

The transfer of employee data to the United States

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The American investigations raised a problem that went beyond the protection of clients. To cooperate with the Department of Justice, the banks under investigation had to disclose, along with data on their accounts, the names of the employees, external asset managers, lawyers and other third parties who had dealt with American clients. Swiss law did not allow such a transfer without authorisation. Article 271 of the Criminal Code prohibits the performance of acts for a foreign state on Swiss territory, while data protection law protects the personal data of employees. In April 2012, the Federal Council authorised the banks concerned to transmit such data to the American authorities within the framework of the investigations.¹

Through the transmissions of several banks during 2012, thousands of names of current and former employees reached the American authorities. Many of those concerned learned only later that their names had been transferred, and some found that they could no longer travel safely to the United States or to states with extradition treaties. The transfer caused a strong reaction among bank employees, their associations and parts of the political spectrum, who accused the banks and the government of sacrificing their staff to save the institutions. The Federal Data Protection and Information Commissioner examined the transfers and issued recommendations to the banks concerned.²

The controversy also shaped the political response. In June 2013, Parliament rejected a special law proposed by the Federal Council, known as the *Lex USA*, which would have authorised the banks to cooperate with the American programme. The Federal Council then used individual authorisations under Article 271 of the Criminal Code to allow the banks to participate in the programme for Swiss banks. Employees who objected to the transfer of their data brought actions before the civil courts, relying on data protection law. In several cases, the courts held that the employees

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were entitled to information about the transfer and, depending on the circumstances, that the transfer of their names required a balancing of interests that the banks had to justify.³

The episode left lasting marks. It showed that the protection which banking secrecy offered to clients did not extend to the bank's own staff when the bank's survival was at stake. For many employees, it ended the sense that their employer and their state would protect them as long as they followed internal instructions. The episode also changed the internal culture of the banks, where employees became more cautious about documenting their own role in cross-border business and more insistent on clear compliance instructions.

1 Notes

1. On the authorisation of the Federal Council of April 2012 under Art. 271 of the Swiss Criminal Code permitting banks under US investigation to transmit to the US Department of Justice data including the names of employees and third parties, see the publications of the Federal Department of Finance and the press reports. To be verified. ↩
2. On the transmission of employee data by several Swiss banks to the US authorities in 2012, the reactions of the employees and of the Swiss Bank Employees Association, and the investigation and recommendations of the Federal Data Protection and Information Commissioner, see the press reports and the publications of the Commissioner. Status to be verified. ↩
3. On the rejection of the "Lex USA" by the Swiss Parliament in June 2013, the subsequent authorisations under Art. 271 StGB for the participation of banks in the US Program, and the civil proceedings brought by bank employees under data protection law against the transfer of their data (including decisions of the Federal Supreme Court), see the federal records and the published decisions. Status to be verified. ↩

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