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Facebook Switzerland not obliged to provide the prosecutor with data under the control of Facebook Ireland

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According to the latest decisions of the Federal Supreme Court (1B_185/2016, 1B_186/2016 and 1B_188/2016), Facebook Switzerland Sàrl ("**Facebook Switzerland**") does not have to provide the prosecutor of the Canton of Vaud with user or content data because the data are processed by Facebook Ireland Ltd ("**Facebook Ireland**").

The decision is based on following facts: A journalist filed a criminal complaint against unknown for slander, defamation and insult because he has been called anti-Semitic on a public facebook account held under a pseudonym.

The prosecutor requested Facebook Switzerland to provide user and content data, log files and IP-addresses of the facebook account, which Facebook Switzerland refused, stating that it does not have access to such data because they are exclusively held by Facebook Ireland.

The Federal Supreme Court first took note that the Lawful Interception Act is not applicable to providers of social media platforms and, therefore, facebook does not have to provide user and content data based on lawful interception.

The Federal Supreme Court then reviewed whether Facebook Switzerland had to hand out the requested data based on article 265 of the Criminal Procedure Code, according to which the holder of items or assets to be seized needs to hand them out. The Federal Supreme Court concluded that only persons or entities having legal and actual control over the data

("tout au moins en avoir le contrôle, c'est-à-dire avoir un pouvoir de disposition en fait en en droit sur ces données") can be requested to hand out data. In this case, the entity controlling or having access to the data requested by the prosecutor was Facebook Ireland, the entity contracting with its users. Hence the prosecutor should have addressed the request to Facebook Ireland by way of legal assistance in criminal law matters and not to Facebook Switzerland.

However, it is likely that in the near future Facebook Ireland will have to provide the requested data based on Lawful Interception Act ("**LIA**"), which has just been revised, although not in force yet. According to the latest revision, the LIA will be applicable to provider of over-the-top services, such as providers of social media platforms. Based on the general principle of territoriality, the LIA is applicable to all actions taking place in Switzerland, irrespective of the registered seat of the service provider. Thus, it is likely that providers of social media platform will have to cooperate with the surveillance authorities in a form that will be defined in the Ordinance on Lawful Interception, which still needs to be implemented.

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