

Swiss Overreact to Exclusion From Dutch Bank Probe, Practitioners Say

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After Dutch authorities announced on March 31 that they had coordinated searches in five countries in connection with an investigation of an unspecified Swiss Bank, the office of Switzerland's attorney general issued a statement expressing concern that it had been specifically

excluded from the probe. Practitioners say the Swiss should have been neither surprised nor offended because there was no requirement for the Dutch to tip them off, especially because it could have cost investigators the element of surprise.

In announcing the searches, [Dutch authorities said their probe focused on "dozens of people" suspected of tax evasion and money laundering](#). They identified the other countries involved in the joint investigation as Australia, France, Germany, and the U.K. While none of the national tax authorities involved in the investigations disclosed the name of the Swiss bank, Credit Suisse on March 31 said its offices in London, Paris, and Amsterdam "were contacted by local authorities concerning client tax matters."

The Swiss response came quickly after news of the searches broke. "The customary practices and rules of international cooperation and mutual assistance were clearly not followed in this case," the attorney general's office said. "The [office of the attorney general] expects a written explanation from the responsible Dutch authorities, and is considering what further action needs to be taken."

The Dutch Tax Administration didn't respond to a request for comment about the complaint by the Swiss attorney general's office.

Douglas Hornung of Hornung Avocats said it's likely that the foreign authorities determined that their coordinated action would have more impact if their Swiss counterparts were not informed in advance. "It is also a way to place the Swiss authorities on the defensive again," he said.

Hornung said the "customary practices" referred to by the office of the Swiss attorney general are not international legal obligations. "They did not request to block accounts in Switzerland nor to have Swiss assistance or cooperation in order to [receive] information/data/bank statements in Switzerland and, consequently, they did not have to first inform their Swiss counterparts, formally or informally," he said.

Different Perception

Thierry Boitelle of Bonnard Lawson agreed that there was no reason for the Dutch to coordinate with their Swiss counterparts at the current stage of the investigation. He said the Swiss attorney general might have informed the Swiss Financial Market Supervisory Authority and/or the Swiss federal counsel, because Credit Suisse is a systematic Swiss bank, meaning that it is considered too big to fail. Credit Suisse "could have picked

up on such communications and could have taken some measures, [such as] shutting down servers, communications, instructing local personnel, making sure lawyers are present during the searches, etc," Boitelle said. "[I'm] not sure if such measures would in the end have an impact on the result of the investigations, but investigators always seem to appreciate the surprise effect."

Bonnard found Switzerland's reaction surprising. "Perhaps they feel that they have been compliant and helpful for a number of years now, so they should be involved as a partner, but it seems the other jurisdictions may still have a different perception of the Swiss judicial authorities when it comes to cooperation in tax matters," he said.

Hornung said that while the Swiss government might be less inclined to cooperate with the Netherlands in the future, any failure to do so would be a violation of the country's international legal obligations.

Vanessa Huygen van Dyck-Jagersma, a tax partner at Jaeger Advocaten-belastingkundigen, said that while it is too early to draw firm conclusions, Switzerland might decide either to reconsider the continuance of its tax treaty with the Netherlands or its willingness to cooperate with future requests from Dutch authorities.

Hornung also said that in the past, most actions taken by foreign governments against Swiss banks suspected of helping clients violate their tax laws were done on an individual country basis. "For the very first time, we now see a coordinated and common action from different countries/administrations which is much more powerful and effective, probably with the aim to demonstrate that this particular bank had a policy to encourage and assist in a global international tax evasion scheme," he said. "It places the bank in a much weaker and more delicate position than if it had to deal with one country at a time. The multiplication of such coordinated actions may lead to the conclusion that all Swiss banks had such a policy and put the whole Swiss industry in real danger."

Huygen said that there could be legal problems depending on the nature of the agreement between the Dutch authorities and the anonymous informant who reportedly provided them with the information that prompted the investigation.

"An important question is whether the anonymous informant -- who is likely to be an ex-employee of Credit Suisse -- is [or] will be paid and/or is more or less controlled by the Dutch authorities to illegally gather information," she said. "Illegally, because the information is likely stolen and/or is disclosed violating Swiss banking secrecy, a criminal offense in Switzerland."

Huygen said that if the anonymous informant is controlled by the Dutch authorities either directly or indirectly, out of a belief that financial compensation will be paid in the future for the stolen information, the evidence could be unusable in criminal cases. "This doesn't only affect the 'original' information by the informant, but also the information gathered thereafter as 'fruits of the poisonous tree,'" she said.

Zero Tolerance

In a move that appeared to indicate Credit Suisse's concern about damage to its reputation, the bank took out

advertisements in British newspapers on April 2. "Credit Suisse applies a strict zero tolerance policy and wishes to conduct business with clients that have paid their taxes and fully declared their assets," the bank said.

In a statement issued the same day, Credit Suisse said it has made [significant investments to implement the standards for the automatic exchange of information in tax matters](#) for its European locations, effective April 1, which will foster even stronger transparency internationally.

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