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The Limits of Swiss Banking Secrecy Under Domestic and International Law

by
Maurice Aubert†

INTRODUCTION¹

Banking secrecy in Switzerland is not, in reality, the monolithic barrier sometimes assumed. In fact, secrecy in banking is subject to definite constraints under Swiss law. Banking secrecy can be overridden by provisions of Swiss domestic laws² and by international treaties.³ In addition, two private agreements among the Swiss banks limit the application of banking secrecy.⁴ Indeed, over the past decade, the scope and practical effect of banking secrecy have been so significantly reduced that the remaining criticism is attributable largely to misunderstandings based on inadequate information.

I

LEGAL BASIS AND SCOPE OF BANKING SECRECY

A. *Legal Basis*⁵

The civil obligation of Swiss banks to respect the confidentiality of a client's account arises from three legal principles: the civil right to personal privacy,⁶ the contractual relationship between customer and bank,⁷ and

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1. This Article is based in particular on M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *LE SECRET BANCAIRE SUISSE* (2d ed. 1982). A German edition, *DAS SCHWEIZERISCHE BANKGEHEIMNIS* (1978), is also available.

2. *See infra* discussion in Part II.

3. *See infra* discussion in Part IV.

4. *See infra* discussion in Part III and text accompanying notes 123-131.

5. For more detailed English discussions of the legal bases for banking secrecy in Switzerland, see Navickas, *Swiss Banks and Insider Trading in the United States*, 2 *INT'L TAX & BUS. LAW.* 159 (1984); Meyer, *Swiss Banking Secrecy and its Legal Implications in the United States*, 14 *NEW ENG. L.R.* 18 (1978).

6. *See, e.g.*, *SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL SUISSE, CODICE SVIZERRO CIVILE*, art. 28:

Whoever suffers unlawful harm in his personal interests may bring an action for an injunction. An action for damages or for payment of a sum of money as compensation may be brought only in the cases stated in the statute.

specific statutory provisions governing banking secrecy.⁸ In addition, penal⁹ and administrative¹⁰ sanctions apply to breaches of banking secrecy. While not specifically stated in the law, the client may expressly release the banker from the obligations of banking secrecy.¹¹

When the Federal Penal Code was adopted twelve years after the Banking Law, it was deemed more appropriate to leave the banking secrecy article in the Banking Law itself.¹² However, the general provisions of the Penal Code do apply to violations of banking secrecy. In addition, article

See also SCHWEIZERISCHES OBLIGATIONSRECHT [OR], CODE DES OBLIGATIONS, CODICE DELLE OBLIGAZIONI, arts. 41, 49:

Art. 41. Whoever unlawfully causes damage to another, whether willfully or negligently, shall be liable for damages (Art. 43 et seq.).

Equally liable for damages is any person who willfully causes damages to another in violation of *bonae mores*.

Art. 49. Where individual inherent rights are injured, the damaged person may, where there is fault, claim compensation for any damage sustained and, where the particular seriousness of the injury and of the fault justify it, claim payment of a sum of money as reparations.

In lieu of, or in addition to, this payment, the judge may also award other kinds of reparations.

7. OR, *supra* note 6, art. 398:

Art. 398. The agent is obligated, in general, to use the same care as the employee under an employment contract (Art. 321a).

He is liable towards the principal for the faithful and careful performance of the mandate.

He shall personally perform his duties unless he is duly authorized, or compelled by the circumstances, to entrust a third person with their performance, or if the right of substitution is considered permitted customarily.

The extension of the agency relationship between client and banker was affirmed by the Swiss Federal Tribunal on September 16, 1937, 63 Arrêts du Tribunal fédéral suisse [ATF] II 242.

8. Federal Law Relating to Banks and Savings Banks, RECUEIL SYSTÉMATIQUE DU DROIT FÉDÉRAL [R.S.] 952.0, art. 47 [hereinafter cited as Banking Law]:

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed 6 months or by a fine not exceeding 50,000 francs.

2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 francs.

3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.

4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.

9. *See, e.g.*, SCHWEIZERISCHES STRAFGESETZBUCH [STGB], CODE PÉNALE SUISSE, CODICE PENALE SVIZZERO, arts. 162, 271, 273.

10. *See infra* text accompanying note 15.

11. M. AUBERT, J.-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 71.

12. The professional secrecy provision in the Penal Code does not include bankers. STGB, *supra* note 9, art. 321:

1. Clergymen, attorneys, defenders, notaries public, secrecybound auditors according to the Code of Obligations, doctors, pharmacists, midwives, and their assisting personnel, who divulge a secret entrusted to them, or of which they

273 of the Penal Code prohibits acts of economic espionage by anyone, and this may be applied to bankers.¹³ In addition, article 162 of the Penal Code punishes anyone who has revealed a business secret and anyone who has profited from such a revelation.¹⁴

The Banking Commission of Switzerland is empowered to withdraw a bank's license for serious breach of legal obligations.¹⁵ Banking secrecy being one of the most important of these obligations, the Commission can prevent any bank conducting business in Switzerland from continuing operations if the bank fails to maintain confidentiality regarding clients' affairs.

B. Scope of Banking Secrecy

The extent of the banker's obligation to maintain banking secrecy is not explicitly defined in article 47 of the Banking Law. According to judicial decisions, however, banks must not disclose to third parties, whether private persons or government authorities, information subject to secrecy,

have become aware in their professional capacity, shall, on petition, be punished by imprisonment or by fine

2. The offender shall not be punished if he divulges the secret based on the protected person's consent or, on the offender's request, on written authorization by his superior or controlling authority.

13. STGB, *supra* note 9, art. 273:

Any person who seeks to discover a manufacturing or business secret with a view to making it available to a foreign official or private organization or to a private foreign enterprise or to the agents thereof or any person who makes available a manufacturing or business secret to a foreign official or private enterprise or to the agents thereof shall be punished by imprisonment or in serious cases to "reclusion". The judge may in addition impose a fine.

For example, in April 1980, two French customs officers were accused of conducting unauthorized inquiries about French nationals' accounts in Swiss banks. On June 17, 1980, the customs officers were sentenced by a Swiss tribunal to three and twelve months imprisonment, respectively, but the sentences were suspended. See J. SUANIER, *LE POUVOIR DES BANQUES SUISSES* 181 (1982).

14. STBG, *supra* note 9, art. 162:

Any person who reveals a manufacturing or business secret which he was bound to maintain by virtue of a legal or contractual obligation and any person who profits thereby shall, upon being charged, be punished with imprisonment or a fine.

15. Banking Law, *supra* note 8, § X. See, e.g., art. 23(1):

The Federal Council elects the Federal Banking Commission consisting of 7-9 members and appoints its President and two Vice-Presidents. This Commission is charged with the supervision of the banking system and of the investment trusts by independent action. The Commission maintains a permanent Secretariat.

See also *id.*, art. 23quinquies.

(1) The Banking Commission withdraws the license to conduct business operations from the bank which no longer meets the conditions necessary for such approval or grossly violates its statutory duties.

(2) The withdrawal of the license results in liquidation in the case of legal entities and general or limited partnerships, and cancellation of the entry in the Register of Commerce in the case of individual proprietorships. The Banking Commission designates the liquidator and supervises his activities.

unless by legal order.¹⁶ The mandate of secrecy covers all activities in the banking domain, including the relationship between client and bank, information given by the client about his financial circumstances, the client's relationship with other banks, if any, and the bank's own transactions, if disclosure would harm a customer.

The same secrecy rules apply equally to both ordinary and numbered accounts.¹⁷ The sole difference between these types of accounts is that in the case of numbered accounts the identity of the account holder is known only to a very few of a bank's employees.

Foreign owned banks doing business in Switzerland are subject to exactly the same regulations as Swiss banks.¹⁸ A foreign bank operating in Switzerland may be either a subsidiary registered as a Swiss corporation or a branch without independent legal personality. While both entities are fully subject to Swiss banking secrecy, a foreign-parent bank is legitimately entitled to scrutinize the activities of its Swiss establishment. As a conflict may clearly arise between the demands of Swiss secrecy laws and the economic interests of the foreign-parent bank, this inspection power presents a delicate question regarding the limits of banking secrecy. No instance of such a conflict, however, has yet come before the courts.

Status of a Foreign-Bank Subsidiary. The foreign-bank subsidiary is a Swiss corporation. Thus, the foreign-parent bank constitutes a third party. All persons employed by a subsidiary are, accordingly, bound by law not to divulge any information about customers to the parent bank or to foreign auditors or authorities. However, by appointing officers of the parent bank to the board of the subsidiary, the parent may indirectly be in a position to acquire information about the subsidiary's operations or the identity of its customers. These board members are nonetheless subject to article 47 of the Banking Law and, accordingly, are forbidden to pass on privileged information to the parent bank. For example, a director on the board of both parent and subsidiary may know of the insolvency of the person with whom the subsidiary proposes to deal. Or he may know of that person's large indebtedness to a third party. In such a case, is it not his responsibility as a director to oppose the proposed deal and to explain why? Yet, the grounds of his opposition would constitute illegal disclosure of banking information under article 47.

While banking secrecy is a duty, and violation is regarded as a crime, article 34 of the Penal Code stipulates that in case of necessity, and to prevent a danger otherwise unavoidable, an act may be regarded as non-punishable. Given that a director must defend his company's interests,

16. Decision of the Swiss Federal Tribunal, October 1, 1969, 95 ATF I 439, 445, 447, 1970 JOURNAL DES TRIBUNAUX [J.T.] I 290, 295, 298.

17. M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 408.

18. *Id.* at 287-303.

disclosure of facts relating to a subsidiary normally covered by banking secrecy may amount to a non-punishable violation of this secrecy. The director involved must weigh the importance of disclosure in avoiding a danger against the seriousness of damage caused by the violation of secrecy itself.¹⁹

When the activity of a Swiss subsidiary consists merely of managing the portfolio of customers, non-divulgence of their identity is of no great importance to the foreign-parent bank. But in other banking transactions the situation may be entirely different. For example, details of the debtor's identity and background are important when granting credit facilities and collateral security. In practice, when a customer seeks a large credit, he is required to sign a waiver on banking secrecy, by virtue of which the Swiss subsidiary is authorized to divulge his identity to the foreign-parent bank.²⁰

By agreement with a subsidiary's board of directors, auditors of a foreign-parent bank can be permitted to audit the subsidiary. The management of that subsidiary, however, is entitled to provide only information of a general nature not constituting a breach of banking secrecy. If, for the purpose of a complete audit, the foreign-parent bank has to know the identities of clients, the auditors may be nominated as agents appointed by the Swiss subsidiary. The auditors are thereby authorized to receive full details, but may not divulge to the foreign-parent bank secret information, such as customers' identities.²¹

Status of a Foreign-Bank Branch. Because a foreign-bank branch does not have independent legal personality, the parent bank, having liability for all debts, must exercise direct control. The Banking Commission takes the view that banking secrecy, while protecting customers against third parties, does not affect the parent bank's entitlement to obtain information from the branch.²² Consequently, the secrecy protection afforded customers with an account at a foreign-bank branch is even less than what they are assured of with a subsidiary. Nevertheless, the special regulation of foreign-bank branches reduces the necessity for foreign inquiries about client information. Foreign branches must always maintain sufficient funds for transacting business in Switzerland without the intervention of the parent bank. They have to be organized and managed independently of the parent bank. For these reasons, the parent bank's inquiries regarding identities of clients are likely to be confined to what is essential for branch control.²³

19. Aubert, *Quelques aspects de la portée du secret bancaire en droit pénal interne et dans l'entraide judiciaire internationale*, 101 REVUE PENAL SUISSE 167, 174-75 (1984).

20. M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 296.

21. *Id.* at 293.

22. RAPPORT DE GESTION 1978 DE LA COMMISSION FÉDÉRALE DES BANQUES, April 1979, at 17-19.

23. M. AUBERT, J-P. KERNEN, H. SCHÖNLE, *supra* note 1, at 292.

II

LIMITS OF BANKING SECRECY UNDER SWISS LEGISLATION

Contrary to the general assumption abroad, Swiss banking secrecy is by no means an absolute right of the customer. Secrecy can be overridden by other provisions of the law which compel the banker to give information. The law of inheritance, debt collection and bankruptcy, taxation, and judicial procedure all provide limits on the operation of Swiss banking secrecy.

Inheritance. On the basis of federal and cantonal court decisions, it is well established that banking secrecy cannot be used for illegally concealing the existence of assets to which heirs of a deceased account-holder are properly entitled.²⁴ Under Swiss law, heirs become the immediate joint owners of a deceased's estate. Contrary to the practice in the United Kingdom and other common law countries, there is no transitional vesting of the estate in executors or administrators in Switzerland.²⁵ Thus, on furnishing proof of being an heir under the will, an individual may obtain information about the account of a deceased person. However, banking secrecy may serve to prevent heirs from acquiring details of a personal and private nature not necessary for establishing their entitlement to the estate. The Swiss courts have allowed this exception to banking secrecy on the ground that the right of heirs to establish the extent of their inheritance is a matter of substantive—not procedural—law.²⁶ In addition, a Swiss court will accord assistance to heirs in foreign probate proceedings when the assets are with a Swiss bank.²⁷

Debt Collection and Bankruptcy. Banking secrecy does not protect customers refusing to pay their debts or entering bankruptcy. Once the rights of a creditor are established, a debtor cannot evade his obligation by pleading banking secrecy. In debt-collection proceedings, a banker is required to produce information relating to the debtor's assets. In bankruptcy, the official receiver, the trustee in bankruptcy, or the liquidator of a company are legally permitted to obtain information from the bank concerning all the assets of the person who is bankrupt. This area of the law is governed by Swiss federal law, applicable in all cantons.²⁸

An obvious conflict of interests arises in the case of bankruptcy of a bank. The creditors need to obtain bank information to protect their rights.

24. Decision of Swiss Federal Tribunal, March 19, 1963, 89 ATF II 87.

25. See ZGB, *supra* note 6, art. 560(2).

26. Decision of the Swiss Federal Tribunal, September 20, 1956, 82 ATF II 555, 563-64, 1957 J.T. I 130, 134-36; Decision of the Swiss Federal Tribunal, February 4, 1981, 1re Cour de Droit Public (unpublished decision).

27. Decision of the Cour de Justice Civil du Canton de Genève, June 19, 1970, 94 LA SEMAINE JUDICIAIRE [SEM. JUD.] 537, 542-43 (1974).

28. Loi federale sur la poursuite pour dettes et la faillite [hereinafter cited as Debt and Bankruptcy Law], April 11, 1889, R.S. 281.1.

On the other hand, customers may have good reasons for requiring the maintenance of banking secrecy, so that their identities do not become known to other creditors. The Swiss Federal Tribunal has judged that the necessity to inform creditors takes precedence over the protection of banking secrecy.²⁹ In practice, however, in all cases of bank bankruptcy the official receiver obtains the agreement of the creditors to maintain banking secrecy. Consequently, the accounting documents relating to customers do not mention identities.³⁰

If a creditor, resident in Switzerland or in a foreign country, believes that his debtor possesses assets in a Swiss bank which the debtor may try to conceal through the operation of banking secrecy, the creditor can obtain a judicial attachment order.³¹ The Swiss bank must comply with this order and block the attached assets as an internal protective measure.³²

Whether banks must disclose information in attachment proceedings remains controversial. Courts have several times held that banks are obligated to furnish information concerning assets in their possession to the Debt Collection Office.³³ At the same time, it is admitted that no power exists in law to enforce these demands.³⁴ For this reason, banks generally decline to give information until a claim has been duly recognized by a Swiss court. When the bank's client is a debtor who has deposited securities as a guarantee for the debt, however, the bank must give information about the client's financial situation to the Debt Collection Office. Otherwise, the right of the bank to enforce the guarantee will be cancelled.³⁵

Tax Claims. Under Swiss tax law, the taxpayer is duty bound to establish a fair and accurate tax declaration.³⁶ Third parties, including banks, are generally not obliged to furnish information directly to the tax authorities. Banking secrecy can properly be invoked against demands by fiscal authorities for production of information. In some circumstances, however, tax claims can lead to the judicial lifting of banking secrecy. These circum-

29. Decision of Swiss Federal Tribunal, October 21, 1960, 86 ATF III 114, 1961 J.T. II 46, 48.

30. M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 133-34.

31. The equivalent terms for attachment in Swiss Law are *Arrestverfahren* and *sequestre*. See Debt and Bankruptcy Law, *supra* note 28, arts. 271-278.

32. M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 136.

33. See, e.g., Decision of the Swiss Federal Tribunal, July 7, 1977, 103 ATF III 91; Decision of the Swiss Federal Tribunal, September 7, 1977, 100 SEM. JUD. 361, 363 (1978). In Switzerland, administration of bankruptcy is handled by the Debt Collection Offices of the Cantons. See Debt and Bankruptcy Law, *supra* note 28, arts. 1-13.

34. Decision of Swiss Federal Tribunal, Feb. 26, 1975, 101 ATF III 58, 63-64. See also Decision of the Swiss Federal Tribunal, Nov. 12, 1949, 75 ATF III 106, 110; Decision of the Swiss Federal Tribunal, July 7, 1977, 103 ATF III 91, 94.

35. Decision of Swiss Federal Tribunal, July 4, 1978, 104 ATF III 42, 102 SEM. JUD. 45, 46 (1980).

36. See, e.g., Arrêté du Conseil fédéral concernant la perception d'un impôt pour la défense nationale, du 9 décembre 1940, R.S. 642.11, arts. 82-87, 89, 91, 97.

stances depend on the nature of the tax offense. Swiss law distinguishes between two types of tax offenses: tax evasion and tax fraud.

Tax evasion involves the failure of the taxpayer to declare certain income or assets in his tax return.³⁷ The tax authorities check tax returns in accordance with standard administrative procedures. These procedures do not mandate the lifting of banking secrecy and the tax authorities cannot obtain information directly from the banks. However, compulsory measures directed against the taxpayer are possible. The fiscal authorities may order the taxpayer to provide an attestation from a bank suspected of holding assets for him. The bank may do nothing more than establish a complete and accurate statement of income and assets. The taxpayer alone is responsible for submitting the statement to the tax authorities.

Tax fraud concerns the submission to the authorities of false, forged, or inexact financial documents³⁸ with the intention to avoid payment of tax.³⁹ Unlike tax evasion, tax fraud is generally subject to penal prosecution. As with common crime, the judge has the right in a tax fraud case to lift banking secrecy.⁴⁰ In addition, a federal law reinforcing measures against tax fraud was promulgated in 1977.⁴¹ Now, all federal tax laws, and the tax laws of the majority of the cantons,⁴² provide for prosecution of tax fraud as a criminal offence for which banking secrecy may be lifted. As all tax-

37. See, e.g., the definition of tax evasion given by M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 158:

Tax evasion occurs when a taxpayer does not declare income and as a consequence is not taxed on that income, when this failure to declare income violates the law.

See also Arrêté du Conseil fédéral concernant la perception d'un impôt pour la défense nationale, *supra* note 36, art. 129; HARVARD LAW SCHOOL, WORLD TAX SERIES: TAXATION IN SWITZERLAND 996-1000 (1976).

38. See Arrêté du Conseil fédéral concernant la perception d'un impôt pour la défense nationale, *supra* note 36, art. 130bis:

Whoever, in evading taxation (*soustraction d'impôt*), will have used false, falsified, or inaccurate documents, such as accounting books, balance sheets, profit and loss statements, or salary certificates or other third party attestations, with the purpose of defrauding the fiscal authorities, will be punished with imprisonment or a fine of not more than 30,000 francs.

39. See, e.g., Decision of the Swiss Federal Tribunal, December 23, 1970, 96 ATF I 737, 748-49, 1971 J.T. I 571, 582-83.

40. Generally, in Switzerland, everyone is under the obligation to bear evidence in a criminal proceeding. See La loi fédérale sur la procédure pénale, du 15 juin 1934 [Swiss Criminal Procedure Code], R.S. 312.0, art. 74. A right of refusal to give evidence is only attributed to clergy, lawyers, notaries, doctors, pharmacists, midwives and their assistants. *Id.*, art. 77. Bankers are not included, and by negative implication, are not immune from testifying or producing documents in a criminal court. See also Decision of the Swiss Federal Tribunal, October 1, 1969, 95 ATF I 439, 1970 J.T. I 290, 294-95.

41. Loi fédérale renforçant les mesures contre la fraude fiscale, du 9 juin 1977 [Federal Law Reinforcing Measures Against Tax Fraud], 1977 FEUILLE FÉDÉRALE [FF] II 693.

42. This applies principally to the Cantons of Basel, Geneva, and Zurich. See Decision of the Swiss Federal Tribunal, December 23, 1970, 96 ATF I 737, 749, 1971 J.T. I 571, 583. The laws of the Cantons of Berne, Grisons, Neuchatel, and Valais do not contain a criminal proceeding in tax matters. Consequently, in tax fraud cases, bankers are not obligated to divulge information to the tax authorities of these cantons.

payers have to pay federal national defense taxes, instances of tax fraud in which banking secrecy cannot be lifted are rare.

Judicial Procedure. Switzerland is a federation of cantons, each with its own jurisdiction to establish codes of civil and criminal procedure.⁴³ Concerning professional secrecy, provisions of the cantonal procedural codes are most commonly applied; federal procedural law is rarely invoked.⁴⁴ Thus, questions relating to banking secrecy are almost invariably retained under cantonal jurisdiction.

While most cantonal criminal and civil procedure codes stipulate that clergy, doctors, and lawyers are entitled to decline to testify on matters relating to their professional activity, no such general rule applies to bankers. The banker's secrecy privilege differs between criminal and civil proceedings, and even among the cantonal civil procedure codes there are variations concerning banking secrecy in civil proceedings.⁴⁵

Banking secrecy cannot be invoked to withhold evidence in a penal prosecution for a crime punishable in Switzerland.⁴⁶ However, the judge may lift banking secrecy only in respect of evidence connected with the accused and only where such waiver would not also affect any third parties not involved in the prosecution.⁴⁷ Ultimately, however, the judge in a criminal case has the discretion to lift or to maintain banking secrecy.

In civil trials, the procedure for the lifting of banking secrecy is not uniform among the cantons. The cantonal procedures fall into three categories. In the first group,⁴⁸ persons bound by professional secrecy, including bankers, are exempted from giving evidence in court. There is no legal provision whereby a banker may be obliged to divulge information. In the second group,⁴⁹ the judge has the discretion to order that banking secrecy be lifted, depending on the nature of the trial and the importance of the

43. CONSTITUTION OF THE SWISS CONFEDERATION, art. 64 and 64 *bis*.

44. La loi fédérale de procédure civile fédérale, du 4 décembre 1947 [Federal Code of Civil Procedure], R.S. 273, art. 42(1)-(2).

45. See *infra* text accompanying notes 48-51.

46. See *supra* note 40.

47. Decision of Swiss Federal Tribunal, October 1, 1969, 95 ATF I 439, 445, 1970 J.T. I 290, 296 et les arrêts citées.

48. Cantons of Argovie (§ 183(2)(b)), Berne (art. 246(1)), Geneva (art. 227), Neuchatel (art. 222(b)), Saint-Gall (art. 241(1)(2)), Valais (art. 216(2)), and Vaud (art. 198(1)). With regard to the Canton of Valais, a recent decision of the Swiss Federal Tribunal confirmed that in the case of an estate, the rules of civil procedure do not prevent the heirs from receiving information about the deceased account. The reason is that the right of heirs is a matter of substantive, not procedural, law. Decision of the Swiss Federal Tribunal, February 4, 1981, 1re Cour de droit public (unpublished decision).

49. Cantons of Fribourg (art. 214(1)(c)(2)), Nidwald (§ 148(2)-(3)), Schwyz (§§ 238 (1)(2), 239), Tessin (art. 230(b)-(c)), Uri (art. 192(1)(b)-(d)), Zug (arts. 168(1)(2), 169), and Zurich (arts. 187(2), 188). With regard to the Canton of Tessin, the code is interpreted to obligate the banker to testify under all circumstances. See also Trade Development Bank v. Continental Insurance Company, 469 F.2d 35, 40 (2d Cir. 1972).

evidence. Finally, in the other cantons,⁵⁰ banking secrecy is not regarded as professional secrecy. In these cantons, the banker is not entitled to refuse to testify.⁵¹

To summarize, in regard to penal proceedings, banking secrecy is always lifted. Concerning civil proceedings, the solutions may vary according to the cantonal laws. To supplement the operation of domestic legal regimes limiting the application of banking secrecy in Switzerland, the Swiss banks have elaborated private agreements intended to reinforce public confidence in the operation of banking secrecy and to guard against abuse. One of these agreements concerns the practice of banking secrecy domestically.

III

THE SWISS BANKERS' ASSOCIATION AGREEMENT

A. Contents of the Agreement

Following the revelations of irregular banking operations in the 1977 Chiasso scandal,⁵² the banking industry realized the necessity of combating economic crime in order to maintain Switzerland's good reputation as a financial center. Accordingly, the Swiss Bankers' Association, the Swiss National Bank, and all the banks situated in Switzerland prepared a private Agreement on the Observance of Care in Accepting Funds and the Practice of Banking Secrecy (hereinafter the Agreement)⁵³ that defined and reinforced the established rules of good conduct in bank management. This code of conduct does not affect customers' rights. The Agreement came into effect in July 1, 1977, and was expanded and renewed for a five-year period beginning October 1, 1982.⁵⁴ Although the banks were not compelled to sign the Agreement, nearly all have in fact done so.⁵⁵

The three main objectives of the Agreement are: (1) to ensure that the identity of account holders and depositors is reliably ascertained; (2) to observe care in renting safe deposit boxes so that they not be used for illegal

50. Cantons of Basel (§ 116(2)), Lucern (art. 161(2)), and the others.

51. For a more detailed discussion, see M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 90-97.

52. *See Chiasso Connection*, Wall St. J., May 16, 1977 at 1, col. 6. *See also* SEC v. BSI, 92 F.R.D. 111 (S.D.N.Y. 1981).

53. Agreement on the Observance of Care by the Banks in Accepting Funds and on the Practice of Banking Secrecy, July 1, 1977, amended and renewed July 1, 1982, *reprinted in* 16 I.L.M. 767 (1977) [hereinafter cited as *Banker's Agreement on the Observance of Care*]. An English translation of the Agreement is on file with the office of the International Tax & Business Lawyer.

54. Aubert, *supra* note 19, at 176.

55. Klausner, *Drei Jahre Vereinbarung über die Sorgfaltspflichten der Banken*, 32 WIRTSCHAFT UND RECHT 285 (1980); M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 182 n.62.

purposes; and (3) to prevent aiding and abetting the flight of capital and tax evasion.⁵⁶

To implement the objectives of the Agreement, banks must verify the identity and circumstances of prospective clients, whether individuals, corporations, companies, institutions, foundations, or trusts. In order to ascertain the true identity of the beneficial owners of accounts opened by fiduciaries, banks must make inquiries about legal entities as well as individuals. Proof of identity is required on all cash operations exceeding 500,000 Swiss francs.⁵⁷

Only persons bound by professional secrecy, such as attorneys-at-law and auditors,⁵⁸ are authorized to open bank accounts in their own name in a fiduciary capacity, without revealing the identity of the third party to the bank.⁵⁹ In such instances, the fiduciaries must sign a declaration confirming that the beneficial owner is known to them and that the transactions are not contrary to the Agreement.

The identity of persons renting a safe deposit box must also be checked in the same way as for the opening of a bank account.⁶⁰ The trustworthiness of the prospective client must also be evaluated, with the aim of preventing use of the safe deposit box for illegal purposes, to the extent that a bank can reasonably be expected to ascertain such information about the prospective client.⁶¹

The third objective of the Agreement is to prohibit banks from facilitating the flight of capital and tax evasion. Banks undertake not to aid and abet capital transfers from countries with legislation restricting investment of funds abroad.⁶² Banks may not collude with their clients in attempts to deceive authorities at home and abroad, by making incomplete or other misleading attestations.⁶³

The auditing agencies which regularly audit the banks are responsible for verifying observance of the Agreement by means of random tests.⁶⁴ To ascertain and punish violations, an Arbitration Committee was set up, comprising two representatives each from the Swiss National Bank and the Swiss Bankers' Association, together with a judge of the Federal Tribunal.⁶⁵ The Arbitration Committee may impose a fine of up to ten million

56. See Banker's Agreement on the Observance of Care, *supra* note 53, art. 7.

57. *Id.*, art. 3, pt. 9.

58. Recognized auditors are members of the *Chambre Suisse des sociétés fiduciaires et des experts comptables*.

59. Banker's Agreement on the Observance of Care, *supra* note 53, art. 6, pt. 40.

60. *Id.*, art. 3.

61. *Id.*, art. 4.

62. *Id.*, art. 8.

63. *Id.*, art. 9.

64. *Id.*, art. 12.

65. *Id.*, art. 13.

Swiss francs on banks guilty of an offense under the Agreement. Some banks have already been fined substantial amounts.⁶⁶

B. The Agreement and the Scope of Banking Secrecy

The Agreement itself does not affect the bank's obligation to maintain secrecy. Bank clients are not parties to the Agreement and thus it has no legal effect on them. The bank auditors charged with controlling the observance of the Agreement are already subject to banking secrecy provisions; they cannot divulge information to a third party.⁶⁷ The fact that an auditing agency must report any offense, or any suspicion of a possible offense, to the Arbitration Committee does not alter the scope of banking secrecy.⁶⁸ The identities of bank customers are not communicated to the Arbitration Committee in such reports, since, according to article 47 of the Banking Law, only a judge is empowered to lift banking secrecy. The members of the Arbitration Committee itself are "mandated persons" in the sense of article 47 of the Banking Law, and thus are not authorized to transmit any information to a Swiss or foreign authority.⁶⁹

When banking secrecy is lifted by a judge, however, the fact that the banker has signed the Agreement may be very important. Banks are now obliged to know the beneficial owner of accounts, the identity of who controls account-holding legal entities, and the origin of the funds. When the judge lifts banking secrecy, the banker must divulge the required information. Contrary to previous practice, a banker cannot escape testimony simply by answering that he does not know the real identity of the owner of the account or the origin of the funds.

IV

LIMITS OF BANKING SECRECY UNDER INTERNATIONAL LAW

A Swiss banker is punishable for any violation of the secrecy obligation of article 47 of the Banking Law whether it occurs in Switzerland or abroad.⁷⁰ However, the punishable character of a violation of banking secrecy committed outside of the country has never been decided by a court. Some authors question whether a banker may be punished for revelations made outside Switzerland.⁷¹ In any case, the fact that a banker may be responding to an authority outside Switzerland is not a defense. Only Swiss judicial authorities are vested with the power to lift Swiss banking secrecy.

66. *Id.*, art. 14. Although such sanctions are private judgments, in the canton of Zurich at least, such judgments are given *res judicata* effect under section 257 of the Zurich Code of Civil Procedure [ZPO].

67. Banker's Agreement on the Observance of Care, *supra* note 53, art. 14(2).

68. Concerning the practice of the Arbitration Committee, see Klauser, *supra* note 55, at 71.

69. Banker's Agreement on the Observance of Care, *supra* note 53, art. 14(4).

70. Article 7 of the Swiss Penal Code mentions that a crime is deemed to have taken place in both the place where the offender has acted and the place where the consequences occurred.

71. Aubert, *supra* note 19, at 171.

No foreign authority is permitted to conduct independent investigations.⁷² A foreign authority may obtain evidence in Switzerland only by sending letters rogatory⁷³ to a competent Swiss authority.

A. Assistance in Criminal Matters According to Domestic Law

International Judicial Comity. Until recently, assistance granted to States not party to special conventions was based on analogy to the Swiss law governing extradition.⁷⁴ The absence of a special international or domestic law did not prevent Switzerland from granting assistance to such States, even without an agreement, when other States offered reciprocal aid.⁷⁵

By virtue of a restriction generally accepted by other States, Switzerland has always refused assistance in matters concerning fiscal, political, or military offenses. When assistance is granted, however, the Swiss principle of *spécialité*⁷⁶ prevents the requesting State from using the information for purposes relating to an offense other than that for which assistance is granted. This restriction is particularly important in the context of crimes such as embezzlement, extortion, or fraudulent bankruptcy, to which charges of tax fraud or offenses against exchange-control regulations are sometimes added after assistance is granted. Assistance in mixed cases involving fiscal, political, or military offenses is invariably refused.⁷⁷

Under the procedure of letters rogatory in the absence of a special agreement, a banker could refuse to disclose information to a Swiss judge on the ground that banking secrecy can only be lifted under a specific provision of the law. In the absence of an international agreement, there are no internal provisions obliging a banker to give information in such proceedings, so he could not be compelled to do so by a court. Moreover, the fact of divulging a secret to a foreign official might constitute economic espionage.⁷⁸ Although bankers have in some cases been prepared to give information when the existence of a crime is clearly demonstrated, they tend to refuse to answer when such disclosure might lead to an accusation of economic espionage.⁷⁹

72. STGB, *supra* note 9, art. 271.

73. Letters rogatory are used by one judicial system to obtain information from a foreign State's judicial system. BLACK'S LAW DICTIONARY 815 (5th ed. 1979).

74. *See, e.g.*, Decision of the Swiss Federal Tribunal, May 25, 1977, 103 ATF Ia 206, 212.

75. Swiss Mutual Assistance Law, *infra* note 80, art. 3(1)-(2).

76. The principle of *spécialité* provides that the information gained from judicial assistance may not be used for any purpose or in connection with any offense other than the offense for which assistance was granted.

77. Decision of the Swiss Federal Tribunal, January 25, 1978, 104 ATF Ia 49, 53. *See also* M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1 at 335.

78. *See supra* discussion of economic espionage accompanying note 13.

79. M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 398.

Swiss Law on International Assistance in Criminal Matters. The Swiss Parliament recently adopted the important Law on International Assistance in Criminal Matters.⁸⁰ This new law, which came into force on January 1, 1983, facilitates assistance in cases of crimes committed in countries, such as the United Kingdom, not party to an international agreement with Switzerland. The provisions are essentially similar to those of the European Convention on Mutual Assistance in Criminal Matters (hereinafter European Convention)⁸¹ and of the Treaty between the United States and Switzerland on Mutual Assistance in Criminal Matters (hereinafter Swiss-American Treaty).⁸² The new law does not, however, incorporate special provisions for organized crime, as does the Swiss-American Treaty.⁸³

Under this law, assistance is available when an inquiry comes from a country with which Switzerland maintains reciprocity.⁸⁴ The existence of reciprocity is not necessary, however, when a common interest to combat criminality prevails. Also, the Swiss authorities reserve the right to refuse assistance, particularly in cases where no serious offenses are involved.

Assistance is not generally given for tax evasion. Although assistance may be forthcoming in cases of tax fraud, this applies only to offenses which would be recognized as a "tax fraud" had they been committed in Switzerland.⁸⁵ If an offense is categorized under Swiss law as "tax eva-

80. Loi fédérale sur l'entraide internationale en matière pénale, du 20 mars 1981, R.S. 351.1 [hereinafter cited as Swiss Mutual Assistance Law].

81. European Convention on Mutual Assistance in Criminal Matters, April 20, 1959, 1977 R.O. 87, R.S. 0.351.1, 472 U.N.T.S. 185, Europ. T.S. No. 30 [hereinafter cited as European Convention]. The parties to the European Convention are Denmark, Greece, Italy, Norway, France, Israel, Austria, Liechtenstein, the Netherlands, Turkey, Belgium, Switzerland, Sweden, Luxembourg, Spain, and the Federal Republic of Germany.

82. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302, 1977 R.O. 42, R.S. 0.351.933.6, — U.N.T.S. —, (entered into force Jan. 23, 1977) [hereinafter cited as Treaty on Mutual Assistance].

83. *Id.*, Ch. II, art. 6–8. See art. 6(3):

For the purposes of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purpose of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either;

(1) strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations, trade unions or other employee's associations; or

(2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b(1).

84. Swiss Mutual Assistance Law, *supra* note 80, art. 8.

85. *Id.*, art. 3(3):

sion", rather than "tax fraud", assistance will always be withheld.⁸⁶

The new law also lifts banking secrecy when the information requested relates to a crime punishable both in the foreign country and in Switzerland.⁸⁷ Through this rule, Switzerland emphasizes its determination to prevent the use of its banking system as a means for concealing the proceeds of criminal activities in other countries.

In order to protect the privacy of persons not connected with the alleged offense, information relating to such persons may be divulged only when it is essential to prove facts of substantial significance for the investigation.⁸⁸ Further, disclosure of trade or bank information will be refused if there is risk of serious damage to the Swiss economy.⁸⁹ To justify refusal, however, such potential damage must greatly outweigh the seriousness of

A request shall not be granted if the subject of the proceeding is an offense which appears to be aimed at reducing fiscal duties or taxes or which violates regulations concerning currency, trade or economic policy. However, a request for judicial assistance under part 3 of this act may be granted if the subject of the proceeding is a duty or tax fraud.

86. *Id.*, art. 3. Cf. Treaty on Mutual Assistance, *supra* note 82, art. 2(1)(c)(5):

This Treaty shall not apply to:

. . .

(c) investigations or proceedings . . .

(5) concerning violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations other than the offenses listed in items 26 and 30 of the Schedule of this Treaty (Schedule) and the related offenses in items 34 and 35 of the Schedule.

87. Swiss Mutual Assistance Law, *supra* note 80, art. 1.

88. *Id.*, art. 10(1):

Pieces of information about the privacy of persons who, according to the request, are not involved in the criminal proceedings abroad, may be given if they seem imperative to establish the facts and if the seriousness of the offense justifies it.

But see Treaty on Mutual Assistance, *supra* note 82, art. 10(2):

The Swiss Central Authority shall, to the extent that a right to refuse to give testimony or produce evidence is not established, provide evidence or information which would disclose facts which a bank is required to keep secret or are manufacturing or business secrets, and which affect a person who, according to the request, appears not to be connected in any way with the offense which is the basis of the request, only under the following conditions:

a. the request concerns the investigation or prosecution of a serious offense;

b. the disclosure is of importance for obtaining or proving facts which are of substantial significance for the investigation or proceeding; and

c. reasonable but unsuccessful efforts have been made in the United States to obtain the evidence or information in other ways.

89. Swiss Mutual Assistance Law, *supra* note 80, art. 10(2):

Disclosure of manufacturing or business secrets in the sense of article 273 of the Penal Code, or of facts which a bank must usually keep secret shall not be allowed if it may be assumed to cause essential prejudice to the Swiss economy and does not appear justified in relation to the seriousness of the offense.

But see Treaty on Mutual Assistance, *supra* note 82, art. 3(1)(a):

1. Assistance may be refused to the extent that:

a. the requested State considers that the execution of the request is likely to prejudice its sovereignty, security or similar essential interests; . . .

an alleged offense.⁹⁰

Despite the restrictions contained in this law, the general authorization to lift banking secrecy in cases of offenses committed abroad represents great progress, and enhances the ability of Swiss authorities to assist in criminal matters in the absence of a special agreement.

B. International Conventions on Mutual Assistance in Criminal Matters

Switzerland is party to two mutual assistance conventions, the 1966 European Convention on Mutual Assistance in Criminal Matters⁹¹ and the Swiss-American Treaty on Mutual Assistance in Criminal Matters.⁹² The Swiss-American Treaty, which came into force January 1, 1977, is a pioneering effort. It is the first major international agreement entered into by the United States with the aim of obtaining information and evidence abroad necessary for criminal investigation and prosecution.⁹³ For Switzerland, it is the first agreement of this type with a country having a common law system. For both nations, it is the first time that an international treaty to which they are parties contains special provisions for assistance in the fight against organized crime.

Common Provisions. A number of the provisions of the Swiss-American Treaty are based on those contained in the European Convention. In both treaties, the Contracting States undertake to provide mutual assistance in investigations or court proceedings in respect of criminal offenses where punishment falls within the jurisdiction of the authorities of the requesting State.⁹⁴ According to this basic rule, a Swiss judge, under the procedure of letters rogatory sent from a Contracting State, has the power to lift banking secrecy and to oblige a banker to give evidence.

Three basic limitations restrain the otherwise expansive effect of the treaties on banking secrecy. First, neither of the two agreements apply to offenses committed in violation of laws relating to military obligations,

90. Swiss Mutual Assistance Law, *supra* note 80, art. 10(2). *But see* Treaty on Mutual Assistance, *supra* note 82, art. 15:

Evidence or information disclosed by the requested State pursuant to paragraph 2 of Article 10 shall, if in the opinion of that State its importance so requires and an application to that effect is made, be kept from public disclosure to the fullest extent compatible with constitutional requirements in the requesting State.

91. European Convention, *supra* note 81, *effective as to Switzerland* as of Mar. 20, 1967, *ratified* Dec. 20, 1966, 597 U.N.T.S. 352, [hereinafter cited as Swiss Ratification].

92. Treaty on Mutual Assistance, *supra* note 82. *See generally* Aubert, *La protection des secrets bancaires, de fabrication et d'affaires et le traité d'entraide judiciaire en matière pénale entre la Suisse et les Etats-Unis*, off-print, *Fiches Juridiques Suisses*, Geneva, September 1977; Meyer, *supra* note 5.

93. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE TREATY WITH THE SWISS CONFEDERATION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, S. EXEC. DOC. F, 94th Cong., 2d Sess. at III (1976).

94. *Compare* Treaty on Mutual Assistance, *supra* note 82, art. 1(1)(a) *with* European Convention, *supra* note 81, art. 1(1).

taxes, or political matters.⁹⁵ Second, the terms of both treaties provide that any information obtained from one State by the other shall not be used for investigative purposes in any proceeding other than that for which assistance has been granted.⁹⁶ Third, under both agreements, assistance *may* be granted even in cases of offenses not punishable in the State making the inquiry.⁹⁷ Compulsory assistance, however, is generally required only in connection with matters constituting offenses in *both* countries. Switzerland made a reservation to the European Convention specifically to introduce such a rule,⁹⁸ and this rule is included in the Swiss-American Treaty.⁹⁹ As Swiss banking secrecy can be lifted only through a judicial measure, a banker in Switzerland may not be obliged to testify except in cases where the crime is punishable in both the requesting State and in Switzerland.¹⁰⁰

Special Swiss-American Treaty Provisions. The Swiss-American Treaty incorporates several more complete and specific provisions not found in the European Convention. Under the Swiss-American Treaty, each country will lend assistance to the other in criminal investigations.¹⁰¹ A request for assistance must, however, proceed in accordance with the rules of procedure of the country in which the information is available.¹⁰² Under the Swiss-American Treaty, banking secrecy will automatically be lifted only in respect of details relating to the accused.¹⁰³ Where a banker's testimony also involves a person not connected with the offense, the following three conditions must be met before the third party information is furnished to the United States: (1) the request must relate to a serious offense; (2) the disclosure must be necessary for the purpose of obtaining facts of substantial significance for the investigation; and (3) reasonable, though unsuccessful

95. Compare Treaty on Mutual Assistance, *supra* note 82, art. 2(1)(c), with European Convention, *supra* note 81, arts. 1, 2.

96. Compare Treaty on Mutual Assistance, *supra* note 82, art. 5, with European Convention, *supra* note 81, art. 2(b) and Swiss Reservation thereto, 597 U.N.T.S. at 352.

97. Compare Treaty on Mutual Assistance, *supra* note 82, art. 3, with European Convention, *supra* note 81, art. 1.

98. European Convention, *supra* note 81, art. 5, 1967 RECUEIL OFFICIEL DES LOIS FÉDÉRALES [R.O.] I 845, 848 (Sept. 27, 1967); Swiss Ratification, *supra* note 91, 597 U.N.T.S. at 352.

99. Treaty on Mutual Assistance, *supra* note 82, art. 4(2):

Such [compulsory] measures shall be employed, even if this is not explicitly mentioned in the request, but only if the acts described in the request contain the elements, other than intent or negligence, of an offense:

a. which would be punishable under the law in the requested State if committed within its jurisdiction and is listed in the Schedule;

or

b. which is described in item 26 of the Schedule.

100. This rule creates special problems when the U.S. attempts to investigate certain administrative law violations, notably insider trading in securities, which have no counterpart in Swiss penal law. For a detailed explanation of the interaction between Swiss secrecy laws and insider trading prosecution, see Navickas, *supra* note 5.

101. Treaty on Mutual Assistance, *supra* note 82, art. 1.

102. *Id.*, art. 9.

103. See *id.*, art. 10(2).

ful, efforts must already have been made in the United States to obtain the evidence through other channels.¹⁰⁴ Every effort is made to limit access to information affecting a person who appears not to be connected in any way with the offense for which assistance was granted. In such situations, the requesting State must withhold information from public disclosure to the fullest extent compatible with constitutional requirements.¹⁰⁵

The Swiss-American Treaty further affects banking secrecy with its provisions regarding personal appearance and testimony.¹⁰⁶ In certain cases, the personal appearance of a witness in the requesting State may be obtained, but a person other than a national of the requesting State will not be subject to any civil or criminal procedure because of failure to comply.¹⁰⁷ Similarly, a person appearing before an authority in the requesting State may not be compelled to give testimony if under the law in either State he has the right to refuse.¹⁰⁸ This provision creates an important legal privilege against compulsory testimony in United States courts if the person in question has the right to refuse under Swiss law, or if the information is protected by banking secrecy requirements in Switzerland.¹⁰⁹ The provision for a right of refusal under the law in the requested State, in recognition of assistance rendered by it to the requesting State, represents an exceptional privilege. It has no known counterpart in any other international agreement to which the United States is a party.¹¹⁰

Organized Crime Provisions. Because of the highly sophisticated techniques used by organized criminal groups to corrupt public officials and intimidate witnesses, normal methods of investigation are often inadequate. For this reason the Swiss-American Treaty also includes an agreement for mutual assistance through special proceedings in the fight against organized crime.¹¹¹

The term "organized criminal group" refers to an association or group of persons aiming to obtain gains or profits by illegal means and to protect, through systematic intimidation, their illegal activities against criminal prosecution.¹¹² When persons are reasonably suspected of being involved

104. *Id.*, art. 10.

105. *Id.*, art. 15. The particular requirement applying here is the public trial provisions of the Sixth Amendment of the U.S. Constitution.

106. *Id.*, arts. 23 and 25.

107. *Id.*, art. 24.

108. *Id.*, art. 25. When the United States is the requesting State, the witness may refuse to testify, in accordance with the applicable professional secrecy rule existing in Swiss law.

109. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, *supra* note 93, at vii.

110. *Id.*, comments on art. 25, at 58-59.

111. Treaty on Mutual Assistance, *supra* note 82, arts. 6-8.

112. *Id.*, art. 6(3). *But see* the definition of "racketeering activity" in 18 U.S.C. § 1961 on Racketeer Influenced and Corrupt Organizations (RICO) as made part of U.S. law in the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. RICO does not attempt a functional definition of organized crime, but lists crimes which potentially bring perpetrators within the definition. *See Note, Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491 (1974).

in the illegal activities of such organized groups, additional assistance will be granted in two situations. First, compulsory measures, such as lifting banking secrecy, will be applied in Switzerland, even if the investigation concerns acts not punishable under Swiss law. Second, assistance will be rendered in exceptional investigations involving violation of provisions of tax, antitrust laws, or political offences, areas normally outside the scope of the treaty.¹¹³

C. Conflict of Laws Concerning Violations of Insider Trading Provisions of Foreign Legislation

As already mentioned, the lifting of banking secrecy is regarded as a compulsory judicial measure. In general, such measures are required to be used only in connection with criminal matters classified as offenses both in a foreign country and in Switzerland. However, Switzerland has no law similar to the American Securities Exchange Act of 1934.¹¹⁴ Certain provisions contained in the Exchange Act apply to activities regarded as crimes in both countries.¹¹⁵ When such crimes are committed, Swiss banking secrecy is lifted. Other cases, particularly offences related to the use of inside information by a member of the board or an officer of the company concerned, are not currently regarded as a crime under Swiss law. In January 1983, the Swiss Federal Tribunal, in the cases relating to the take-over of Santa Fe International Corporation by Kuwait Petroleum Company,¹¹⁶ confirmed this principle for the "insider" when this person is a director of the company and used the information only for his own benefit. In contrast, if the "insider" revealed to a "tippee" a business secret in the sense of article 162 of the Penal Code, they are punishable along with the "tippee" who used the inside information.¹¹⁷ In such a case, the Swiss-American Treaty applies.¹¹⁸ This decision was confirmed by the Swiss Federal Tribu-

113. Treaty on Mutual Assistance, *supra* note 82, arts. 2, 6, 7.

114. U.S. Securities Exchange Act of 1934, 15 U.S.C. §§ 77 and 78 (1982).

115. Whereas bidding and asking prices on a stock exchange should be unrestricted, certain rules of ethical conduct must, nevertheless, be respected. For this reason, a person having access to inside information concerning a major development in a company is not allowed to buy or sell on the stock exchange before such information is made public. A director, manager, or employee, having access to inside information in his company, may not exploit his privileged knowledge in buying or selling stocks or in inciting third parties to take advantage of his knowledge before the facts are made public. Unfortunately, unscrupulous persons with access to inside information have fraudulently used Swiss banks as a fiduciary to effect stock exchange transactions and circumvent foreign securities regulations.

116. Santa Fe International, Decision of the Swiss Federal Tribunal of January 26, 1983, 104 ATF I 47. *But see* Decision of Swiss Federal Tribunal of May 18, 1984 (unpublished) (ordering assistance). A summary of the 1983 opinion in English translation appears at 22 I.L.M. 785 (1983).

117. Courtois/Antoniu, Decision of the Swiss Federal Tribunal of January 26, 1983 (unpublished) (a copy is on file in offices of the International Tax & Business Lawyer). *Cf. dicta* in *Santa Fe*, 22 I.L.M. at 787.

118. STGB article 162 is not listed in the schedule of offenses for which assistance is granted under the Swiss-American Treaty, but the Swiss Federal Tribunal held that assistance

nal in its second decision in *Santa Fe*.¹¹⁹ Efforts are currently underway to make certain forms of insider trading illegal in Switzerland.¹²⁰ Compulsory measures cannot be used to obtain information on insider trading covered by banking secrecy.

Foreign judicial authorities, in view of the conflict of laws, have generally recognized that a Swiss bank is not authorized to reveal the identity of its clients without the client's authorization. In 1981, however, a U.S. court ordered a Swiss bank to divulge the identity of a customer who had violated the insider trading provisions of the Securities Exchange Act.¹²¹ This resulted in a conflict of legislation between the United States and Switzerland. To resolve the impasse, the competent authorities of both countries entered into a two part agreement comprising the Memorandum of Understanding between the United States and Switzerland¹²² and the private Agreement between Swiss Banks Concerning Cooperation with the Securities and Exchange Commission of the United States on Misuse of Inside Information (hereinafter Bankers' Agreement on Inside Information).¹²³

The Bankers' Agreement on Inside Information defines the transactions which can be the subject of an inquiry, including a proposed merger or the proposed acquisition of at least ten percent of the securities of an issuer. An inquiry may be opened only when the price of securities varied at least fifty percent or more during the twenty-five trading days prior to an announcement. The Bankers' Agreement on Inside Information also defines "insider"¹²⁴ and "tippee".¹²⁵

Under the Bankers' Agreement on Inside Information, when the SEC is of the opinion that insider trading has been carried out by persons acting through a Swiss bank, it may send a request for information to the Swiss authorities through the U.S. Department of Justice.¹²⁶ The information is

may nevertheless be granted in such a case if the alleged facts are of special importance. *Courtois/Antoniu* (unpublished).

119. Decision of the Swiss Federal Tribunal, May 18, 1984 (unpublished).

120. See *infra* text accompanying note 131. See also Aubert, *supra* note 19, at 182-83.

121. SEC v. Banca della Svizzera Italiana (BSI), 92 F.R.D. 111 (S.D.N.Y. 1981).

122. Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading [hereinafter cited as MOU], August 31, 1982, United States-Switzerland, 22 I.L.M. 1 (1983).

123. Agreement XVI of the Swiss Bankers' Association with Regard to the Handling of Requests for Information from the Securities and Exchange Commission of the United States on the Subject of Misuse of Inside Information, August 31, 1982, 22 I.L.M. 7 (1983) [hereinafter cited as Banker's Agreement on Inside Information].

124. *Id.*, art. 5(2)(a)-(b):

(a) a member of the board, an officer, an auditor or a mandated person of the *Company* or an assistant of any of them; or

(b) a member of a public authority or a public officer who in the execution of his public duty received information about an *Acquisition* or a *Business Combination*. . . . (emphasis in original)

125. *Id.*, art. 5(2)(c): "a person who on the basis of information about an *Acquisition* or a *Business Combination* received from a person described in 2 (a) or (b) above has been able to act for the latter or to benefit himself from inside information." (emphasis in original).

126. *Id.*, art. 1.

forwarded to a Commission of Inquiry (hereinafter the Commission), composed of three independent Swiss representatives plus three alternates who will require the bank in question to submit a detailed report on the transactions involved.¹²⁷ On receipt of a request for information, the bank will inform the customer and invite him to furnish proof that these transactions were not carried out in violation of the United States' legislation on insider trading.¹²⁸ The bank will report its findings to the Commission.¹²⁹ When the bank establishes, to the reasonable satisfaction of the Commission, that their client was not an insider, no information will be passed on. If the client's status cannot be determined, the SEC will receive information concerning the transactions and the client's identity.

Clients of Swiss banks are to be informed of the contents of the Bankers' Agreement on Inside Information and implicitly have to decide whether they accept the provisions.¹³⁰ In the event of refusal, the Swiss banks should decline to place orders in United States securities markets.

This Bankers' Agreement on Inside Information is temporary and merely private. Switzerland is considering the introduction of provisions in the Swiss Penal Code and Code of Obligations which would make insider trading punishable as a violation of general legal provisions, particularly fraud.¹³¹ When and if these provisions are embodied in Swiss law, the present arrangements cease to be applicable and U.S. authorities can obtain the required information under the Swiss-American Treaty on Mutual Assistance in Criminal Matters.

D. Mutual Assistance in Civil Proceedings

Switzerland is party to the Hague Convention on Civil Procedure.¹³² Under this Convention, letters rogatory delivered to a judge in Switzerland are evaluated according to the relevant cantonal civil procedure.¹³³ Where cantonal procedural law includes bankers among persons bound by professional secrecy, banking secrecy cannot be lifted. When the judge has the power to decide, the banker may be obliged to testify on important matters. Where cantonal law does not contain a special provision exempting persons bound by professional secrecy from testifying, banking secrecy may be

127. *Id.*, art. 4(1).

128. *Id.*, art. 4(2).

129. *Id.*, art. 4(3)-(4).

130. *Id.*, art. 12.

131. For the text of the proposed draft legislation on insider trading in Switzerland, see 2 INT'L TAX & BUS. LAW. 190 (1984).

132. Hague Convention Relating to Civil Procedure, July 17, 1905, 2 Martens Nouveau Recueil 243 (3ème série), revised March 1, 1954, 286 U.N.T.S. 265; 1957 R.O. I 467. The other parties to the Convention as of 1983 are Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Hungary, Israel, Italy, Japan, Luxembourg, Liechtenstein, Morocco, the Netherlands, Norway, Poland, Portugal, Romania, Sweden, Turkey, Union of Soviet Socialist Republics, Vatican City, and Yugoslavia.

133. See *id.*, Part II, art. 14.

lifted. The general provisions of Swiss domestic laws and restrictions concerning assistance in criminal matters continue to apply, however. Thus, information provided under the Convention must conform to the principle of *spécialité* and may not be used for purposes other than the civil suit in question. Similarly, a banker may refuse to be a witness when his testimony might be regarded as economic espionage.

E. Bankruptcy in Foreign Countries

When a foreign client of a Swiss bank goes bankrupt, the legal consequences in Switzerland depend on whether or not an international agreement for the recognition of bankruptcy exists. According to early court decisions, in the absence of an international agreement, a bankruptcy declared in a foreign country has no effect in Switzerland.¹³⁴ The bankrupt person can continue to dispose of his assets in Switzerland without hindrance. For this reason, a bank's obligation to furnish information to the foreign official receiver relating to a bankrupt person's Swiss assets is not clearly established. A declaration of bankruptcy by a corporation or private person, however, deprives that entity or individual of the right to independently control and dispose of assets in Switzerland. Thus, a Swiss bank which gives information to a foreign official receiver is not likely to be held in violation of article 47 of the Banking Law. Generally, Swiss banks agree to send information to the official bankruptcy receiver when the foreign law corresponds to the applicable Swiss law, even if they are not obliged to do so.¹³⁵

Switzerland and France have concluded a treaty on mutual assistance in bankruptcy cases.¹³⁶ Pursuant to this treaty, the Swiss Federal Tribunal has held that in the case of bankruptcy in France, a banker in Switzerland is obliged to disclose information concerning assets of persons involved in a bankruptcy as if the bankruptcy had been pronounced in Switzerland.¹³⁷ In addition, three other conventions concerning bankruptcy were signed by a majority of the cantons in the nineteenth century.¹³⁸

134. See Decision of the Swiss Federal Tribunal, March 12, 1976, 102 ATF III 71, 1977 J.T. II 148; Decision of the Swiss Federal Tribunal, February 6, 1974, 100 ATF Ia 18, 1975 J.T. II 80.

135. See M. AUBERT, J-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 402. The authors emphasize that the bank is prohibited by the Banker's Agreement on the Observance of Care, *supra* note 53, from providing the Debt Collection Office an incomplete or misleading attestation. So, in order to avoid large fines, it is in the bank's interest to provide the requested information.

136. Convention Respecting Jurisdiction and the Execution of Civil Judgments, June 15, 1869, France-Switzerland, 139 Perry's T.S. 329, 12 R.S. 315.

137. Decision of Swiss Federal Tribunal, September 10, 1968, 94 ATF III 83, 1969 J.T. II 98, 109.

138. Convention with the Duchy of Wurtemberg, December 12, 1825/May 13, 1826, 10 RECUEIL OFFICIEL DES LOIS DU CANTON DE FRIBOURG 231; Convention with the Kingdom of Bavaria, May 11/June 27, 1834, 16 RECUEIL OFFICIEL DES LOIS DU CANTON DE FRIBOURG 92;

F. Exchange of Information Under Double Taxation Treaties

Of the bilateral conventions signed between Switzerland and other States on avoidance of double taxation, only five provide for exchange of information. The conventions with France,¹³⁹ the Federal Republic of Germany,¹⁴⁰ and Denmark¹⁴¹ expressly provide that no information may be disclosed in breach of banking secrecy. The earlier conventions with the United Kingdom¹⁴² and the United States¹⁴³ contain the provision that "[no] information shall be exchanged which would disclose any trade, business, industrial or professional secret"¹⁴⁴

The convention with the United States provides, however, that "[t]he competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary . . . for the prevention of fraud or the like in relation to the taxes which are subject of the present Convention."¹⁴⁵ This provision, unique to the U.S. Treaty, allows the Swiss bank to transmit information relating to fraud committed by an American citizen to the Internal Revenue Service.¹⁴⁶ The obligation under the treaty is limited, however, to the furnishing of a written report by the Swiss Tax Administration.¹⁴⁷ It does not extend to the hearing of witnesses.¹⁴⁸ Thus, the special access to banking information afforded the U.S. Internal Revenue Service is restricted to the area of taxes subject to the Convention, and does not serve as a first step toward more general assistance in tax matters.

As noted above, however, the new Swiss law on international assistance in criminal matters does authorize lifting banking secrecy in instances of tax fraud, as it is defined in Switzerland. Since any applicant country may now be assisted under this law, States such as France, the United

Convention with the Grand Duchy of Saxe, 1837, 17 RECUEIL OFFICIEL DES LOIS DU CANTON DE FRIBOURG 116, cited in M. AUBERT, J.-P. KERNEN & H. SCHÖNLE, *supra* note 1, at 405.

139. Convention Concerning the Avoidance of Double Taxation, September 9, 1966, Switzerland-France, — U.N.T.S. —, 1967 R.O. II 1119, art. 28, amended December 3, 1969, 1970 R.O. 1297.

140. Convention Concerning the Avoidance of Double Taxation, August 11, 1971, Switzerland-W. Germany, — U.N.T.S. —, 1972 R.O. II 3128, art. 27.

141. Convention Concerning the Avoidance of Double Taxation, November 23, 1973, Switzerland-Denmark, — U.N.T.S. —, 1974 R.O. II 1720, art. 27(1).

142. Convention for the Avoidance of Double Taxation with respect to Taxes on Income, September 30, 1954, Switzerland-United Kingdom, art. XX, 209 U.N.T.S. 197, 1955 R.O. II 329, modified June 14, 1966, 603 U.N.T.S. 298, 1966 R.O. II 1677.

143. Convention for the Avoidance of Double Taxation with respect to Taxes on Income, May 24, 1951, Switzerland-United States, art. XVI, 2 U.S.T. 1751, T.I.A.S. No. 2316, 127 U.N.T.S. 227, 1951 R.O. II 895, art. XVI(1) [hereinafter cited as U.S.-Swiss Double Taxation Treaty].

144. See *id.* at XVI(1). "Professional secret" is interpreted to cover banking secrecy.

145. *Id.* at XVI.

146. *Id.* See also Decision of the Swiss Federal Tribunal, Dec. 23, 1970, 96 ATF I 737, 1971 J.T. I 571.

147. U.S.-Swiss Double Taxation Treaty, *supra* note 143, art. XVI.

148. Decision of the Swiss Federal Tribunal, May 16, 1975, 101 ATF Ib 160.

Kingdom, and the United States can obtain information from Swiss banks without invoking a double taxation convention.

V

BANKING SECRECY AND POLITICS

In 1978, the Swiss Socialist Party launched a "people's initiative", with the object of modifying the Banking Law through a national referendum.¹⁴⁹ The socialist initiative proposed that: (1) banking secrecy be lifted in specified cases of tax evasion (at home and abroad) and where foreign exchange controls have been violated; (2) banks be required to publish fuller statements of their financial dealings, including disclosure of "hidden reserves", and that the Swiss Parliament be empowered to discuss these financial statements; (3) banks participation in other branches of the economy be restricted, and interlocking directorates and direct investment in non-banking companies be limited; and (4) banks be required to insure savings deposits.

Contrary to the general impression, banking secrecy has never been an absolute right in Switzerland; it has always been circumscribed by many other legal provisions. Switzerland's political stability and the absence of exchange-control regulations are of inestimably greater importance than banking secrecy in maintaining the crucial economic role fulfilled by Swiss banks. Thus, the question is thus one of maintaining an equitable balance between justifiable protection of private personality rights and cooperation with local and international authorities regarding legitimate public needs for information.

Viewing the Socialist initiative in light of these objectives, it is obvious that most of the "proposals" have already become established procedures. In domestic criminal proceedings, banking secrecy is invariably lifted. The fact that Switzerland signed the European Convention on Mutual Assistance in Criminal Matters and concluded a similar treaty with the United States shows that banking secrecy is not a substantial obstacle to Swiss participation in the fight against international crime. Further, the new law on assistance in criminal matters facilitates reciprocal cooperation with countries which have no special agreement with Switzerland. In addition, Swiss judges now have the ability to lift banking secrecy in cases of tax fraud. Where tax evasion is concerned, the authorities already have other adequate means at their disposal. Thus, the fact that foreign and domestic authorities are not empowered to ask banks directly for client information is no longer a justification for regarding Switzerland as a paradise for tax dodgers.

Providing more assistance to foreign countries in fiscal matters would create many problems. In many countries, including the Federal Republic

149. The text of the initiative is published in 1979 FF III 734.

of Germany and Austria, banking secrecy is normally not lifted in tax cases. Increased assistance from Switzerland would therefore enable some foreign authorities to acquire more information from the Swiss than they could obtain under their own domestic laws. In light of these considerations, the provisions on international assistance in cases of tax fraud, as embodied in the new Swiss law on assistance in criminal matters, can fairly be regarded as representing an effective and adequate measure.

Infringements of exchange-control regulations is a domain in which disclosure requirements vary, depending upon the policies of the government concerned. Switzerland, lacking exchange-control regulations, cannot easily decide whether assistance should be given or not. For this reason, assistance in exchange-control matters is not included in the new Swiss law. However, Swiss banking law already requires an irreproachable standard of conduct, and Swiss bankers are in no way authorized to facilitate illegal transfers of assets from foreign countries.

The Swiss Federal Council, in its Message to Parliament of August 18, 1982, recommended rejection of the Socialist initiative without presenting a counter-proposal.¹⁵⁰ In fact, while recognizing the necessity of intensifying the fight against fiscal fraud, the Council suggested that the authors of the initiative had gone too far.¹⁵¹ The Socialist initiative was put to a popular vote on May 20, 1984 and was rejected by a very large majority.¹⁵² This referendum demonstrated that the Swiss people value the obligation of discretion imposed on bankers.

CONCLUSION

The Swiss in general strongly value individual liberties. Among these liberties, the provisions applying to the right of confidentiality in the private sector, in relation to telephone monitoring devices, professional secrecy, private documents, and economic espionage, are particularly well developed in comparison with the prevailing standard in most other nations. The requirement of banking secrecy is simply another manifestation of the Swiss emphasis on personal privacy. The modifications in banking secrecy introduced in recent years should not be interpreted as a trend towards removing the obligation of discretion where the banker is concerned. Instead, they represent measures directed toward preventing abuse of banking secrecy. As is true in other fields, the Swiss have found that progressive modification is the best way to maintain the relevance of a legal rule relating to a widely felt social need.

150. Swiss Federal Council, Message sur l'initiative populaire "contre l'abus du secret bancaire et de la puissance des banques" du 18 août 1982, 1982 FF II 1237. See also Wall St. J., Mar. 16, 1983, at 36, col. 4.

151. Message to Parliament, *supra* note 150, at 1274.

152. The results were 73% against, 27% in favor.