

Swiss banking secrecy

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I would like to present in a short statement the fundamentals of Swiss banking secrecy – its legal basis, the main elements of its contents as well as its limitations. Let me start with some remarks on the impact Swiss banking secrecy has in the context of the Swiss legal system.

Banking secrecy – a part of privacy protection

Banking secrecy is not an erratic block within the Swiss legal system but rather an aspect of privacy protection, the latter being deeply rooted in our law and having a long tradition in Switzerland. The protection of a sphere of privacy is recognised in Switzerland as a part of the personal rights of every individual, and encompassed within this sphere are not only a person's intellectual and spiritual individuality but also his financial situation.

Throughout history – in particular in World War II – Swiss banking secrecy has proved to be a life saver for refugees from many countries and civilisations, and today it can be said that – despite criticism of cases in which the protection of secrecy has been abused – the concept of banking secrecy is accepted by a large majority of the Swiss population.

Although banking secrecy is often considered to be a peculiarly Swiss concept, it should be noted that it is not merely a Swiss institution. In fact, similar institutions can be found in civilised countries throughout the world, and strict discretion with regard to the client's financial and personal affairs is perhaps a basic element of a banker's professional obligations everywhere.

What is somewhat unusual, however, is the high priority the secrecy concept has in Switzerland and its strong legal protection.

This leads to some remarks on

The legal basis

The duty to keep information obtained from a client confidential is – to start with – considered as being an implied element of any banker-customer

relationship and, therefore, flows from the contract between a bank and its client.

In addition to this contractual right implicitly agreed upon, there is a strong basis in general legal provisions.

As has been said already, the right to banking secrecy is considered to be an element of privacy protection. Privacy is an enforceable right protected in accordance with Art. 28 of the Swiss Civil Code, which reads as follows:

Whoever is being illicitly injured in his personality can for his protection apply to the judge against anyone who takes part in the offence.

Arts. 41 and 49 of the Swiss Code of Obligations provide for compensation by way of damages and – in certain cases – for the payment of a sum of money by way of moral compensation in cases of a violation of privacy.

These general principles of Swiss private law, which are also the fundamentals of banking secrecy, are supplemented by a specific provision in the Federal Law on Banks and Savings Banks. The difference between this provision and other areas of privacy protection is that a violation of banking secrecy is *punishable*. This protection of banking secrecy by penal law was introduced into Swiss law in 1934. Today, this provision – as revised in 1971 – reads as follows:

1. Whoever discloses a secret entrusted to him or of which he has become aware in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, representative of the Banking Commission, officer or employee of a recognised auditing company, or who attempts to induce others to commit such a violation of professional secrecy, shall be punished by imprisonment for not more than six months or by a fine of not more than Sfr. 50,000.
2. If the act has been committed by negligence, the penalty shall be a fine not exceeding Sfr. 30,000.
3. The violation of professional secrecy remains punishable even after termination of an official or employment relationship or the exercise of the profession.
4. Remain reserved federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority.

Violation of banking secrecy, therefore, is a criminal offence. Contrary to other professional duties of secrecy – such as that of an attorney or a medical doctor – the violation of banking secrecy is an *ex officio* offence, which means that it is prosecuted by law even if the injured person does not request it. An investigation will be conducted by the cantonal criminal prosecution authorities and the matter will be decided by the ordinary cantonal courts and – if the defendant appeals – by the Supreme Court.

The text of the article clearly states that even the *negligent* disclosure of

banking information is punishable. The same applies to an attempt of violation, even if unsuccessful, and the inducement – even if unsuccessful – of another person to disclose confidential information.

It is somewhat surprising that neither the general rule of Art. 28 of the Civil Code nor Art. 47 of the Banking Law *defines* banking secrecy. Its scope must, therefore, be determined by considering the whole body of Swiss legislation and court practice. The same applies with respect to the question when the duty of secrecy is superseded by overriding rules.

To be complete it should be noted that there are other provisions in Swiss civil, business and penal law that protect a bank customer's interest of privacy. E.g., if a secret is disclosed to a foreign source – private or public, including foreign fiscal or currency authorities – this fulfills the factual elements of economic espionage punishable according to Art. 273, which reads as follows:

Any person who exploits trade or manufacturing secrets in order to make them accessible to foreign governments or foreign enterprises or foreign organisations or their agents, or who makes such trade secrets accessible to foreign governments or organisations or private enterprises or to agents thereof, shall be punished by imprisonment, in serious cases in the penitentiary. In addition, a fine may be imposed.

Finally, Art. 162 of the Penal Code makes it an offence – which is prosecuted upon complaint only – to reveal a business secret which has to be guarded pursuant to a legal or contractual obligation.

The content of the duty of secrecy

While the law fails to provide a definition of the term “secret information”, it is established in legal practice that nothing may be disclosed if disclosure might cause any harm whatsoever to the interests of the customer. Thus the scope of banking secrecy is basically unlimited both with regard to the details of the customer/bank relationship (including the existence of such a relationship itself) and as to duration (the duty is upheld even after termination of the contractual relationship and there is no statute of limitations bringing the duty of secrecy to an end).

The purpose of banking secrecy is – exclusively – the protection of the customer. The bank, therefore, has no right to rely on banking secrecy for its own interest. Rather, it is obliged to make full disclosure to the client and – if requested to do so by the client – to third persons.

Subject to the duty of secrecy are the bank's organs and employees personal-

ly, not only the bank as an institution. Furthermore, certain third persons, such as agents or members of the Banking Commission, are subject to the provision.

The duty of the bank to know its customers

It should be stressed that banking secrecy does not imply a right of the customer to remain anonymous vis-à-vis the bank. Quite on the contrary, a bank is required, according to well-accepted professional standards, to know its customers and – in case of trust agreements – to identify the beneficial owner. This duty has been confirmed and is regulated in some detail in a 1977 agreement between the Swiss National Bank and the Swiss banks regarding the Duty of Diligence upon Acceptance of Moneys and the Handling of Banking Secrets. This agreement has been re-ratified several times and will – without the participation of the Swiss National Bank – come into effect this October in a newly amended form.

In this context, it is perhaps necessary to say a word about the device of numbered accounts. The numbered account is a means to obtain a higher degree of discretion within the bank – and only within the bank. Within the organisation of the bank, a client is identified by a code number rather than by his name. This reduces the risks of indiscretion or blackmail by the personnel of the bank. However, the management of the bank knows and always must know the customer's identity. There is, therefore, no such thing as an "anonymous" account. With regard to the legal protection of secrets, the numbered account is in exactly the same position as any other ordinary account.

The duty of full disclosure to the client, his representatives and heirs

As has already been said, banking secrecy is a right for the benefit of the customer, not of the bank. From this it follows that the bank is obliged to make full disclosure to the client. Basically, there is no limitation – neither as to time nor with regard to the details – on this duty of disclosure. As long as the bank has to keep or in fact keeps a client's dossiers, it has to give any information to the client or his authorised representative upon his request.

According to the Swiss law of inheritance all rights of a deceased person pass

to his heirs. Therefore, the bank has to disclose information with respect to the estate of a deceased client to the heirs, and this principle is again without limitation. While in the past banking secrecy has sometimes been abused in order to circumvent provisions of the inheritance laws, the actual practice of banks and courts has erected quite efficient barriers against such abuse.

The limitations of banking secrecy

Contrary to a widespread myth, banking secrecy is not absolute under Swiss law. Rather, there exists a series of limitations both on the national as well as the international level.

According to Swiss internal law banking secrecy is expressly subject to the duty to testify as a witness in court and to present information to an official. The extent of these duties varies according to the sector in question and derives from various federal and cantonal procedural and substantive laws.

The procedural laws of the Federation and – far more importantly – of the cantons contain considerable restrictions on the duty of banking secrecy:

- The overwhelming majority of cantonal codes relating to *criminal* procedure as well as the Federal Code do not exempt the banker from the obligation to testify or to make his books available for inspection. In criminal proceedings, the bank has to give information to the prosecutor and the court but not to police officers unless they are specifically authorised.
- With respect to *civil* procedure there is more of a variety among the cantonal laws. However, most cantons either grant the banker a right to refuse to testify with respect to matters of professional secrecy or leave it to the court's discretion to exempt the banker from giving evidence.
- In *administrative* proceedings the banker is – as a rule – exempted from testifying.

Essential limitations on banking secrecy exist in proceedings for the enforcement of debts. Generally speaking, one can say that a debtor cannot hide his assets behind the veil of banking secrecy. The duty to give information until recently had been more limited in proceedings for attachment (*Arrest*) but a new Supreme Court decision has held that a bank must inform an enforcement officer in attachment proceedings about the assets held as well as the name and address of the client.

Perhaps the area subject to the greatest discussion is the scope of banking secrecy in fiscal matters. In this very complex field there exists a considerable degree of confusion. This, however, is perhaps less the result of peculiarities of

Swiss banking secrecy than of specific concepts of Swiss tax law:

- According to a general principle tax authorities in Switzerland have to obtain their information from the taxpayer and not from third persons. Therefore, tax authorities have no direct access to bank information in the assessment procedure.
- With regard to tax offences, federal and cantonal laws are not uniform. Generally speaking however, one can draw a line between mere tax evasion (*Steuerhinterziehung*), which is the non-reporting of facts essential for the assessment, on the one hand, and the qualified form of tax fraud (*Steuerbetrug*) which involves fraudulent means such as falsified or untrue financial statements, balance sheets and other documents. Contrary to other countries and in particular to the United States, tax evasion is not a crime in Switzerland and banks need not divulge information in cases of tax evasion. On the other hand, in cases of tax fraud, which is criminally punishable, banks must make their books available for inspection.

As a whole, the duty of professional secrecy of the banker is somewhat limited compared to the secrecy of other professionals, in particular the attorney. While the attorney can and must refuse to testify in any proceedings, the banker must give information in a variety of cases. On the other hand, banking secrecy is more strongly protected insofar as – as has been shown – its violation is prosecuted *ex officio* and not only upon request of the injured person.

I would like to add that the banks consider themselves customarily authorised to give general credit information on their customers insofar as this is commercially relevant. Such information, however, must not contain specifics or details of the bank/customer relationship.

Legal assistance in particular

On an international level, banking secrecy is limited by the duty to give legal assistance to foreign courts and public authorities.

As a rule, the disclosure of secret information to foreign authorities, such as courts and governmental agencies, is not allowed unless a law or an international treaty provides otherwise. The most important rules in this field derive from the Swiss Law on International Legal Assistance dated 20 March 1981 (*Rechtshilfegesetz*) and from two international treaties: (1) the treaty between Switzerland and the United States on Mutual Assistance in Criminal Matters, in force since 23 January 1977 (*Staatsvertrag zwischen der Schweiz. Eidgenos-*

senschaft und den Vereinigten Staaten von Amerika über gegenseitige Rechtshilfe in Strafsachen) and (2) the European Convention on Mutual Assistance in Criminal Matters dated 20 April 1959 which came into force in Switzerland on 23 March 1976 (*Europäisches Übereinkommen über die Rechtshilfe in Strafsachen*). Moreover, duties of mutual assistance can arise out of tax treaties or treaties on mutual assistance in criminal matters.

Where under such internal or international provisions information must be given, it is restricted to what would be available to Swiss authorities under corresponding circumstances. This limits the duty and the circumstances in which information must be given insofar as foreign criminal authorities can obtain information only if the alleged offence is also considered a crime under Swiss law (*Grundsatz der beidseitigen Strafbarkeit*). As has been seen, this limits the duty to give information in tax cases, mere tax evasion not being a crime in Switzerland.

Swiss authorities, however, will generally assist foreign countries by requesting banks to give information in the prosecution of fraud, swindling, embezzlement, burglary and other criminal cases.

The limitation of the duty of disclosure to cases where an alleged offence is also considered a crime according to Swiss law has led to certain conflicts with other nations and to two exceptions which broaden the duty of disclosure in relation to the United States:

- In the Treaty on Mutual Assistance in Criminal Matters Switzerland has undertaken to give broader assistance – extending to tax offences – in cases where organised crime is involved.
- A non-conformist approach has been taken in an attempt to assist the United States in its fight against insider trading. Insider trading up to now not being a crime under Swiss law (with certain very specific exceptions), the normal channels of mutual assistance do not work. Based upon a Memorandum of Understanding between Switzerland and the United States, however, the banks have entered into an agreement according to which they obtain the permission of their clients to inform a Swiss private commission on the purchase and sale of securities in the American market if certain specific conditions are met. The commission then decides whether insider trading has occurred or not. In the former case, it will transmit some information through official channels to the American authorities.

For customers who did not agree to these proceedings, the banks will no longer execute orders in the United States' markets.

This approach has proved generally satisfactory over the last years. It is, however, an extraordinary means which was intended to apply for a limited

period of time only and I am personally pleased that it will presumably disappear within the near future when – by an amendment of our Criminal Code – insider trading will become a criminal offence in Switzerland too. Legal assistance in insider trading cases will then become possible through the ordinary official channels.

Erosion of Swiss banking secrecy?

In recent years – particularly as regards the Memorandum of Understanding – critics have expressed their fear that Swiss banking secrecy might become weaker in the future. I do not think that this is the case. While it is certainly true that abuses of our secrecy rules should be prevented and while the provisions against abuse must be amended in response to the fantasy and innovative capacities of abusers, the content of banking secrecy as a means of privacy protection remains. Thus, in the recent past abuses have been prevented by the devices already mentioned, such as the Agreement regarding the Duty of Diligence upon Acceptance of Moneys and the Convention concluded among the banks based upon the Memorandum of Understanding. Moreover, in court decisions new aspects of mutual assistance have been taken into consideration. The principle of banking secrecy, however, has remained, and a recent public vote showed that its concept has the strong support of the Swiss people.

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Proceedings of the 40th International Banking Summer School

Interlaken Switzerland, 5–18 July 1987