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Whistleblowers in the Swiss Banking Sector: Legal Hurdles to Cooperating with Foreign Governments

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Since the 2008 financial crisis, governments from many countries have focused on the prosecution against taxpayers with foreign undeclared bank accounts, as well as against banks, bankers and other professionals. As the global market leader in the cross-border private banking business with a share of 26 percent[1], Switzerland is under unprecedented pressure. Its banking secrecy is targeted, in particular, by neighboring countries and the United States. In their effort to crack down on tax evasion, foreign governments have been helped by some Swiss banking's whistleblowers[2] who have passed or sold them bank clients' details. Whistleblowing is not a new phenomenon in the Swiss banking industry[3], but it has increased significantly over the past few years. In some instances, foreign governments have also obtained information from individuals who were convicted abroad of assisting taxpayers to evade tax and who cooperated in order to receive a reduction in their sentence.

The purpose of this paper is to provide an overview of the main Swiss criminal law provisions, which prohibit the theft and disclosure of banking information to foreign authorities or courts, and to see how they have been applied to whistleblowers in recent cases by Swiss courts and authorities.

A. Overview of the Main Swiss Criminal Law Provisions

1. Unauthorized Obtaining of Data (Article 143 SCC)

Article 143 of the Swiss Criminal Code ("**SCC**")[4] prohibits the unauthorized obtaining of electronic data, also known as data theft or data espionage.

Article 143 (1) SCC reads as follows (unofficial translation):

"Whoever, with the intention of procuring himself or a third party an unlawful gain, takes, for himself or a third party, data which is recorded or transmitted electronically or in a similar way, and which is not intended for him and was specially protected against unauthorized access, shall be sentenced

[1] More information about the Swiss banking sector can be found in the Report "*2014 Banking Barometer: Economic trends in the Swiss banking industry*" published by the Swiss Bankers Association in September 2014, available (in English) on the following website: http://www.swissbanking.org/en/2014_bankenbarometer_en.pdf.

[2] In this paper, the term "*whistleblower*" will be used widely so as to encompass cases of persons inspired by motivations of public interest who disclose banking information in order to denounce wrongdoings, as well as cases of persons motivated by greed who sell, or try to sell, banking information for their own profit.

[3] In 1997, a night watchman at a bank in Zurich took documents that contained account information related to Holocaust victims' assets. The documents were about to be destroyed, but the night guard gave them to a Jewish organization instead. See the Declaration of the former security guard before the U.S. Senate Banking Committee on May 6, 1997 available on the following website: http://www.banking.senate.gov/97_05hrg/050697/witness/meili.htm.

[4] An unofficial translation into English of the Swiss Criminal Code is available on the following website: http://www.admin.ch/opc/en/classified-compilation/19370083/index.html.

to imprisonment not exceeding five years or to a monetary penalty".

The data protected by Article 143 SCC are all information processed, stored and transmitted by way of a computer, i.e. information gathered, processed, and then automatically transmitted, by mean of a computer system, usually in a coded form and not visible[5].

The data are specially protected when they were not intended to be accessible to the person who stole or intercepted them[6]. In particular, the data must be protected in a way that is appropriate to the specific situation. The protective measures, which can include both software protection (e.g. passwords and encryption) and physical protection (e.g. locking server rooms and limiting access to buildings), must make the access sufficiently difficult[7].

Article 143 (1) SCC is a criminal offense prosecuted *ex officio* by the cantonal authorities (Article 22 of the Criminal Procedure Act, "**CPA**").

2. Breach of Manufacturing or Business Secrecy (Article 162 SCC)

Article 162 SCC was enacted to protect the individual interest of the persons willing to have confidentiality maintained[8].

Article 162 SCC reads as follows (unofficial translation):

"Whoever discloses a manufacturing or business secret which he or she was legally or contractually bound to safeguard,
whoever uses such disclosure for his or her own profit or the profit of a third party,
shall be sentenced, upon complaint of the aggrieved party, to imprisonment not exceeding three years or to a monetary penalty."

Manufacturing or business secrets within the meaning of Article 162 SCC are defined as facts that are relevant to the economic result achieved or aimed at by a company, for example, manufacturing processes, plans, suppliers and customer lists, etc.[9].

Article 162 SCC is a criminal offense that is only prosecuted if the aggrieved party files a criminal complaint.

3. Economic Espionage (Article 273 SCC)

The purpose of Article 273 SCC is to protect the territorial sovereignty of Switzerland and its economic independence and security, by prohibiting the disclosure of trade or business secrets to foreign authorities and/or private persons[10].

Article 273 SCC reads as follows (unofficial translation):

"Whoever seeks to discover a manufacturing or business secret, in order to make it accessible to a foreign official or private agency, or a foreign private enterprise, or their agents,
any person who makes a manufacturing or business secret accessible to a foreign official or private agency, or a foreign private enterprise, or their agents,
shall be sentenced to imprisonment not exceeding three years or to a monetary penalty, or in serious cases to imprisonment for not less than one year. An imprisonment sentence can be combined with a monetary penalty."

Article 273 SCC does not protect all kind of information, but only confidential information[11]. The scope of this notion covers any data/business facts (i) that are known only by a restricted group of persons, of economic importance and difficult to access from abroad, (ii) that the interested persons

[5] Message from the Swiss Federal Council, FF 1991 II 933, 952. Available on the following website: http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10106593.
[6] Bernard Corboz, Les infractions en droit suisse, vol. I, 3rd ed., Bern 2010, §6 p. 285.
[7] Bernard Corboz (fn. 6), §6 p. 285.
[8] Philipp Fischer/Alexandre Richa, U.S. pretrial discovery on Swiss soil, Bibliothek zur Zeitschrift für Schweizerisches Recht, Band 49, Helbing & Lichtenhahn, Basel 2010, §179 p. 66.
[9] Swiss Supreme Court decision ATF118 Ib 547, para. 5a.
[10] Fischer/Richa (fn. 8), §153 p. 57.
[11] Bernard Corboz, Les infractions en droit suisse, vol. II, 3rd ed., Bern 2010, §2 ad Article 273 SCC.

intend to keep secret and (iii) which, from a Swiss standpoint, need to remain secret[12].

The information that a company receives from its customers falls within the scope of Article 273 SCC. As such, identities of bank customers are protected[13].

Furthermore and according to a ruling of the Swiss Supreme Court, the secret, within the meaning of Article 273 SCC, may also cover information related to business practices that are in breach of foreign laws[14], such as e.g. tax or antitrust laws[15].

The information protected by Article 273 SCC shall also have a sufficient nexus with Switzerland[16]. Swiss courts and authorities have, in this respect, a large degree of discretion as to what constitutes a sufficient nexus with Switzerland.

Article 273 SCC is prosecuted *ex officio* but, due to its political nature, any prosecution under this provision is subject to the prior approval of the Swiss Federal Council (Article 66 of the Criminal Federal Authorities Organization Act, "**CFAOA**"). The latter has a broad discretion in its decision regarding the opportunity to initiate proceedings. Pursuant to Article 23 (1) (h) CPA, the Swiss federal prosecuting authorities (Office of the Attorney General of Switzerland, "**OAGS**"), as opposed to the cantonal authorities, have exclusive jurisdiction to prosecute on the basis of Article 273 SCC.

4. Banking Secrecy (Article 47 BA)

Switzerland enshrined banking secrecy as a criminal offense in Article 47 of the Banking Act ("**BA**").

First, it is important to note that Article 47 BA only applies to the disclosure of information by bank directors, employees or auditors that conduct banking activities in or from Switzerland in an entity that has been licensed as a "Swiss Bank" by the Swiss Financial Market Supervisory Authority ("**FINMA**")[17].

Article 47 (1) BA reads as follows (unofficial translation):

"Shall be sentenced to imprisonment not exceeding three years[18] or a monetary penalty, anyone who willfully:

a. *Discloses a secret that is entrusted to him in his capacity as body, employee, appointee, or liquidator of a bank, as body or employee of an audit company or that was brought to his knowledge in such capacity;*

b. *Induces a third person to violate the professional secrecy".*

Article 47 (2) BA adds that (unofficial translation) *"Persons acting by negligence will be sentenced to a fine not exceeding CHF 250,000.-"*.

Swiss law does not provide a statutory definition of banking secrecy. However, the term may be defined as the "*professional discretion, which banks, their employees or persons belonging to any of their bodies must observe with respect to financial and personal affairs of their clients coming to their knowledge during the exercise of their profession*"[19].

The duty of confidentiality resulting from Article 47 BA extends to all data that the bank

[12] Fischer/Richa (fn. 8), §158 p. 59, and references cited. As regards the notion of secret, Fischer/Richa underline that the notion set forth in Article 273 SCC is broader than the one applied in the context of Article 162 SCC (see above section 2), to the extent that, unlike Article 162 SCC, Article 273 SCC also covers information that is unrelated to a specific business entity, inaccurate or not usable by the recipient (see Fischer/Richa (fn. 8), §180 p. 67, and references cited).

[13] Fischer/Richa (fn. 8), §160 p. 60, and references cited.

[14] Swiss Supreme Court decision ATF101 IV 312, para. 2, *in* JdT 1976 IV 146.

[15] Swiss Supreme Court decision ATF 101 IV 312, para. 2, *in* JdT 1976 IV 146; Dario Hug, Whistleblowing et secrets pénalement protégés: quels risques pour le lanceur d'alerte en Suisse?, *in* ZstR/RPS 131/2013 pp. 1-27, p. 18.

[16] Bernard Corboz (fn. 11), §13 ad Article 273 SCC; Markus Husmann, *in* Basler Kommentar, Marcel Alexander Niggli/Hans Wiprächtiger (edit.), Strafrecht II. Article 111 – 392 StGB, 3rd ed., Basel 2013, §9 ad Article 273 SCC and the references cited.

[17] Fischer/Richa (fn. 8), §168 p. 63 and §175 p. 65.

[18] The Swiss Parliament has recently decided to increased imprisonment sentences to a maximum of five years for those who obtain a financial benefit for themselves or for a third party by acting as described under Article 47 (1) (a) BA or (new letter c to Article 47 (1) BA) by disclosing to third parties a secret that is entrusted to them in violation of Article 47 (1) (a) BA or by exploiting such secret for their own profit or the profit of a third party. For more information, see the following website: http://www.parlament.ch/f/suche/Pages/geschaefte.aspx?gesch_id=20100450.

[19] Maurice Aubert/Pierre-André Beguin/Paolo Bernasconi/Johanna Graziano-von Burg/Renate Schwob/Raphael Treuillaud, Le secret bancaire suisse, ed. Staempfli, Bern 1995, p. 43.

has acquired knowledge of in connection with its business relationship with the client (including the mere existence of the banking relationship)[20].

Contrary to popular belief, Swiss banking secrecy is not absolute. It can be waived first by the client, who is the "master of the secret". Furthermore, Article 47 (5) BA provides that provisions of federal and cantonal legislation regarding the duty to inform authorities and give testimony in court overrides Swiss banking secrecy. Finally Swiss banking secrecy can also be waived under certain circumstances by a judicial or administrative authority in civil, administrative or criminal proceedings.

Article 47 BA is a criminal offense prosecuted *ex officio* by the cantonal authorities (Article 47 (6) BA).

B. Recent Cases

1. Swiss Banking Data Handed Over to WikiLeaks

One of the first recent cases of banking whistleblowers is a long-running saga, which began in 2005 and is still ongoing.

The whistleblower is a Swiss citizen who was Chief Operating Officer of a Swiss Bank in the Cayman Islands until his dismissal in 2002. He was still in possession of backup copies of data and started to disclose information about undeclared accounts to Swiss media and tax authorities in 2005.

On September 27, 2005 the Zurich General Attorney's Office opened an investigation against him on suspicion of violating banking secrecy. He was arrested and held in custody for thirty days.

He really came into prominence as a whistleblower later in 2008 when WikiLeaks' website published confidential banking documents provided by him.

On January 17, 2011, two days before going on trial, he held a press conference with a WikiLeaks representative and publicly handed over two CD-ROMs which allegedly contained additional data about offshore bank accounts.

On January 19, 2011, the Zurich District Court sentenced him to two hundred forty days-fine at thirty Swiss francs a day[21] (i.e. CHF 7,200.-) with probation for a period of two years for threats (Article 180 SCC), multiple counts of attempted coercion (Article 181 SCC) and violation of banking secrecy (Article 47 BA). Both the whistleblower and the Attorney General, who had demanded eight months imprisonment and a monetary penalty of CHF 2,000.-, appealed against the judgment.

On the same day of the first instance judgment, the whistleblower was arrested on renewed suspicion of violation of Swiss banking secrecy for the information disclosed two days earlier and was taken into custody on the grounds of urgent suspicion and risk of collusion. He was finally released from custody on July 25, 2011.

At the appeal hearing, on November 17, 2011, the Zurich Supreme Court decided that it lacked clear evidence to rule on appeal and asked the Attorney General to complete his investigation. In particular, it was not clear whether the CD-ROMs handed over by the whistleblower to WikiLeaks contained data of bank clients in Switzerland or only in the Cayman Islands. This question is of importance as the whistleblower denies the charges against him, and argues that he should not be prosecuted under Swiss banking secrecy laws because his data came from the Cayman Islands subsidiary.

The Attorney General conducted additional investigations and, on December 10, 2013, amended the indictment.

The new trial before the Zurich District Court began one year later, on December 10, 2014, but was stayed on the first day after the whistleblower collapsed. The trial will probably continue in 2015 but, at the time of publishing this paper, the date is still unknown.

[20] Even information that is publicly known is protected by the banking secrecy if its disclosure by the bank gives reason to believe that a certain client has a business relationship with a certain bank (see Carlo Lombardini, Droit bancaire Suisse, 2nd ed., Zürich 2008, §4 p. 967).

[21] Switzerland applies the system of "day-fine" which is an alternative sanction to short imprisonment sentence. The day-fine is based on the offender's personal income.

2. Swiss Banking Data Sold to the German State of Nordrhein-Westfalen

On December 15, 2011 a former employee of a Swiss bank was found guilty by the Swiss Criminal Federal Court of aggravated economic espionage (Article 273 (2) SCC), money laundering (Article 305bis SCC), breach of business secrecy (Article 162 SCC) and violation of banking secrecy (Article 47 BA). He was sentenced to twenty-four months suspended imprisonment, with a probation period of two years, and a fine in the amount of CHF 3,500.-[22].

In essence, the whistleblower provided confidential data on German clients, as well as internal banking documents, to an accomplice who sold them for EUR 2.5 millions to the German State of Nordrhein-Westfalen. The amount was shared with the whistleblower.

The OAGS started criminal proceedings on February 6, 2010, following the revelations by the German press on the purchase of bank information by the tax authorities. On September 14, 2010 the OAGS arrested and took into custody the accomplice. The latter committed suicide a few days later while in custody. The whistleblower was arrested in the Czech Republic on September 15, 2010 and extradited on November 18, 2010 to Switzerland where he was taken into custody. He was released from custody on February 17, 2011 and alternative measures were ordered against him.

Upon request from the whistleblower, the OAGS decided on September 6, 2011 to continue the prosecution by way of so-called "*accelerated proceedings*"[23]. The latter explained that he started stealing confidential data from his employer "*to kill time, out of passion and historical interest*".

In its decision dated December 15, 2011, the Swiss Criminal Federal Court ratified the sanctions proposed by the OAGS and sentenced the former employee to twenty-four months suspended imprisonment with a probation period of two years and a fine in the amount of CHF 3,500.-[24].

3. Swiss Banking Data Sold to the German Tax Authorities

On August 22, 2013 a former employee of a Swiss bank was found guilty by the Swiss Criminal Federal Court of aggravated economic espionage (Article 273 (2) SCC), money laundering (Article 305bis SCC), breach of business secrecy (Article 162 SCC) and violation of banking secrecy (Article 47 BA). He was sentenced to 36 months imprisonment, of which 18 months suspended imprisonment with a probation period of two years. Also, the Court ordered the seizure of his assets to guarantee a compensatory claim by the Swiss authorities worth EUR 739,100.-[25].

Between October and December 2011, the whistleblower, an IT specialist who was an interim employee of a Swiss bank in Zurich, searched and collected client data in different internal systems of the Bank following the incentive of a German intermediary. He copied data of wealthy German and Dutch clients during his working hours. He sent fifteen emails from his work computer to his private mailbox with attachments containing client names, addresses, account numbers, opening dates, account balances and currencies. He then filtered the data on German clients with more than 100,000.- Euros, Swiss francs, pounds sterling or U.S. dollars and, in December 2011, sent a sample of the information (on approximately 100 clients) to his accomplice in Berlin, a retired German tax inspector. Later on February 2012, he met his

[22] Swiss Criminal Federal Court decision SK.2011.21, available (in German only) on the following website: http://bstger.weblaw.ch/pdf/20111215_SK_2011_21.pdf.

[23] Pursuant to Article 358 (1) CPA: "*At any time prior to bringing charges, the accused may request the public prosecutor to conduct accelerated proceedings provided the accused admits the matters essential to the legal appraisal of the case and recognizes, if only in principle, the civil claims.*". Accelerated proceedings can therefore be considered as the Swiss version of the U.S. plea agreement.

[24] It is interesting to note that the Swiss Criminal Federal Court underlined that the proposed sanction of twenty-four months of suspended imprisonment was at the lowest admissible limit (see Swiss Criminal Federal Court decision SK.2011.21, §10 p. 5).

[25] Swiss Criminal Federal Court decision SK.2013.26, available (in German only) on the following website: http://bstger.weblaw.ch/pdf/20130822_SK_2013_26.pdf; see also the press release from the OAGS from June 28, 2013 available (in German, French and Italian) at https://www.news.admin.ch/message/index.html?lang=fr&msg-id=49505.

accomplice in Berlin and handed over data on 2,700 German clients of the Bank for transfer to the German tax authorities.

The whistleblower had agreed with his accomplice on a reward of EUR 1.1 million for the collection and delivery of client data. In March 2012, the whistleblower received EUR 200,000.- in cash in Berlin. He had intended to use the rest of the money to pay off taxes he owed in Germany.

In May and June 2012, he sent a new sample of information on 42 Dutch clients to his accomplice with the intention to sell them to the Dutch tax authorities. They intended to sell these data for EUR 400,000.- but the Dutch tax authorities refused to buy tax information from an anonymous source.

On July 24, 2012 the Bank filed a criminal complaint and the Zurich Attorney General Office opened an investigation against the whistleblower and his wife. On the same day, the whistleblower was arrested and taken into custody. On August 3, 2012 the Zurich Attorney General Office transferred the case to the OAGS who opened an investigation for economic espionage (Article 273 SCC), violation of banking secrecy (Article 47 BA) and money laundering (Article 305bis SCC).

The whistleblower admitted that he copied and sold client data from the Swiss Bank to the German tax authorities through an intermediary in Berlin. Upon his request, the OAGS decided on May 17, 2013 to continue the prosecution by way of accelerated proceedings[26].

In its decision dated August 22, 2013, the Swiss Criminal Federal Court found the former employee guilty of the charges mentioned above and ratified the sanctions proposed by the OAGS (see above). On the question of the adequacy of the thirty-six months imprisonment, the Swiss Criminal Federal Court referred to its previous decision SK.2011.21 of December 15, 2011 (see above section 2) and the fact that twenty-four months imprisonment and a fine in the amount of CHF 3,500.- were at the lowest admissible limit. In the present case, the Swiss Criminal Federal Court considered that a sentence of thirty-six months imprisonment was adequate, although still low.

4. Swiss Banking Data Handed Over to the U.S. Authorities

On July 21, 2014 a former employee of a Swiss bank was found guilty by the OAGS of economic espionage (Article 273 (2) SCC) and sentenced to a monetary penalty of thirty days of fine at CHF 200.- a day (i.e. CHF 6,000.-) with a probation period of two years[27].

The whistleblower was a registered investment advisor with the United States Securities and Exchange Commission. From 1995 to August 2008, he was employed by a Swiss bank as a private banker. From February 2009, he worked as an independent investment advisor.

He was working closely with a fellow former banker at the Swiss bank and arranged to travel to the United States and meet with clients to discuss their investments in undeclared accounts. He was arrested in a hotel in Miami on November 8, 2010, after meeting with a client (who was cooperating with the U.S. authorities).

The whistleblower started cooperating with U.S. officials almost immediately after his arrest in 2010. He provided information about his former U.S. clients who evaded their income taxes and his former Swiss colleagues who assisted those U.S. taxpayers.

On December 22, 2010 he pleaded guilty to conspiring to defraud the United States and was sentenced on November 18, 2011 to sixty months probation and ordered to return to the United States at least once a year to assist the Justice Department in its ongoing investigations of illegal cross border banking[28].

[26] See above fn. 23 for the description of accelerated proceedings.
[27] The decision July 21, 2014 of the OAGS (in German only) is not published but is accessible upon request.
[28] For more information, see charges information notice of December 14, 2010 available on the following website: http://www.justice.gov/usao/fls/PressReleases/Attachments/101215-01.Information.pdf and the press release from the DOJ of December 22, 2010 available on the following website: http://www.justice.gov/tax/txdv101474.htm.

On July 3, 2012 the Zurich General Attorney's Office opened an investigation against the whistleblower on suspicion of violation of banking secrecy (Article 47 BA). On April 10, 2013 it handed over the investigation to the OAGS.

During a hearing before the OAGS, the whistleblower explained that the U.S. authorities obtained information by confiscating his laptop, his smartphone and work documents during his arrest in 2010. However, he also admitted that he later handed over financial statements of two undeclared U.S. clients. These were former clients that he introduced to another bank. The two financial statements that he handed over to the U.S. authorities came from the other bank. He also admitted that he had been interrogated by the U.S. authorities 3-4 times during 2-4 hours. During his interrogations, he was confronted to the depositions of twelve former clients and was requested to confirm information already in the hands of the U.S. authorities.

In its decision, the OAGS[29] considered that there was no violation of banking secrecy with respect to the information obtained from his laptop and smartphone as the disclosure was the result of coercive measures and because he did not disclose the information on his own. With respect to the two financial statements that he later handed over to the U.S. authorities, as explained above, they were coming from another bank of which the whistleblower had never been an employee or representative. It follows that he was not subject to the Banking Act and Article 47 BA was not applicable to this case. In conclusion, the OAGS dismissed the charge of violation of banking secrecy. However, even though the whistleblower was not subject to banking secrecy for the two financial statements, the OAGS considered that these documents represented business secrets and were thus protected by Article 273 SCC. Moreover, the content of the financial statements was known only by the clients, the bank and the external investment advisor and thus they had a legitimate interest for the content to remain undisclosed to third parties. Therefore, the whistleblower was found guilty of economic espionage under Article 273 (2) SCC.

A "*state of necessity*", i.e. a justificatory mean that would have suppressed the guilt of the former employee, was rejected by the OAGS. Although the whistleblower was required to cooperate with the U.S. authorities in order to receive a reduction in his sentence, the OAGS considered that the higher interests of the State, in particular the Swiss economy, as well as the interest of the clients to business secrecy clearly overrode the interest of the whistleblower to benefit of a more lenient sentence.

However, in fixing the sentence, the OAGS took into account several extenuating factors, including the fact that he admitted spontaneously having handed over the two financial statements and also that, as a result of the plea agreement, he had to request a special permit to the U.S. authorities before every trip to the United States, where two of his three children live.

5. Disclosures on the Swiss Bank Accounts of a Former French Budget Minister

On December 19, 2014 a former employee of a Swiss bank was found guilty by the Swiss Criminal Federal Court of economic espionage (Article 273 SCC) and violation of business secrecy (Article 162 SCC). He was sentenced to two years suspended imprisonment with a probation period of three years[30].

The whistleblower, who was fired from the Swiss bank at the end of 2009, accepted to be heard by the French customs services in February 2013 and to testify about tax evasion. In April 2013, he was heard by the Judges in charge of an investigation on the Swiss bank accounts of a former French budget minister, which attracted wide attention from the media. He also alleged that he had a list of French well-known politicians who had undeclared accounts in Switzerland. On June 14, 2013 he provided to a

[29] Under Swiss law (Article 352 ff. CPA), cantonal and federal prosecutors are authorized to render decisions if the indicted person admits the facts or if the facts are clear and if the sentence does not exceed six months of imprisonment. The indicted person can then challenge the decision, in which case the matter is then sent to trial before a criminal court.

[30] At the time of publishing this paper, the decision was not yet published on the Swiss Criminal Federal Court's website.

French media an internal document from the Swiss bank which turned out to be forged.

On June 17, 2013, the bank filed a criminal complaint with the OAGS against his former employee for theft, forgery as well as violation of professional and business secrecy.

The whistleblower continued to stay at the forefront by testifying on July 3, 2013 before a commission of the French parliament[31].

He was arrested on July 5, 2013 when he came back to Switzerland and was held in custody for about two and a half months. He finally admitted to be guilty of the charges of economic espionage and violation of business secrecy. The prosecution continued by way of accelerated proceedings[32]. The OAGS decided to dismiss the charges of violation of professional secrecy and forgery.

The trial before the Swiss Criminal Federal Court on December 19, 2014 was a closed-door hearing in order to preserve confidential information. According to Swiss media, the whistleblower was found guilty of economic espionage (Article 273 SCC) and violation of business secrecy (Article 162 SCC). He was, however, not convicted of violating banking secrecy (Article 47 BA) because he was not working as a banker, but at the Bank's concierge service for wealthy clients, which is a separate entity of the Swiss Bank licensed by the FINMA.

6. Swiss Banking Data Handed Over to France and Spain

The OAGS announced on December 11, 2014 that it had filed a bill of indictment with the Swiss Criminal Federal Court against an IT specialist of a Swiss Bank for aggravated economic espionage (Article 273 (2) SCC), unauthorized obtaining of data (Article 143 (1) SCC), breach of business secrecy (Article 162 SCC) and violation of banking secrecy (Article 47 BA)[33].

In essence, the whistleblower is suspected of having, since February 2008, handed over banking data to Lebanese banks, to the French Tax Investigations Office in Paris ("*Direction nationale d'enquêtes fiscales*") and to other foreign authorities.

The whistleblower started transferring client account data to his own data carriers in October 2006 in order to compile personal and financial data on the Bank's clients and thus obtain complete client profiles.

The OAGS learned in April 2008 that a man and a woman had attempted to sell banking data in Lebanon and decided to open an investigation in May 2008. The OAGS discovered the names of the two individuals later in December 2008 and interrogated the whistleblower about his activities in Lebanon. The latter fled Switzerland during the night following the first hearing.

The whistleblower, who is a Franco-Italian national, took refuge in France. Swiss authorities requested urgent mutual legal assistance to the French authorities. He was arrested in January 2009 and questioned during that month. Simultaneously, house searches were conducted at his domicile in France and various objects were seized. Based on the data seized, the Attorney General of Nice decided to open his own investigation against alleged French tax evaders.

The whistleblower was released and rearrested in Barcelona in the summer of 2012 under an international arrest warrant issued by Switzerland. On May 8, 2013 a Spanish court ruled against his extradition to Switzerland on the grounds that violating banking secrecy laws was not a criminal offence in Spain.

On December 11, 2014 the OAGS submitted the bill of indictment to the Swiss Criminal Federal Court. The trial will probably take place in 2015[34] but, at the time of publishing this paper, the date is still unknown.

[31] The hearing was recorded and is available on the website of the French parliament: http://videos.assemblee-nationale.fr/index.php.
[32] See above fn. 23 for the definition of accelerated proceedings.
[33] See press release into English available on the following website: https://www.news.admin.ch/message/index.html?lang=en&msg-id=55629.
[34] The CPA does not exclude the possibility of holding a court trial of the accused person *in absentia*.

C. Conclusion

As mentioned in the introduction, whistleblowing in the Swiss banking sector has increased significantly over the past few years. However, the cases presented in this paper are probably only the tip of the iceberg. The investigations on whistleblowing are often lengthy because of the difficulty to trace and find which information or data was stolen and/or disclosed. In addition, the investigations are usually kept confidential in order to safeguard the interests of the master of the secret.

The different cases in this paper also show the influence of jurisdiction considerations on the prosecution of whistleblowers. As discussed, the OAGS have exclusive jurisdiction to enforce Article 271 and 273 SCC, but we see that prosecutions are often initiated by cantonal prosecuting authorities for violation of banking secrecy and are later transferred to the OAGS.

It is also worth noting, as the Swiss Criminal Federal Court pointed out (see above sections 2 and 3), that the sentences are rather lenient. The imprisonment sentences are short and are often reduced to a suspended imprisonment. An explanation is that the procedure is in most cases conducted by way of accelerated proceedings, where the whistleblower has admitted to the criminal offenses and accepted the civil claims. The role of the Court is therefore limited to accepting or rejecting the plea agreement between the Attorney General and the whistleblower.

Finally, the cases discussed in this contribution show that, under Swiss law, whistleblowers expose themselves to civil and criminal sanctions, not to mention reputation damages. So far, apart from very few exceptions, the Swiss legislator has not enacted laws protecting whistleblowers[35].

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[35] A modification process of the Swiss Code of Obligations, aiming at implementing a reporting procedure and enhancing whistleblowers' protection, started on December 5, 2008. On November 20, 2013 the Swiss Federal Council published a message to the Swiss parliament in order to revise the Swiss Code of Obligations. This is currently under discussion by the two Swiss Parliament chambers.