



## IT and Internet Newsletter Switzerland

# Two Swiss Decisions of Federal Supreme Court concerning Facebook Posts

### 1. No Direct Lawful Interception of Data Stored in the USA by Swiss Prosecutor

In summer 2014, anti-Semitic statements were posted on Facebook, several of them under a pseudonym. As these statements violated the anti-racism provisions of the Swiss criminal code, the prosecutor opened a procedure. In order to identify the person(s) behind the pseudonym, the prosecutor requested the US-Facebook company to provide her with the registration data and the IP-History of the concerned profiles/accounts for the last six months. The prosecutor based her decision on art. 273 of the Criminal Procedure Code ("CPC") and on art. 32 lit. b of the Convention of Cybercrime ("CCC") of the Council of Europe, which the USA ratified as non-members. The wording of the CCC is the following:

*Article 32 – Trans-border access to stored computer data with consent or where publicly available*

*A Party may, without the authorisation of another Party:*

*a (...); or*

*b access or receive, through a computer system in its territory, stored computer data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system.*

In parallel, the prosecutor requested the competent authority, the Zurich Court of Appeal, to approve the surveillance order, as required by art. 273 CPC. The Zurich Court of Appel refused its approval and the prosecutor challenged the refusal before the Swiss Federal Supreme Court.

The question to be decided was whether art. 32 CCC allows direct access to data stored with a provider abroad (here Facebook in the USA) or whether the prosecutor is required to request the data through mutual assistance in criminal matters, i.e. in

application of the Mutual Legal Assistance Treaty of May 25, 1973.

The Swiss Federal Supreme Court found that, according to art. 32 lit. b CCC, the Swiss prosecutor is entitled to request and to receive the data but only with the provider's consent. Thus, Facebook could have consented to provide the data requested to the prosecutor, but as it did not, the Swiss Federal Court held that the prosecutor must request the data through the procedures of mutual legal assistance in criminal matters.

Also from a practical point of view, the decision of the Swiss Federal Supreme Court cannot be objected, as the Swiss prosecutor has no enforcement means against Facebook in the USA without the support of the US authorities. However, this decision also shows the difficulties to prevent racial or discriminatory or other illegal content to be spread over the Internet.

### 2. Facebook Posts are not Directed to the Public

A Facebook user posted on his account a threat according to which he would exterminate everybody and ending with the onomatopoeia POW!!!! POW!!!! POW!!!! This post could be viewed by his 290 "friends".

The prosecutor found the user guilty of causing fear and alarm among the population according to art. 258 of the Swiss Criminal Code and issued a penalty order.

The Facebook user opposed the penalty order; the Criminal Court and the Zurich Court of Appeal confirmed the condemnation according to art. 258 Criminal Code. The Swiss Federal Supreme Court reversed the decision as it found that Facebook friends cannot be considered as the public at large, i.e. inhabitants of a certain region.



### **3. Conclusion**

As new communication models, Facebook obliges the Courts to interpret existing legal disposition from a new angle. However, the biggest challenge remains the international dimension of the internet, which needs to be caught by national regulations. The enforceability of any cybercrime/activity is thus limited and very much depends on the legal framework and the will to cooperate amongst prosecutors located in the different jurisdictions.

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