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Laga Newsflash
Stolen financial data can be used by the public prosecutor's office

The Court of Cassation recently judged that the Belgian public prosecutor's office is allowed to base its investigation into major tax fraud on stolen financial data (in this case from the Liechtenstein LGT Bank). This judgment runs parallel to a judgment by the European Court of Human Rights in October 2016, which also concerned the data stolen from LGT Bank.

Cassation: public prosecutor's office can initiate a criminal investigation based on stolen financial data

In June 2008, the Belgian Special Tax Inspectorate ("*Belgische Bijzondere Belastinginspectie*" (BBI)) received financial data (bank statements) from the German government regarding two Belgian tax payers. The data was stolen by a former employee of the Liechtenstein LGT Bank and were sold to the German government for EUR 4 million. In turn, the German government provided them to the BBI. Based on said data, a judicial inquiry was launched regarding the two taxpayers. The Court of Cassation judged that the authorities were indeed allowed to use the stolen data as 'information' to initiate a criminal investigation.

In the Court's view, the fact that financial data was stolen and therefore obtained unlawfully is not decisive. On its own, raw financial data does not constitute evidence of any criminal offence. It can therefore only constitute information. The use of unlawfully obtained "information", which does not qualify as "evidence" but is solely used as material for further criminal investigation, does not render the prosecution inadmissible. The "*Antigoon check*" (i.e. the check, based on criteria set out

in the infamous "*Antigoon*" case, on whether or not illegally obtained evidence is still admissible) applies to unlawfully obtained evidence and not unlawfully obtained information.

According to the Court of Cassation, the judge will still need to assess whether the use of unlawfully obtained information does not infringe the right to a fair trial for the parties involved. In this regard, the Ghent Court of Appeal considered that the persons involved were able to set up a defence with regard to the disputed information and that the government itself had not acted unlawfully. Taking into account the nature of the infringements and charges (i.e. organised fraud on a major scale), the violation of the right to respect for private life (as a European human right) did not outweigh the committed infringement. As a result, the Court of Appeal judged that there had been no violation of the right to a fair trial, which was in turn confirmed by the Court of Cassation.

ECHR: no violation of the right to respect for private life following a house search based on stolen financial data

On 6 October 2016, the European Court of Human Rights rendered a similar decision. A German couple filed a lawsuit against the Federal Republic of Germany because they were convinced that a search conducted on their residential premises had violated their right to respect for private life. The search warrant was issued based on the same information stolen by the former employee of the LGT Bank and then sold to the German secret service. Moreover, the ECHR came to the conclusion that there had been no violation of the right to respect for the German couple's private life. In other words, within the context of human rights, there was no issue with the house search being based on unlawfully obtained information.

Tax investigation based on stolen financial data?

These judgments are relevant for fraud cases handled by the public prosecutor's office.

From a purely tax point of view, raw financial data may indeed constitute "evidence". Therefore, if the fraud is only dealt with by the tax authorities (and not investigated by the criminal prosecutor), the case would relate to unlawfully obtained evidence. Consequently, as per the Court of Cassation's 22 may 2015 judgment, the fiscal "*Antigoon check*" needs to be applied.

Apart from assessing the fairness of a trial, the fiscal "*Antigoon check*" entails an assessment on whether the evidence acquisition method was in line with appropriate tax authority conduct, which can lead to debate. Furthermore, the tax judge will also need to assess the degree to which the documents concerned qualify as evidence. It should also be noted that following various earlier judgments, e.g. the KB-Lux case, the introduction of financial data by tax authorities does not in itself automatically constitute sufficient evidence in tax cases.

Laga's Tax Controversy Solutions Team will provide updates and remains readily available to assist with any questions.

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