



PROFESSIONAL ARTICLE

Twitter and SMS from the Courtroom

Thomas Stadelmann*¹

Twitter and other social media in the judiciary have been a topic in this magazine before. Judith C. Gibson, for example, dealt with "The future of judges in a social media world" in the October 2016 issue. This short article aims to illustrate the problem of the use of social media in the courtroom using a small, recent practical example from the Swiss Federal Supreme Court.

Keywords: Social Media; Twitter; Public Deliberation; Media Coverage

I. The legal situation

The Swiss Federal Supreme Court discusses about 1% of its cases, i.e. about 70–80 cases per year, in an oral public hearing;² this means that anyone can participate as a spectator and listener while the judges discuss the decision and its justification. During court hearings and deliberations, video and audio recordings are prohibited;³ the chairperson may allow recordings, but only for the opening of the hearing and the pronouncement of the judgement.⁴ Furthermore, the Federal Supreme Court Act provides that anyone who violates decency or disturbs the course of business in proceedings before the Federal Supreme Court shall be punished with a reprimand or a fine of up to 1,000 francs.⁵ The chairperson may then expel persons who do not follow their instructions from the meeting room and punish them with a fine of up to 1,000 francs.⁶ This regulation may easily be seen as the basis for a ban on telephone calls from the courtroom.

On the other hand, it is doubtful whether the aforementioned legal and regulatory provisions could also form the basis for a ban on reporting from the courtroom – for example via Twitter or SMS – since neither video nor audio recordings are made, and such reporting hardly disturbs the course of proceedings, the judges or the public.

* Dr. iur. h. c. (University of Basel), lic. iur., lawyer and notary, tax expert, Justice at the Swiss Federal Supreme Court, CH. email: thomas.stadelmann@bger.ch

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² Art. 59 para. 1 of the Federal Act on the Federal Supreme Court (Federal Supreme Court Act; FSCA) of 17 June 2005 (SR 173.110; the Systematic Collection of Laws of Switzerland – SR – is accessible via <https://www.admin.ch/gov/de/start/bundesrecht/systematische-sammlung.html>).

³ Art. 62 para. 1 of the Rules of the Federal Supreme Court (BGER) of 20 November 2006 (SR 173.110.131).

⁴ Art. 62 para. 2 BGER.

⁵ Art. 33 para. 1 BGG.

⁶ Art. 33 para. 3 BGG.

II. The practical case

a. Antecedents

On 26 July 2019, the Federal Supreme Court publicly discussed a request for administrative assistance from the French tax authorities regarding the transfer of approximately 40'000 UBS client's data. The day before, there had been speculation in different daily newspapers as to how the Federal Supreme Court would probably decide. As the "Tagesanzeiger" stated in its July 25, 2019 edition: "Based on the party affiliation of the responsible judges,⁷ it is possible to speculate on how the verdict in the case of France could turn out. And it doesn't look very good for UBS. Four [male] federal judges and one [female] federal judge will be deciding the case." Due to the party affiliation of the five judges,⁸ the journalist speculated that it would be scarce, the two SVP⁹ judges (judges 1 and 2) would probably vote against handing over the data to France, the Green-Party¹⁰ judge (judge 3) and the judge who belonged to the GLP¹¹ (judge 4) would rather vote for it. It was uncertain how the fifth judge, who was a member of the CVP,¹² would behave. The journalist's reflections were rather far-fetched, but what is decisive in the present context is that they created an expectation of the readership about the outcome of the proceedings.

b. Public deliberation

The deliberation began at about 9.30 a.m. Judge 5 was the referent in the public deliberation and could take the floor first. His votum showed that he wanted to refuse the handover of the data for several reasons. Judge 3 then gave her counter-presentation. As had been speculated by the journalist, she applied for permission to hand over the data. Since the lecture and counter-lecture lasted quite a long time, a short break in the session was then taken around noon. After the resumption of the deliberation, Judge 4 was given the floor. He, too, behaved as the journalist had assumed and proposed permission for the data to be released. At about 1.15 p.m. Judge 2 could speak. His vote was – measured by the preview in the "Tagesanzeiger" – a big surprise: Contrary to what the journalist had speculated, he also took the view that the data transmission should be approved. Finally, Judge 1 could present his opinion. Like Judge 5 – and as speculated by the journalist – he came to the conclusion that data disclosure should be refused.

Already this first round of the public deliberation made it quite clear that the data handover would be approved with a ratio of 3:2.

c. The online reporting

Throughout the public deliberation, another major daily newspaper ("Neue Zürcher Zeitung"; "NZZ") maintained online reporting on the course of the discussion, which the court was not aware of at the time. The court correspondent of the newspaper continuously delivered the results of the votes of the individual judges from the courtroom and her report could be followed in a live-ticker on the "NZZ" website.

d. The consequences

What is interesting for our topic is the subsequent determination of the effects of the online reporting; it was obviously directly relevant to the stock exchange. From the chart of the price

⁷ The positions at the Swiss Federal Supreme Court are filled according to party representation in the Swiss Federal Parliament. This procedure, its advantages and disadvantages, its influence on the jurisdiction of the judges and the possible party-political orientation of the judges are not the subject of this article.

⁸ The subject of this contribution is not the influence of political orientations on decision-making; therefore, the speculation of the journalist is not dealt with in detail here.

⁹ Swiss Peoples Party, a right-wing party.

¹⁰ A left-wing party.

¹¹ Green Liberal Party, a partial (depending on the topic) central, partial left-wing party.

¹² Conservative Democrats, a centre party.



Figure 1: Share price performance (on the Swiss Securities Exchange).

development of UBS shares during the deliberations, it can be seen that the presentation by Judge 5 or his motion was interpreted as a very positive signal in UBS's favour. Obviously, it was at this moment assumed that the data handover would be refused at a ratio of 3:2 (i.e. in favour of UBS) and the price of UBS shares rose quite rapidly. The relative high of the share price did not change even during Judge 3's counter-presentation. This is easily understandable, since her vote in favour of transferring the files and thus against UBS corresponded to what had been expected. During the break of deliberations, the share price was practically unchanged and also during the – so expected – vote of Judge 4, it remained practically stable. When Judge 2 had the opportunity to speak and it soon became clear that he would vote for data transfer – contrary to expectations – the UBS share price literally plummeted. Of course, the last vote of Judge 1 did not change that (**Figure 1**).

III. The conclusion

The example shows exemplarily that online reporting – from a courtroom – can have far-reaching effects.¹³ In this specific case, it was relevant to the stock market. This can be accepted by taking the standpoint that since everyone assumes identical assumptions and information, such an influence is not really harmful. However, one can also take the view that such processes make little economic sense and that the court should not help to promote them. In this case, it would not only be necessary to ban video and audio recordings from the courtroom, but also online reporting. However, in the case of the Swiss Federal Supreme Court, this would probably require the creation of a legal basis.

Competing Interests

The author has no competing interests to declare.

¹³ It would be interesting to find out whether such effects are also known, for example, from the live broadcasts of the deliberations of the Brazilian Supreme Court.

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