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Legal risks associated with cross-border banking activities

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**Problem of the illegal collection of evidence
The cases concerning LGT Bank and HSBC Luxembourg**

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I. Recent cases of illegal collection of evidence

LGT:

- Theft occurred 1999 – 2002
- Kieber tried to blackmail the owners – from this moment on they new about the theft
- 2004/2005: Tax amnesty in Germany. Inquiring clients are not informed about the data leakage
- 2006: sale of data to BND (German Intelligence Service), finalised 2007
- Summer 2007: clients inform LGT about the fact, that there is a data leakage and that foreign fiscal authorities are involved.
- LGT decided not to inform their clients, actively asking clients were misinformed: “no data leakage”

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I. Recent cases of illegal collection of evidence

LGT:

- February 2008: official information to LGT by british authorities that the were in poission of the data of numerous clients and that these data had already been transferred to other jurisdictions
 - 15. and 22. February 2008: LGT informs via Website
 - The resulting investigations in 2008 involved more than 900 Germans – including Mr. Klaus Zumwinkel, the former chief executive of Germany's postal group Deutsche Post AG
- (→ Zumwinkel pleaded guilty and received a 2-year suspended prison sentence and a €1.0 million fine)

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I. Recent cases of illegal collection of evidence

LGT:

- Criminal prosecution of about 40 members of the institution
 - 3.65 Million € paid as monetary condition by the accused individuals (§ 153a criminal code)
 - 46,35 Million € fine paid by LTG Group (§ 30 law of misdemeanors)
- 20 Million claim against LGT rejected by Liechtenstein High Court: the consequences of illegal behavior have to be borne by the individual and criminal offender
- Fiscal authorities are holding bank employees financially liable for the evasion of taxes of identified and not identified clients

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I. Recent cases of illegal collection of evidence

HSBC:

- Herve Daniel Falciani was employed as IT-Specialist by HSBC from 1997 to 2007. He copied data of more than 15.000 clients. These data went to the french tax authorities that returned them to HSBC and started investigations and gave them to other states
- on March 20, 2008, the Swiss Association of Bankers, a lobby group for Swiss financial interests, sent out a warning. On February 4, a man calling himself Ruben El-Chidiak (in reality Falciani), had gone to the Audi Bank in Beirut to negotiate the sale of data containing the names of clients of various Swiss banks
- Britain's HM Revenue & Customs sent letters to 6,000 of the individuals offering them a limited amnesty to repay tax that was owed or face further sanction.
- The Wuppertal Tax Investigation Office buys a set of 3000 data for 2,5 Million €

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I. Recent cases of illegal collection of evidence

HSBC:

- The Prosecutors Office in Bochum is entrusted with the investigation and works together – like they do since more than 15 years – with the Tax investigation Office in Wuppertal headed by Peter Beckhoff
- 14th October 2012: Search of premises in Düsseldorf, Munich and Stuttgart of an asset managing company with ties to HSBC
- Herve Daniel Falciani was arrested in the harbor of Barcelona the 1st of July 2012. He awaits extradition to Switzerland. He alleges that he acted in order to prevent tax fraud and that the officers of HSBC did not react to his warnings
- 6.732 voluntary disclosures have reached the tax authorities in Northrhine-Westphalia since 2010. In 3.413 cases investigations were initiated. 903 cases have been closed, a verdict was delivered in 11 cases.

II. Legal situation in Germany

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1) Exclusion of illegally obtained evidence – „stolen“ data – CD

•**Situation in Germany: Consideration of interests**

Public interest in law enforcement vs. seriousness of the breach of procedural rules and its meaning for the defendant

•**Rule for illegally obtained evidence by a private person:**

→ In principle no exclusion of the illegally obtained evidences

→ Exception: the obtaining is attributable to the state

•**The case concerning LGT Group**

No exclusion of evidence because the obtaining is not attributable to the state; no instigation and no aiding and abetting.

(Decision of the Federal Constitutional Court 9th Nov. 2010)

II. Legal situation in Germany

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2) Complicity and criminal prosecution of the bank employees

- There are indications that some banker aided clients to evade taxes. Meanwhile the prosecutors focus their investigation on complicity of bank employees.
- There is still no conviction for aiding and abetting to tax evasion.
- “The banks are buying themselves free”
→ Proceedings are closed against payment.
LGT Group paid €50 million to stop the proceedings against its bankers

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3) New jurisprudence of the Federal High Court of Justice

- Since summer 2008: new jurisdiction at the Federal High Court of Justice for all proceedings concerning tax evasion
- New senate – new jurisprudence
 - stricter interpretation of the law: for example:
 - No more partial reporting of one's own violation of tax laws = impunity only if completely reported
 - New assessment of sentence depending on the evasion amount:
 - monetary penalty or suspended imprisonment up to one year if tax evasion between €50T and €100T
 - (usually) no more monetary penalty if more than €100T tax evaded
 - (usually) no more suspended imprisonment if more than €1.0 million tax evaded

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4) New law - „law against black money” in 2011

- Confirmation of the new jurisprudence of the High Court of Justice
→ No more partial reporting of one’s own violation of tax laws (§ 371 (1) AO)
- Surcharge of 5% to get impunity if more than €50T tax evaded (§ 398a AO)
- Impunity because of the reporting of one’s own violation of tax laws is excluded when the tax authority announce a tax audit (§ 371 (2) AO)

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5) Plans of the Minister of Justice

- In September 2012 the federal minister of justice, Mrs. Leutheusser-Schnarrenberger announced the plan to criminalize the illegal collection of data including of the “Tax-CDs”.
- These plans were criticized by the political opposition which buys the CDs in their states (especially in North Rhine – Westphalia).
- This dispute gets special significance in the context of the new tax treaties between Switzerland and Germany.
(The SPD intends to block the ratification in the Bundesrat [federal council]).

III. The banks policy

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Outwards

- Cautious and late information for the clients
- Try to get no (more) press → harm reduction
 - LGT Bank only issued two short press releases
 - No official statement by the HSBC Bank

• Own Statement

Inwards

- Prosecution of the whistleblower/informant
 - Payment of all defense and court costs by LGT
 - “Severance” payment in order to allow new existence abroad
- Increase of the intern safety checks

• Own Statement

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Thank you for your attention

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