 June 2013).

[101] *Schwarzgeld in der Schweiz: Gabriel wirft Banken bandenmäßige Steuerhinterziehung vor* (Illicit funds in Switzerland: Gabriel accuses banks of collaborative tax evasion), SPIEGELONLINE, 12 Aug. 2012, available at: www.spiegel.de/politik/deutschland/gabriel-wirft-schweizer-banken-bandenmaessige-steuerhinterziehung-vor-a-849582.html (last accessed: 27 June 2013); *Gabriel wirft Schweizer Banken organisierte Kriminalität vor* (Gabriel accuses Swiss banks of organized crime), FAZ, 12 Aug. 2012, available at: www.faz.net/aktuell/wirtschaft/steuerhinterziehung-gabriel-wirft-schweizer-banken-organisierte-kriminalitaet-vor-11853255.html (last accessed: 27 June 2013)..

[102] Joachim Jahn, *SPD droht Banken mit Lizenzentzug* (SPD threatens banks with resumption), FAZ, 27 Dec. 2012, available at: www.faz.net/aktuell/wirtschaft/steuerbetrug-spd-droht-banken-mit-lizenzentzug-12007430.html (last accessed: 27 June 2013); Christina Hebel & Veit Medick, Kam*pf gegen Steuerhinterziehung: SPD-Länder drohen Schweizer Banken mit Lizenzentzug* Fight against tax evasion: SPD-governed states threaten Swiss banks with resumption), SPIEGELONLINE, 27 Dec. 2012, available at: www.spiegel.de/politik/deutschland/spd-laender-wollen-schweizer-steuersuender-banken-lizenz-nehmen-a-874326.html (last accessed: 27 June 2013).

[103] *Credit Suisse legt Kundendaten offen* (Credit Suisse reveals customer data), HANDELSBLATT, 13 Nov. 2011, available at: www.handelsblatt.com/unternehmen/banken/konten-von-us-buergern-credit-suisse-legt-kundendaten-offen/5831634.html (last accessed: 27 June 2013); *Streit um Schwarzkonten: Schweizer Banken legen Tausende Daten offen* (Controversy on illicit funds: Swiss banks reveal thousands of data records), SPIEGELONLINE, 1 Feb. 2012, available at: www.spiegel.de/wirtschaft/soziales/streit-um-schwarzkonten-schweizer-banken-legen-tausende-daten-offen-a-812812.html (last accessed: 27 June 2013);

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governing the disclosure of such data to U.S. authorities thus ensuring compliance with the Foreign Account Tax Compliance Act (FTCA Agreement) in the future.[104] Meanwhile, the negotiations between Switzerland and the U.S. on how to deal with tax-relevant issues in the past are in full swing.[105] However, a wrench was lately thrown in the works when the Swiss Federal Parliament (Nationalrat) rejected a statute that would have resolved the issue.[106] Offside the political plane, the District Court for the Southern District of New York has recently handed down a harsh decision as regards Wegelin & Co., the oldest Swiss private bank.[107] The bank had admitted to helping wealthy U.S. citizens to evade taxes and pleaded guilty to conspiracy two months before. On 4 March 2013, Judge Jed Rakoff sentenced the bank to pay 58 million dollars causing the bank to shut down within a short time. The case constitutes "one of the most aggressive bank crackdowns in U.S. history."[108] Remarkably enough, the U.S. meanwhile seem to establish themselves as an attractive retreat area for the discreet investment of assets – the state of Florida already being nicknamed the "New Switzerland".[109]

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[104] Markus Häfliger & Hansueli Schöchli, *Bundesrat billigt Facta-Abkommen* (Federal Council adopts FACTA Agreement), NZZ, 13 Feb. 2013, available at: www.nzz.ch/aktuell/schweiz/bundesrat-billigt-fatca-abkommen-1.17999556 (last accessed: 27 June 2013); as to FACTA, *see* Kevin Packman/Maurizio Rivero, *The Foreign Account Tax Compliance Act*, 22 JOURNAL OF ACCOUNTANCY, August 2010, available at: www.journalofaccountancy.com/Issues/2010/Aug/20102736.htm (last accessed: 27 June 2013).

[105] Häfliger & Schöchli, *supra* note 104.

[106] Marcel Amrein & Markus Häfliger, *Die «Lex USA» scheitert im Nationalrat* (The "lex USA" fails in the National Council), NZZ, 18 June 2013, available at: www.nzz.ch/aktuell/schweiz/lex-usa-scheitert-im-nationalrat-1.18100993 (last accessed: 27 June 2013).

[107] *Swiss bank Wegelin to pay $58 mln in US tax evasion case*, REUTERS, 5 Mar. 2013, available at: www.reuters.com/article/2013/03/05/wegelin-sentence-idUSL1N0BWKIK20130305 (last accessed: 27 June 2013); *Älteste Schweizer Bank in Amerika verurteilt* (Oldest Swiss bank sentenced in America), FAZ, 5 Mar. 2013, available at: www.faz.net/aktuell/wirtschaft/unternehmen/wegelin-aelteste-schweizer-bank-in-amerika-verurteilt-12103403.html (last accessed: 27 June 2013); *Beihilfe zu Steuerbetrug: US-Gericht verurteilt älteste Schweizer Bank* (Assistance in tax evasion: US court convicts oldest Swiss bank), SPIEGELONLINE, 5 Mar. 2013, available at: www.spiegel.de/wirtschaft/unternehmen/schweiz-wegelin-wegen-beihilfe-zur-steuerhinterziehung-verurteilt-a-886880.html (last accessed: 27 June 2013).

[108] Nate Raymond & Lynnley Browning, *Swiss bank Wegelin to close after guilty plea*, REUTERS, 4 Jan. 2013, available at: www.reuters.com/article/2013/01/04/us-swissbank-wegelin-idUSBRE9020O020130104 (last accessed: 27 June 2013).

[109] Claude Baumann, *Miami: Das Steuerparadies im Sonnenstaat* (Miami: The tax haven in the sunshine state), HANDELSZEITUNG, 7 Mar. 2013, available at: www.handelszeitung.ch/politik/miami-das-steuerparadies-im-sonnenstaat (last accessed: 27 June 2013); Claude Baumann, *Deutsche Steuerflüchtlinge: Miami wird die neue Schweiz* German tax evaders: Miami turning the new Switzerland), SPIEGELONLINE, 7 Mar. 2013, available at: www.spiegel.de/wirtschaft/soziales/florida-steuerfluechtlinge-aus-der-schweiz-fliehen-in-die-usa-a-887381.html (last accessed: 27 June 2013).

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E. Conclusion

On 14 February 2008, German prosecutors and investigative authorities searched Klaus Zumwinkel's villa in Cologne in a dawn raid. About one year later, Zumwinkel was convicted of tax evasion to two years of prison placed on probation. Hailed by many as a triumph for the prosecution of white-collar crimes and the fight against corporate executives' recklessness, some already questioned the approach of prosecutors and investigators in the early stages. The reason for this is that the authorities had gathered important information from a CD they had purchased from a Liechtenstein banker who had before "stolen" the respective data from his employer, a Liechtenstein bank. As German investigative authorities proceeded in such a way in more than just this one case, there is an ongoing debate on the legality and legitimacy of this approach. On the one hand, the issue has provoked heated political discussion where the opinions are – as is so often the case – split along party lines. On the other hand, there is an intense legal debate which focuses on the question of whether the data contained on such a CD itself or information gained from subsequent investigations are admissible as evidence in criminal proceedings against an alleged tax evader. Although this particular question remains open to the present day, the BVerfG decided in 2010 that information contained on such a CD could at least legally establish an initial suspicion which, in turn, justifies the initiation of criminal investigations and specific measures of investigation such as a search respectively. The decision was welcomed by the major part of the academia and quickly found its way into the jurisprudence of the ordinary courts. However, the approach of the BVerfG – as well as the BGH – regarding the admissibility of evidence in criminal proceedings remains questionable – particularly in the area of tax evasion. Taking a tougher stance against alleged or convicted tax evaders, the decision nevertheless fits in well to the recent jurisdiction of the BGH on related issues. It also gave way to a political debate on whether a new provision should be introduced to the StGB which explicitly makes the purchase of such CDs a punishable offense. While this debate is in full swing, the entire issue keeps damaging the political relations between Germany and Switzerland. The questionable practice – now endowed with Karlsruhe's blessing – undermines the Swiss Financial Integrity Strategy whereas the attempt of the German Federal Government to resolve the issue politically and in cooperation with the Swiss Federal Government failed. As the envisaged Agreement was drawn deeper and deeper into German domestic politics, the tone towards Switzerland got more and more strident thus further impairing the German-Swiss relations. In view of the Federal Elections in September 2013, the Agreement has ended in deadlock and there seems to be no chance for a political solution at this point. Consequently, the legal questions related to the purchase of "stolen" banking data will most likely remain in the current state of uncertainty and it will continue to fall to the courts to resolve these questions until the Federal Government comes up with a political solution after the September elections.