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White Collar Crime - Spain

The Falciani lists: does the end justify the means?

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Extradition proceedings

Spanish tax authorities' use of Falciani's lists

Use as evidence for prosecution in criminal proceedings

Can courts analyse validity of evidence obtained abroad?

Extradition proceedings

On July 1 2012 Hervé Falciani was arrested in Barcelona, Spain under an international arrest warrant issued by the Swiss judicial authorities seeking his extradition to Switzerland.

Falciani was alleged to have criminally violated banking and commercial secrecy and to have committed commercial espionage. According to the information provided by the Swiss judicial authorities,⁽¹⁾ Falciani is alleged to have taken the following criminal actions:

- Between October 2006 and January 2009 Falciani worked as an IT technician at HSBC Private Bank (Suisse) in Geneva and had access to clients' personal and financial data spread over various databases.
- In breach of the bank's internal policies, Falciani allegedly copied this data to his personal electronic devices. All of the misappropriated data relates to a 10-year period between February 1997 and December 2007.
- Falciani then allegedly used data mining to connect the pieces of isolated data he had copied in order to form a complete picture of the financial and personal information of each client.
- Falciani allegedly intended to sell this information to interested banks and public authorities in foreign countries.
- In February 2008 Falciani allegedly tried to sell some of these electronic files to several Lebanese banks.
- In July 2008 Falciani allegedly handed the electronic files over to the French tax authorities, which eventually shared them with officials from other countries. Later, Falciani allegedly provided the same information to German and British government agencies (ie, the security services and tax authorities).

The Spanish National Court considered that in this case there was no double incrimination, which is required for extradition, and therefore denied Falciani's request for extradition to Switzerland.⁽²⁾ In reaching this conclusion, the court held as follows:

- In accordance with the Spanish Criminal Code, the breach of individual or commercial secrets and commercial espionage constitutes a criminal offence. However, these offences were not applicable to Falciani's alleged conduct.
- The criminal offences with which Falciani was charged by the Swiss prosecutor are intended to protect Swiss banking secrecy. Banking secrecy is closely connected to Swiss political interests, but is not treated the same way under Spanish legislation. For that reason, banking secrecy does not merit the same legal protection under the Spanish Criminal Code.
- Under Spanish law, professional secrets do not enjoy special protection *per se*. The protection of a secret is justified only when it is used to protect higher values such as individual privacy, fair competition or national security. Accordingly, information kept secret must still be lawful. In this

case, the secret information which Falciani provided to the authorities of different countries was used to hide criminal or administrative infringements (not only tax fraud, but also money laundering and even terrorist financing). Therefore, these secrets merited no protection under the law.

Spanish tax authorities' use of Falciani's lists

In May 2010 the French authorities provided the Spanish authorities with the financial and personal data of 659 Spanish tax residents (mostly individuals) obtained from the Falciani lists.

In June 2010 the Spanish Tax Agency (AEAT) notified all of the Spanish tax residents included on the lists that:

- the AEAT had received information on their financial standing in the bank;
- as yet, no proceedings had been launched to verify the fiscal impact of such financial information; and
- the addressees should consider the possibility of regularising their tax position as soon as possible.

Under Spanish tax law, spontaneous tax regularisation is allowed if the AEAT has not launched any verification proceedings in order to settle the tax debt at issue. In the event of spontaneous tax regularisation, no penalties are levied on the tax evader, other than payment of the corresponding legal interest. As a result, nearly 300 Spanish tax residents filed complementary tax returns in order to regularise their fiscal positions.

The opposition party asked the Ministry of Tax why the individuals included in the Falciani lists were given this opportunity. The ministry responded that the decision was intended to prevent the statute of limitations from running on personal income tax corresponding to Fiscal Year 2005.⁽³⁾ However, this explanation is rather unconvincing, given that the statute of limitations could also have been tolled if verification proceedings had been started.

It is also possible that the AEAT's approach stemmed from serious concerns about the lawfulness of use of the Falciani lists for prosecutorial purposes. Due to these concerns, the Spanish authorities might have decided to try to avoid – insofar as possible – launching penalty proceedings that would eventually have been declared null and void for constitutional reasons.

Use as evidence for prosecution in criminal proceedings

More than 45 criminal proceedings have been launched, based on information obtained from the Falciani lists, in relation to Spanish tax residents which did not accurately settle their fiscal positions before the AEAT.

The Spanish courts have not yet analysed whether the use of the information included in the Falciani lists as evidence for the prosecution is constitutionally acceptable within the framework of criminal proceedings.

The AEAT alleged that the information was obtained legally through international cooperation channels with the French authorities, and thus the original source of the evidence is irrelevant from a Spanish point of view. In addition, the National Court declared that Falciani's conduct did not constitute a criminal offence under Spanish criminal law.

However, the way in which the evidence was obtained from its source cannot be completely disregarded. In accordance with Article 11 of the Act on the Judiciary, any evidence obtained in direct or indirect violation of constitutional rights shall not be accepted at trial. Falciani apparently violated the bank's clients' right to privacy when he illegally accessed and seized their confidential financial data. In addition, before providing the French authorities with the bank's information, he manipulated this information in order to match the data corresponding to each client. This process was conducted privately by Falciani and was not subject to the supervision of any public authority. Thus, there were no guarantees that the original data obtained from the bank's records corresponded exactly to the information ultimately provided to the Spanish authorities.

The National Court declared that Falciani's actions did not constitute a criminal offence under Spanish law. However, this ruling was issued while assessing the existence of double incrimination for the sole purposes of the extradition proceedings, and does not preclude the possibility of alleging the unlawfulness of the evidence in the context of criminal proceedings. Further, Article 11 of the Act on the Judiciary does not provide that a breach of constitutional rights which occurs in the gathering of illegal evidence constitutes a criminal offence. On the other hand, the National Court's decision did not analyse

any issues which were outside the scope of the extradition proceedings, including:

- whether Falciani's conduct breached the bank's clients' constitutional rights; and
- the impact of this breach, if confirmed, on the validity of the evidence obtained.

Therefore, it must be considered whether Spanish judges are entitled to question whether evidence provided by a foreign authority has been obtained legally.

Can courts analyse validity of evidence obtained abroad?

Supreme Court case law does not provide a uniform answer to this question.

The Supreme Court has analysed the question of evidence obtained abroad through the following international mutual judicial assistance mechanisms:

- the European Convention on Mutual Judicial Assistance in Criminal Matters (Strasbourg 1959) and its First Protocol (Strasbourg 1978);
- the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, established in 2000 in accordance with Article 34 of the Treaty on the European Union;⁽⁴⁾ and
- other international agreements signed by Spain for the same purposes.

The enforcement of the Convention on Mutual Assistance in Criminal Matters introduced a significant change in the basic principles applicable to judicial cooperation in the European Union. It established the general *locus regit actus* rule, according to which the execution of judicial assistance is subject to the procedural laws of the requested state.⁽⁵⁾

When reviewing this kind of legislation, the Supreme Court has frequently concluded that:

- as a general rule, the courts are not entitled to question the legality of a process in which a foreign European authority obtained evidence that was transferred within the framework of a letter rogatory in accordance with the Convention on Mutual Assistance in Criminal Matters;
- the courts are required to ensure the correct enforcement of international legislation regulating mutual legal assistance between member states; and
- the courts must confirm that the process under which the evidence was obtained is not contrary to the most basic principles underpinning Spanish law.

However, in a few cases the Supreme Court has agreed to assess the legality of the process through which evidence was obtained by foreign authorities. In these cases the Supreme Court concluded that this assessment must take into consideration the local law of the member state in which the evidence was sought.

This notwithstanding, in the cases considered by the Supreme Court, evidence has always been obtained from the source by a competent authority within an EU member state. The Spanish courts have never had the opportunity to rule on a case similar to that at hand, in which the evidence was obtained by an individual who stole it from its legitimate owners in breach of their right to privacy.

The use of data included in the Falciani lists as evidence for prosecution in criminal proceedings should be considered contrary to the basic principles of Spanish law because:

- it was obtained in breach of the defendants' right to privacy recognised by the Spanish Constitution and international agreements on human rights; and
- it was not properly guarded at all times between leaving the bank and reaching criminal proceedings.

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Endnotes

⁽¹⁾ Judicial Decision 19/2013 of May 8 2013, rendered by the Spanish National Court, Section 2 within Extradition Proceedings 72/2012.

- (2) *Id.*
- (3) According to Spanish tax legislation, the statute of limitations for fiscal administrative infringements is four years. Therefore, in July 2010 the statute of limitations of the personal income tax corresponding to the fiscal year 2005 was coming to an end.
- (4) Switzerland is a party to these conventions.
- (5) As opposed to the previous convention, according to which the law applicable to the execution of the judicial assistance was that of the requesting state.

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