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Swiss Bank Secrecy: Its Limits Under Swiss and International Laws

*Olivier Dunant and Michele Wassmer **

I. INTRODUCTION

The political and economic stability enjoyed by Switzerland in this century has attracted many foreigners to whom depositing their assets in Swiss banks meant escaping from disturbing conditions existing in their countries of residence. The respect for the confidential relationship existing between the client and his Swiss banker has, of course, played a key role in the appeal of Switzerland.

Bank secrecy, which is the manifestation in the banking field of the Swiss emphasis on personal privacy, was incorporated as a provision in the Federal Banking Law ("FBL")¹ of 1934 in order to give additional protection to the victims of the Nazi regime. Bank secrecy, therefore, was never meant to protect illegal activities; on the contrary, it was enacted to safeguard personal liberties. This position was clearly reaffirmed by the Federal Council² when it presented a new version of the FBL to the Swiss Parliament in 1970.³

Nevertheless, Swiss bank secrecy has continuously raised criticism abroad, and in particular, in the United States. Partly for these reasons and partly due to the rapid developments of international relationships, Switzerland, whose domestic legal provisions could already override bank secrecy,⁴ has entered into various international treaties.⁵ In addition, the Swiss banks have signed one private agreement limiting the application of bank secrecy in insider trading cases,⁶ and one agreement

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¹ Loi fédérale sur les banques et les caisses d'épargne (Federal Law on Banks and Savings Banks) (1934), as amended by RS 952 (1971) [hereinafter FBL].

² Conseil Fédéral (the Swiss Government).

³ Message du Conseil Fédéral à l'Assemblée Fédérale concernant la révision de la loi sur les banques (message of the Federal Council to the Federal Assembly regarding the revision of the Banking Law), I FF (1970), at 1157. See especially where the message explains that bank secrecy is not unlimited and shall not cover misdemeanors. *Id.* at 1175.

⁴ See *infra* pt. III.

⁵ See *infra* pt. IV.

⁶ See *infra* pt. V. A.

regarding the due diligence to be applied when opening accounts.⁷

II. DEFINITION, LEGAL GROUNDS AND SCOPE OF THE BANK SECRECY

A. Definition

Bank secrecy, which is not defined in any specific legal provision, is understood as being the banker's obligation to keep confidential the facts learned in the course of banking activity.⁸ Bank secrecy is a banker's duty and a client's right. Consequently, only those facts involving the relationship of a client and the bank which are of public knowledge (e.g., publication in the media, etc.) are not considered as secret. In fact, in order to be effective, bank secrecy should cover all the activities having a banking character, especially the existence of a relationship between the bank and the clients, information given by the clients on their financial situation, their relationships with other banks, and even information received relating to transactions effected by third parties in other banks.⁹

B. Legal Grounds

The legal grounds underlying the Swiss banks' obligation of confidentiality are to be found in the Civil Code, the Code of Obligations,¹⁰ and the FBL.

1. Civil Code

Article 28 of the Civil Code¹¹ recognizes the fundamental right of individuals and companies¹² to be free from any invasion in their private sphere, which includes their economic privacy.

2. Code of Obligations

In most cases, the services rendered by a bank qualify as a mandate whereby the agent undertakes to carry out the contractually agreed upon

⁷ See *infra* pt. V. B.

⁸ R. SCHINDELHOLZ, *LE SECRET BANCAIRE* 2 (1969) (quoting Phillipe de Weck).

⁹ M. AUBERT, J. KERNER, & H. SCHÖNLE, *LE SECRET BANCAIRE SUISSE* 80 (1982) [hereinafter AUBERT, KERNER & SCHÖNLE].

¹⁰ Message of the Federal Council to the Federal Assembly, *supra* note 3, at 1175 (the Federal Council stated that bank secrecy is derived from the general provisions of the Code of Obligations, and from articles 27 and 28 of the Civil Code which provide for protection of personality rights).

¹¹ CC, RS 210, art. 28 (1907), as amended by RO 1984, at 778-82:

Whoever suffers unlawful harm to his personality may bring a court action against any person who participates in it.

An attack is deemed unlawful unless it is justified by the consent of the victim, or by a prevailing private or public interest or by law.

Id.

¹² 1972 JOURNAL OF THE TRIBUNALS 242 [hereinafter JT].

business transactions or services with which he has been entrusted by the client.¹³ The agent is liable for the faithful and careful performance of the mandate;¹⁴ it is generally accepted that the obligation of confidentiality is included in the concept of "faithful and careful performance."¹⁵ For some contracts where the bank only assured the safekeeping of securities deposited within it, some authors have felt that these contracts do not involve any element of mandate. In these cases, it is understood that the obligation of confidentiality is an *implied* obligation of all contracts concluded with a bank¹⁶ resulting from the general obligation of performing duties according to the rules of *bona fides*.¹⁷

3. Federal Banking Law

The FBL contains a specific provision on bank secrecy¹⁸ which, in fact, merely describes the persons bound by the obligation of confidentiality and the criminal penalties incurred by the author and instigator of a breach of the bank secrecy, without defining the nature of the breach or the duty of secrecy.

When the Federal Criminal Code,¹⁹ which included a provision

¹³ CO, RS 220, art. 394 (1911).

¹⁴ *Id.* art. 398:

The agent shall in general exercise the same care as the employee under the employment contract. 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 to third person their performance or unless substitution is permitted by usage.

Id.

¹⁵ VI BERNER KOMMENTAR pt. 12 (G. Gautschi ed.). See subsections *Obligationenrecht*, (Teilband pt. 4) and *Der einfache Auftrag* (concerning art. 398) 354-55.

¹⁶ On this controversy see AUBERT, KERNER & SCHÖNLE, *supra* note 9, at 34-5.

¹⁷ CC, RS 210, art. 2, ¶ 1.

¹⁸ FBL, *supra* note 1, art. 47 provides:

[W]hoever divulges a secret entrusted to him in his capacity as officer, employee, mandatary, liquidator or commissioner of a bank, as a representative of the Banking Commission, an officer or employee of a recognized auditing firm or who has become aware of such a secret in his capacity and whoever tries to induce others to violate professional secrecy shall be punished by a prison term not to exceed six months or by a fine not exceeding SFrs. 50,000.

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

The violation of professional secrecy remains punishable even after termination of the official or employment position or the exercise of the profession. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.

Id.

¹⁹ CP, RS 311, art. 321 (1937). This does not include the bankers, and provides that clergymen, attorneys, public notaries, secrecy-bound auditors, pharmacists, doctors, midwives and their assisting personnel, who divulge a secret entrusted to them, or of which they have become aware of in their professional capacity, shall, on complaint, be punished by imprisonment or by a fine.

punishing the violation of professional secrecy, entered into force in 1942, it appeared more appropriate to leave the bank secrecy provision in the Banking Law itself. Nevertheless, the general provision of the Criminal Code also applies to violations of bank secrecy. Besides, provisions of the Criminal Code regarding the disclosure of commercial and business secrets²⁰ and those dealing with espionage and the supplying of economic information to foreign officials and private organizations²¹ are also applicable to bankers.

4. Consequences of a Breach of Bank Secrecy

The breach of bank secrecy being unlawful, a violation thereof involves civil consequences for the author (employee or officer of the bank) and the bank itself; both can be held liable for the damages incurred by the client. The client's claim may be founded on tort²² or on the contractual relationship existing between the client and the bank.²³ In addition, the banking supervisory authority, known as the Federal Banking Commission,²⁴ is empowered to withdraw a bank's license in case of serious breach of a legal obligation.²⁵ The obligation of confidentiality being one of the most important of these legal obligations, the Commission can prevent any bank conducting business in Switzerland from continuing operations if the bank persistently fails to maintain bank secrecy regarding its clients' affairs.

²⁰ *Id.* 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 complaint, be punished with imprisonment or a fine." *Id.*

²¹ *Id.* art. 273.

Any person who shall have attempted to discover a manufacturing or business secret with the intent to making it available to a foreign official or private organization or to a private foreign business or to the agents for the above-said,

Any person who shall have given access to a manufacturing or business secret to a foreign official or a private organization or to a private foreign business or to the agents for the above-said shall be punished by imprisonment and, in serious cases by criminal detention. The judge may further impose a fine.

Id.

²² CO, RS 220, art. 41. "Whoever unlawfully causes damages to another, whether willfully or negligently, shall be liable for damages." *Id.*

²³ *Id.* art. 97. "Where an obligation due was not performed or its performance was inadequate, the obligor shall compensate for the damages arising therefrom unless he proves that no fault whatever is attributable to him." *Id.*

²⁴ FBL, *supra* note 1, art. 23, ¶ 1 provides that the Federal Council elects the Federal Banking Commission, which consists of seven to nine members, and appoints its president and two vice presidents. This Commission is responsible for the supervision of the banking system and of the investment funds. The Commission maintains a permanent secretariat.

²⁵ *Id.* art. 23 (quinquies), ¶ 1: The Banking Commission shall withdraw the license to conduct business from banks that no longer meet the conditions necessary for such license or that grossly violate their legal duties.

C. *Scope of Bank Secrecy*

1. General

Bank secrecy protects the relationship that a client has with a bank, as defined in the FBL,²⁶ and with the associated establishments which are governed by the Banking Law,²⁷ in particular the finance companies publicly soliciting customers' deposits. Thus, the relationships maintained with brokers, private investment managers, and notaries are not protected by bank secrecy,²⁸ and in case of violation of the professional secrecy, the penalty provided by article 47 of the FBL is not applicable. These individuals or firms are nevertheless bound by a *civil* obligation of confidentiality,²⁹ and where business secrets are involved the penalties of the Criminal Code are applicable to unlawful disclosure of such secrets.³⁰

2. Swiss Subsidiaries and Branches of Foreign Banks in Switzerland

Due to the increasing number of foreign banks maintaining a branch office or a subsidiary in Switzerland, it seems worthwhile to examine briefly their status and the application of bank secrecy regulations to these establishments. A conflict may arise between Swiss secrecy rules and the legitimate interest of the foreign parent bank to scrutinize the activities of the Swiss establishment. The control exercised by the foreign banking supervisory authority may also be a source of conflict. Foreign-owned banks doing business in Switzerland are subject to exactly the same regulations as the Swiss banks,³¹ therefore the provisions gov-

²⁶ *Id.* art. 1, ¶ 1. "The present Law applies to banks, private bankers (individual proprietorships, general and limited partnerships) and savings banks, hereinafter referred to as banks." *Id.*

²⁷ *Id.* art. 1, ¶ 2:

The following are treated as banks under the Law:

- a. bank-like finance companies and individual proprietorships that publicly solicit customer deposit. Otherwise, only Articles 7 and 8 of the Law apply to such finance companies and individual proprietorships,
- b. all other finance companies and individual proprietorships that publicly solicit customer deposits, unless this business is restricted to the placement of bond issues
- c. deferred credit institutions.

Id.

²⁸ *Id.* art. 1, ¶ 3:

The present Law is not applicable to exchange agents and broker firms, which limit their activity to negotiate securities and to execute the related operations, without conducting banking business, to private investment managers and public notaries who limit their activity to the managing of their clients' assets without exercising any banking activity.

Id.

²⁹ See *CO*, RS 220, art. 398. See also *BERNER KOMMENTAR*, *supra* note 15.

³⁰ *CP*, RS 311, art. 162.

³¹ *FBL*, *supra* note 1, art. 2: "The provisions of the present Law shall apply by analogy to the

erning bank secrecy which prohibit any disclosure or passing of information to third parties are applicable. Foreign-owned banks may operate in Switzerland either as a subsidiary registered as a Swiss corporation or as a branch office without any independent personality. Their situation, therefore, has to be distinguished.

a. Subsidiary

From a legal viewpoint, the foreign bank subsidiary is a Swiss corporation and the foreign parent bank constitutes a third party. Consequently, all the employees or officers of the subsidiary and its board members are bound by the duty of confidentiality and may not disclose information concerning the clients of the subsidiary.

As a shareholder, the parent bank has the right to obtain general information (auditor's reports, business reports, proposals concerning allocation of the net profit).³² The authorization to consult the company's books and correspondence is only granted to shareholders where such disclosure does not jeopardize the business interests of the company.³³ In banking matters it is obvious that bank secrecy must be strictly safeguarded and therefore, that no information concerning the clients of a Swiss subsidiary can be passed directly or indirectly to the parent bank.

In order to enable the parent bank or the foreign banking supervisory authority to exercise an effective control on the activities of the Swiss subsidiary of a foreign bank, the Federal Banking Commission has set out some principles regarding the supplying of the necessary information.³⁴ The position of the Federal Banking Commission can be summarized as follows:

- Confidential information relating to customers of the subsidiary may only be disclosed with the prior approval of the customer concerned.
- Disclosure of information relating to the activity of the subsidiary is only possible if such information is requested and used for supervision purposes (communications of statistical information relating to classification, on a per country basis, of the subsidiary's assets and liabilities, currency exposure, summary reports on the subsidiary's clients on the basis of their professional activity are authorized for supervision purposes as long as the names of the client are not mentioned).

Important debtors may be notified along with the consolidated supervision of major risks. The foreign recipient should, in that case, give

offices, branches and agencies of foreign banks in Switzerland as well as to their permanent representatives." *Id.*

³² CO, RS 220, art. 696, ¶ 1.

³³ *Id.* art. 697.

³⁴ 1984 FEDERAL BANKING COMMISSION REP. 32 [hereinafter 1984 BANKING REPORT].

the assurance that the information supplied will be used exclusively for supervision purposes. The board of directors is responsible for the adherence to Swiss law, namely to article 273 of the Criminal Code.

b. Branches

The Swiss branch of a foreign bank is not an independent legal entity. The Federal Banking Commission, taking into account that the parent bank is liable for all debts of its branch, has taken the position that the bank secrecy rules do not affect the right of the parent bank to obtain information from the branch for control purposes and, therefore, the bank secrecy which protects the clients cannot conflict with the organization of the foreign banks. It is, however, emphasized that the foreign banking supervisory authorities may under no circumstances have direct controls on the branch.³⁵

It has to be mentioned, however, that the Ordinance on Foreign Banks provides various requirements (maintenance of sufficient funds for transacting business in Switzerland, independent management and organization from the parent bank).³⁶ Consequently, the parent bank's inquiries are likely to be confined to what is essential for branch control.³⁷ In particular, no information on specific creditors or debtors may be transmitted without important grounds of supervision.³⁸

In conclusion, it is interesting to note that according to the Criminal Code provisions,³⁹ it is forbidden for a Swiss bank (and, therefore, for the Swiss subsidiaries and branches of a foreign bank) to grant to foreign officials or their agents the right to examine the books and the files. They are also forbidden to authorize inspections on the spot, even in the presence of an imperative regulation in the internal legislation of the country in which the head office or the major shareholder is located. The persons who facilitate a violation of this prohibition, and the foreign officials or their agents, incur criminal penalties.

³⁵ 1978 FEDERAL BANKING COMMISSION REP. 17-18 [hereinafter 1978 BANKING REPORT].

³⁶ Ordonnance concernant les banques étrangères en Suisse (Ordinance on Foreign Banks in Switzerland) (1984), RS 952.11, art. 3, ¶ 1(a).

³⁷ AUBERT, KERNER & SCHÖNLE, *supra* note 9, at 292.

³⁸ 1984 BANKING REPORT, *supra* note 34.

³⁹ CO, RS 311, art. 271 reads:

Acts performed without right for a foreign state

Any one who, without having been authorized, shall have performed on Swiss territory for a foreign state acts within the public power, any one who shall have performed such acts for a foreign political party or other organization abroad, any one who shall have aided and abetted such acts, shall be punished by imprisonment and, in grave cases, criminal detention. . . .

III. LIMITS OF BANK SECRECY VIS-À-VIS THE SWISS AUTHORITIES

In relation to this chapter, it is useful to recall that article 47 of FBL specifically reserves the application of federal and cantonal regulations concerning the obligation to testify and to furnish information to governmental authorities.⁴⁰

A. Civil Procedure

The question of the banker's obligation to testify or to produce documentary information in the course of proceedings before a civil court chiefly involves cantonal laws of civil procedure since the Federal Tribunal⁴¹ does not, as a rule, review the facts established in the course of cantonal court proceedings.⁴² Therefore, the Federal Tribunal usually does not hear witnesses nor examine documentary evidence that was not previously submitted to the lower courts.

At the cantonal level, the situation differs from one canton to another since the law of civil procedure falls within the legislative purview of each canton. Three groups of cantons can be distinguished. Some cantons, like Geneva,⁴³ recognize the right of any person bound by a professional obligation of confidentiality not to testify. The banker is included in this category of persons. Other cantons, like Zurich,⁴⁴ leave it up to the judge to decide whether the particular case or the interests involved oblige a banker to testify. In the last group of cantons, like Bale,⁴⁵ bank secrecy is not regarded as a professional secrecy which entitles the banker to refuse to testify. It is interesting to note that each of the laws of procedure of the three cantons (Geneva, Bale and Zurich), which constitute the major focus of Swiss banking activities, holds a different view on this point.

In this context of civil trials, in inheritance matters it is well established by federal and cantonal courts⁴⁶ that bank secrecy cannot be used for illegally concealing the assets to which the heirs of the deceased account-holder are entitled. Therefore, on furnishing to the bank the proof of heirship under the will or the law applicable to the estate, an individual can obtain information regarding the account of the deceased. It has been held that in order to exercise their rights, the heirs are entitled to be

⁴⁰ FBL, *supra* note 1, art. 47.

⁴¹ The Federal Tribunal is the Swiss Supreme Court (*see* CST, arts. 106-14 *bis*).

⁴² Loi fédérale d'organisation judiciaire (Federal Law on Judicial Organization) (1943), RS 173.110, arts. 41, 42 and 43, ¶ 3.

⁴³ Geneva, Argovie, Bern, Neuchâtel, Saint-Gall, Valais, Vand.

⁴⁴ Zurich, Fribourg, Nidwald, Schwyz, Tessin, Uri, Zng.

⁴⁵ Bâle-ville, Bâle-campagne, Appenzell AI, Appenzell AR, Glaris, Grison, Lucerne, Obwald, Schaffhouse, Soleure, Thurgovie.

⁴⁶ AUBERT, KERNER, & SCHÖNLE, *supra* note 9, at 216-17.

as fully informed as the deceased.⁴⁷

Bank secrecy rules may, nevertheless, protect the confidential information relating to the private life of the deceased account-holder, provided the account-holder has requested the fiduciary to keep it secret even from heirs and also provided it does not hinder the heirs from establishing their entitlement to the estate.⁴⁸

B. Debt Collection and Bankruptcy

Without examining this field in detail it has to be noted that bank secrecy does not protect the clients of a bank who refuse to pay their debts or who are declared bankrupt. In debt collection proceedings, a banker is required to furnish information relating to the debtor's assets. In bankruptcy proceedings, the official receivers, trustees in bankruptcy, or liquidators of a company are authorized to obtain information from the bank concerning all the assets of the bankrupt person.⁴⁹ This area is governed by the Federal Law on Debt and Bankruptcy.⁵⁰

A specific provision of the Debt and Bankruptcy Law⁵¹ has raised some questions with regard to bank secrecy. This provision allows a creditor (domiciled in Switzerland or in a foreign country) who believes that a debtor is concealing assets in a Swiss bank, to request as a protective measure a judicial order attaching the debtor's assets. The bank is compelled to block the assets pursuant to the judicial order, but the question of the nature of the information which may be given to the creditor through the Debt and Bankruptcy Office is still controversial.

Despite various court decisions which have affirmed the obligation of the banks to disclose information⁵² on the assets blocked, it has appeared that there are no legal means to force the banks to answer before a final judgment is rendered on the merits of the creditor's claim.⁵³ Therefore, the banks usually decline to answer until a final decision in favor of the creditor has been rendered.

C. Criminal Procedure

With the involvement of the public interest in criminal procedure cases, the only persons who are *not* under the obligation to testify are priests, lawyers, public notaries, doctors, chemists, midwives and their

⁴⁷ 89 II Arrêt du Tribunal Fédéral (Decision of the Federal Tribunal), at 87, 93-94 [hereinafter ATF].

⁴⁸ 1957 I JT, *supra* note 12, at 130.

⁴⁹ AUBERT, KERNER & SCHÖNLE, *supra* note 9, at 122, 124.

⁵⁰ Loi fédérale sur la poursuite pour dettes et la faillite (Federal Law on Debt and Bankruptcy), RS 281.1 (1889). [hereinafter LPDF].

⁵¹ *Id.* art. 271.

⁵² 109 II ATF, *supra* note 47, at 22.

⁵³ AUBERT, KERNER & SCHÖNLE, *supra* note 9, at 139.

assistants.⁵⁴ This list does not include the banker who has to testify and produce all documents which appear necessary to the case.

The Federal Law on Criminal Procedure⁵⁵ provides that the inspection of documents has to be executed in a manner which respects secrets of a private nature. This legal provision has been construed as permitting the banker to safeguard the client's private sphere by not delivering documents which are not relevant to the criminal investigation (clients' letters, for example).⁵⁶

D. Administrative Procedure

Under this paragraph we will limit our examination to the observance of bank secrecy toward the tax authorities.

1. Taxation Procedure

As a general principle, the tax authorities in the normal course of taxation procedure collect the necessary information from the taxpayer who is bound to make a fair and accurate tax return.⁵⁷ Third parties are compelled to give information only to the extent provided by law. It is only when the taxpayer does not comply with the tax authorities' request for information that a third person may have to provide answers directly.⁵⁸

Whereas the investment managers, accountants and other persons who manage the assets of the taxpayer can be requested to provide information directly to the tax authorities,⁵⁹ a restriction with respect to the persons bound by a legal duty of professional secrecy is expressly made.⁶⁰ This restriction concerns the professional secrecy as instituted by the Criminal Code⁶¹ and also bank secrecy, a breach of which carries criminal consequences.⁶² Consequently, in the course of a taxation procedure the tax authorities cannot investigate directly or request a bank to give information or documents concerning its clients, as bank secrecy can be invoked successfully.

⁵⁴ Loi fédérale sur la procédure pénale (Federal Law on Criminal Procedure), RS 312.0, art. 77 (1939) [hereinafter Federal Law on Criminal Procedure].

⁵⁵ *Id.* art. 69.

⁵⁶ AUBERT, KERNER & SCHÖNLE, *supra* note 9, at 101.

⁵⁷ Arrêté du Conseil Fédéral concernant la perception d'un impôt fédéral direct (Federal Decree on Federal Income Tax), RS 642.11, arts. 82-7, 89, 91, 97 (1940) [hereinafter AIFD].

⁵⁸ *Id.* art. 90, ¶ 6.

⁵⁹ *Id.* art. 90, ¶¶ 5, 6. These requirements were introduced in Loi Fédérale instituant des mesures propres à lutter plus efficacement contre la fraude fiscale au titre de l'impôt fédéral direct RO 1977 (1977), at 2103-07.

⁶⁰ AIFD, *supra* note 57, art. 90, ¶ 6.

⁶¹ CP, RS 311, art. 321.

⁶² FBL, *supra* note 1, art. 47; AUBERT, KERNEN, SCHÖNLE, *supra* note 9, at 153.

2. Tax Fraud/Tax Evasion

Nevertheless, in certain circumstances tax claims may lead to the lifting of bank secrecy (e.g., in cases of tax fraud). Swiss law, at the federal and cantonal level, makes a distinction between tax evasion and tax fraud. Tax evasion occurs when a taxpayer does not declare income and, as a consequence, is not taxed on that income.⁶³ At the federal and cantonal level, tax evasion is an administrative offense which is punishable by the imposing of a fine.⁶⁴ The authorities in a procedure for tax evasion have the same powers of investigation which they have in a taxation procedure⁶⁵ (e.g., no direct information can be requested directly from third parties bound by a professional or legal duty of secrecy).

Tax fraud is committed when a taxpayer uses false, falsified or inaccurate documents with the purpose of defrauding the tax authorities.⁶⁶ Tax fraud is qualified as a criminal offense by the Federal Law on Income Tax and is pursued by criminal procedure.⁶⁷ As seen previously, in such procedure, bank secrecy is not effective.⁶⁸ Tax fraud also constitutes a criminal offense under the Federal Laws on Stamp Tax,⁶⁹ Withholding Tax,⁷⁰ and Anticipatory Tax⁷¹ and is prosecuted by the administrative authorities according to the Criminal Administrative Law.⁷²

Bank secrecy will consequently be lifted in the course of a tax fraud prosecution when the tax authorities are empowered to investigate in direct cooperation with the banks and to seize documents. At the cantonal level, the tax laws of the majority of the cantons provide for prosecution of tax fraud as a criminal offense (especially in Zurich, Geneva and Basle).⁷³

IV. BANK SECRECY AND INTERNATIONAL ASSISTANCE

A. *In General*

The FBL prohibits any violation of bank secrecy which may take

⁶³ AIFD, *supra* note 57, art. 129.

⁶⁴ *Id.* art. 129, ¶ 1.

⁶⁵ See *supra* notes 57 and 58.

⁶⁶ *Id.* art. 130 *bis*.

⁶⁷ *Id.* art. 133 *bis*; see *supra* note 54.

⁶⁸ See *supra* pt. III. C.

⁶⁹ Loi fédérale sur le droit de timbre (Federal Law on Stamp Tax), RS 641.10 (1973), art. 50.

⁷⁰ Loi fédérale sur l'impôt anticipé ¶ 1. RS 642.21 (1965), art. 67, (Federal Law on Withholding Tax).

⁷¹ Arrêté du Conseil Fédéral instituant un impôt sur le chiffre d'affaires (Importation Duty Law), RS 641.20 (1941), art. 41, ¶ 1.

⁷² Loi fédérale sur le droit pénal administratif (Federal Law on Criminal Administrative Law), RS 313.0. (1974).

⁷³ AUBERT, KERNEN & SCHÖNLE, *supra* note 9, at 164.

place in Switzerland or abroad.⁷⁴ In addition, article 271 of the Criminal Code⁷⁵ prohibits the execution in Switzerland of foreign acts of state and punishes the offenders by imprisonment. Therefore, a foreign authority wishing to obtain information, documentary evidence, or witness statements from Swiss citizens or residents of Switzerland must request the official assistance of this country.

In civil matters, Switzerland being a party to the Hague Convention on Civil Procedure,⁷⁶ the requests are addressed to a Swiss judge and executed according to the cantonal laws of procedure.⁷⁷ Therefore, the question of the lifting of bank secrecy will be resolved as if it were a domestic procedure.⁷⁸

Switzerland has entered into various agreements for the purpose of avoiding double taxation. These agreements provide for a limited exchange of information.⁷⁹ In the field of assistance in criminal matters, Switzerland is a party to the European Convention on Judicial Assistance in Criminal Matters⁸⁰ and entered into a Treaty of Mutual Assistance with the United States in 1973.⁸¹ In addition, Switzerland has recently enacted a Federal Law Relating To The International Assistance in Criminal Matters in 1981, which entered into force in 1983.⁸²

Consideration should also be given to the Memorandum of Understanding between the United States and Switzerland to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading and also to the private agreement of the Swiss Bankers' Association on this subject and future legislation in this field.⁸³

B. Assistance Through Bilateral Agreements Designed to Avoid Double Taxation

1. In General

Certain bilateral conventions signed by Switzerland include a clause

⁷⁴ CP, RS 311, art. 7 provides that a crime is deemed to have taken place where the offender has acted, and at the place where the consequences have occurred.

⁷⁵ CP, RS 311, art. 271.

⁷⁶ The Hague Convention Relating to Civil Procedure, July 17, 1905 (codified as RS 0.274.12 and revised in 1957).

⁷⁷ *Id.* art. 14.

⁷⁸ See *supra* pt. III. A.

⁷⁹ See *infra* pt. IV. B.

⁸⁰ See *infra* pt. IV. C. 1.

⁸¹ See *infra* pt. IX. C. 2.

⁸² Loi fédérale sur l'entraide internationale en matière pénale (Federal Law on Assistance in Criminal Matters), RS 351.1 (1981) [hereinafter Federal Law on Assistance]. See *infra* note 149 and accompanying text.

⁸³ See *infra* pt. V.

providing for the exchange of such information as is necessary for carrying out the provisions of the conventions: those signed with Austria,⁸⁴ Belgium,⁸⁵ Canada,⁸⁶ Denmark,⁸⁷ France,⁸⁸ Great Britain,⁸⁹ Italy,⁹⁰ New Zealand⁹¹ and the Federal Republic of Germany.⁹² The convention with the United States contains a more extensive exchange of information clause.⁹³

In practice, Switzerland has agreed to transmit information which is proved to be necessary for the proper application of the agreements even when the agreement concerned does not expressly provide for such exchange of information.⁹⁴ In most cases, information will not be exchanged for the purpose of assisting the foreign state in applying its own tax legislation; rather such assistance will be limited to the exchange of information necessary for the control of the regular application of the agreement. In addition, the agreements which provide for exchange of information all contain a limitation in the sense that no information revealing a business, industrial or professional secret or trade process may be disclosed.⁹⁵

Only the agreements signed with Austria, Belgium, West Germany, Denmark, France and Italy mention bank secrecy expressly.⁹⁶ It has, however, always been held that business and professional secrets include bank secrecy; thus, a specific reference to this concept is not necessary to guarantee its protection.⁹⁷

⁸⁴ Convention Concerning the Avoidance of Double Taxation, Jan. 30, 1974, Switz.-Aus., (codified as RO 1974 II, art. 26, ¶ 1, at 2085).

⁸⁵ Convention Concerning the Avoidance of Double Taxation, Aug. 28, 1978, Switz.-Belg. (codified as RO 1980 II, art. 27, ¶ 1, at 1456).

⁸⁶ Convention Concerning the Avoidance of Double Taxation, Aug. 20, 1976, Switz.-Can. (codified as RO 1977 II, art. 25, ¶ 1, at 1526).

⁸⁷ Convention Concerning the Avoidance of Double Taxation, Nov. 23, 1973, Switz.-Den. (codified as RO 1974 II, at 1720).

⁸⁸ Convention Concerning the Avoidance of Double Taxation, Sept. 9, 1966, Switz.-Fr. (codified as RO 1967 II, art. 28, at 1119).

⁸⁹ Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, Sept. 30, 1954, Switz.-U.K. (codified as RO 1955 II, art. XX, at 329).

⁹⁰ Convention Concerning the Avoidance of Double Taxation, Mar. 9, 1976, Switz.-Italy (codified as RO 1979 I, art. 27, ¶ 1, at 461).

⁹¹ Convention for the Avoidance of Double Taxation, June 6, 1980, Switz.-N.Z. (codified as RO 1981 II, art. 24, ¶ 1, at 1812).

⁹² Convention Concerning the Avoidance of Double Taxation, Aug. 11, 1971, Switz.-W. Ger. (codified as RO 1972 II, art. 27, at 3128).

⁹³ Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, May 24, 1971, Switz.-U.S. (codified as RO 1951 II, art. XVI, ¶ 1, at 895).

⁹⁴ Gremaud, *Entraide administrative et judiciaire en matière fiscale*, 30 ETUDES SUISSES DE DROIT EUROPEAN 187 (1986); JT, *supra* note 12, at 303.

⁹⁵ See *supra* notes 84-93.

⁹⁶ See *supra* notes 84, 87, 88, 90, and 92.

⁹⁷ Gremaud, *supra* note 94.

In order to reassure the foreign states which signed an agreement concerning the avoidance of double taxation with Switzerland that the conditions set forth are respected, the Federal Council enacted a decree in 1962.⁹⁸ The purpose of this decree is to preclude the unjustified use of the agreements against double taxation (withholding tax).

Under these regulations a taxpayer who desires to benefit from the agreement shall furnish certain information to the Federal Tax Administration. If the requested information is not provided, the benefit of the agreement is refused. Switzerland can therefore give the necessary assurance to the foreign states that the agreements are not abused without having to communicate information qualified as business or industrial secrets or covered by bank secrecy.⁹⁹

2. The Double Taxation Agreement with the United States

The Double Taxation Agreement entered by and between Switzerland and the United States in 1951¹⁰⁰ contains a clause on the exchange of information with a larger scope than those examined above. Article XVI provides that the competent authorities will also exchange such information as is necessary for the prevention of tax fraud and the like in relation to the taxes which are the subject of the convention. It is nevertheless provided that there will be no exchange of information when it will imply the disclosure of any trade, business, industrial or professional secret on any trade process. This feature has been tested twice by the Federal Tribunal.

In 1970, the U.S. Internal Revenue Service ("IRS") requested the Federal Tax Administration to transmit information obtained from the documents of a Swiss bank. At that time, the Federal Tribunal held that although the Agreement provides for an exchange of information to prevent tax fraud, this concept of prevention was said to include repression.

The Tribunal further stated that despite the restriction relating to business and professional secrets, bank secrecy could not be set up against the transmission of information in case of tax fraud.¹⁰¹ This decision has been criticized by a majority of legal authors¹⁰² who have noted that according to article XVI of the Agreement, professional secrecy, including bank secrecy, should prevail over the general mutual assistance obligation.

In 1972, the IRS requested the Federal Tax Administration to trans-

⁹⁸ Arrêté du Conseil Fédéral instituant des mesures contre l'utilisation sans causes légitimes des conventions conclues par la Confédération en vue d'éviter des doubles impositions, RS 672.202 (1962).

⁹⁹ Gremaud, *supra* note 94, at 190-91.

¹⁰⁰ See *supra* note 93.

¹⁰¹ 1971 II JT, *supra* note 12, at 571.

¹⁰² AUBERT, KERNEN & SCHÖNLE, *supra* note 9, at 390.

mit original documents obtained from a Swiss bank and the testimony of witnesses. The Federal Tribunal on this occasion specified the limits of the cooperation¹⁰³ which could be granted under the Swiss-U.S. Agreement, and stated that article XVI concerned only the exchange of information in the form of a written report and did not prescribe actual judicial assistance in criminal matters which would include the testimony of witnesses. Therefore, the Federal Tribunal ordered the Federal Tax Administration not to grant the extended assistance requested by the IRS.

It should be noted that since the enactment of the Federal Law on Judicial Assistance in Criminal Matters in 1983,¹⁰⁴ article XVI of the Swiss-U.S. Agreement has lost its importance as the Federal Law allows assistance in case of tax fraud offenses.

3. Multilateral Convention

In this context it is relevant to mention that Switzerland has recently expressed its refusal to sign the New Multilateral Convention on Tax Co-operation prepared by the Organization for Economic Cooperation and Development ("OECD")¹⁰⁵ on the basis that the Convention does not guarantee the rights to the private sphere, does not distinguish, as Swiss law does, tax fraud from tax evasion, and does not respect the principle of "specialty."¹⁰⁶

C. Assistance in Criminal Matters

We have seen¹⁰⁷ that in the course of a criminal prosecution conducted in Switzerland, bank secrecy cannot be invoked since the public interest prevails over the private interest of a bank's client.

In terms of international assistance, the same solution applies provided that the conditions for obtaining Swiss assistance are met, and that the offense prosecuted abroad is not of a nature for which Switzerland refuses to grant assistance.

¹⁰³ 101 Ib ATF, *supra* note 47, at 160.

¹⁰⁴ See *infra* pt. IV. C. 3.

¹⁰⁵ Journal de Genève, Oct. 10, 1987 (interview with Ambassador Jean Zwahlen).

¹⁰⁶ The principle of "specialty" means that information obtained through judicial assistance may not be used for any purpose, or in connection with any offense, other than the one for which assistance was granted.

¹⁰⁷ See *supra* pt. III. C.

1. European Convention on Judicial Assistance in Criminal Matters¹⁰⁸

Through the European Convention Switzerland is bound with West Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Iceland, Israel, Italy, Liechtenstein, Luxembourg, Norway, the Netherlands, Sweden and Turkey.¹⁰⁹ Swiss cooperation is granted to foreign states in proceedings concerning the prosecution of offenses which are of the competence of judicial authorities in the requesting state.¹¹⁰

The assistance shall, however, be refused when the offense is characterized as a political offense or a tax offense.¹¹¹ The assistance shall also be refused when it may, if granted, jeopardize the sovereignty, security, public order or other essential interests of Switzerland.¹¹² In that respect, restrictions concerning currency control have been held to be contrary to the Swiss public order;¹¹³ consequently, Switzerland will refuse to cooperate with the prosecution of offenses of this nature.

It follows logically that the information and/or documents transmitted to a foreign country for a specific prosecution may not be used for a procedure concerning offenses for which Switzerland would not have granted its assistance or has refused it. In order to introduce this particular rule of Swiss law (principle of speciality)¹¹⁴ into the realm international cooperation and assistance, Switzerland has made an express reservation to the European Convention.¹¹⁵

The Federal Tribunal has held that a foreign authority is precluded from using the information obtained through Swiss assistance for the prosecution of offenses described in article 2(a) of the European Convention only when the Swiss authority has made the assistance conditional upon the prohibition of such use.¹¹⁶

In all cases where the cooperation requires the use of coercive measures (seizure of documents, search warrant, etc.), Switzerland will grant assistance on condition that the offense prosecuted in the foreign state also constitutes a criminal offense under Swiss law. This constitutes the

¹⁰⁸ European Convention on Judicial Assistance in Criminal Matters, Apr. 20, 1959 codified in RS 0.351.1) [hereinafter European Convention].

¹⁰⁹ List of ratifications of Apr. 1, 1986.

¹¹⁰ European Convention, *supra* note 108, art. 1, ¶ 1.

¹¹¹ *Id.* art. 2(a).

¹¹² *Id.* art. 2(b).

¹¹³ 1970 I JT, *supra* note 12, at 92-94; AUBERT, KERNEN, SCHÖNLE, *supra* note 9, at 337.

¹¹⁴ See *supra* note 106.

¹¹⁵ European Convention Swiss Reserves, *supra* note 109, art. 2(b). Switzerland reserves its right in special cases to grant assistance, according to the Convention, on the express condition that the result of the investigations conducted in Switzerland, and information contained in documents or files transmitted, be used exclusively to investigate and judge the offenses for which assistance has been granted.

¹¹⁶ 107 Ib ATF, *supra* note 47, at 264.

principle of "double incrimination." To this effect, Switzerland has used the possibility reserved by the European Convention to make a reservation for the application of this principle.¹¹⁷

The lifting of bank secrecy always implies coercion and, therefore, the limits to the assistance resulting from the two restrictions made by Switzerland to articles 2 and 5 of the European Convention allows this country to impose its internal principles on international cooperation. In particular, bank secrecy cannot be lifted more extensively in providing international assistance than it could be in the course of a domestic prosecution.

2. Swiss-U.S. Treaty Concerning Assistance in Criminal Matters

The Swiss-U.S. Treaty, signed on May 25, 1975, was entered into force on January 23, 1977.¹¹⁸ It contains two parts: the first concerns general assistance which does not differ drastically from the European Convention and the usual practice followed by Switzerland in international cooperation; the second part provides a special procedure intended to facilitate the prosecution of what is described as organized groups of criminals.

Due to the different approach and protection of the private sphere maintained by each country, numerous specific provisions have been included in the Swiss-U.S. Treaty in order to guarantee the right to confidentiality according to the Swiss law concept.¹¹⁹

a. General Procedure

Each party to the Treaty attempts to grant assistance to the other in investigations and court proceedings for criminal offenses, the punishment of which falls within the jurisdiction of the authorities of the requesting state.¹²⁰

(i) The Treaty contains a basic limitation, already examined with regard to the European Convention by which Switzerland provides its assistance; this limitation has a particular effect on the lifting of bank secrecy. In particular, the Treaty is not applicable when the offense being prosecuted is of a political, military or tax nature or concerns anti-trust laws.¹²¹ However, assistance may be possible for offenses involving customs and tax laws when they constitute violations of gambling and

¹¹⁷ European Convention, *supra* note 108, art. 5, ¶ 1(a).

¹¹⁸ *Traité entre la Confédération Suisse et les Etats-Unis d'Amérique sur l'entraide judiciaire en matière pénale* (Treaty on Mutual Assistance in Criminal Matters), May 25, 1973, U.S.-Switz. RS 0.351.933.6 [hereinafter Swiss-U.S. Treaty].

¹¹⁹ See *infra* notes 128-29, 134, 135 and 136.

¹²⁰ Swiss-U.S. Treaty, *supra* note 118, art. 1.

¹²¹ *Id.* art. 2, ¶ 1(c).

betting regulations, or to drugs, weapons and explosives regulations.¹²²

Not only has the principle of specialty¹²³ been expressly set forth,¹²⁴ but also the principle of double incrimination has been introduced in the Treaty if the assistance involves measures of coercion. In fact, a list of the offenses for which measures of coercion can be taken is annexed to the Treaty.¹²⁵ In case the offense prosecuted is not mentioned in the said list, the requested state may decide whether the seriousness of the offense nevertheless justifies the application of coercive measures.¹²⁶

This provision allows the requested state to provide assistance by taking coercive measures even when the offense is not mentioned in the list annexed to the Treaty but is punishable under the criminal laws of both states.¹²⁷ The assistance can be refused when the request may jeopardize the sovereignty, security or similarly important interests of Switzerland.¹²⁸

The Swiss Implementing Law to the Treaty¹²⁹ provides that disclosure of a business or industrial secret in the sense of article 273 of the Criminal Code¹³⁰, or of a banking secret, will harm important interests of Switzerland when it is foreseeable that the Swiss economy will be seriously endangered and when the resulting damage will be outweighed by the importance of the offense prosecuted.¹³¹

Therefore, transmission of secret information should be limited. This limitation will be invoked in exceptional circumstances only where, for instance, a Swiss bank would, in order to fulfill the request of assistance, disclose its relationship with an important segment of its clientele.¹³²

These questions are examined by a special Commission¹³³ which will apply the principle of proportionality and balance, in each case, the necessity of assistance with the harm that the Swiss economy may suffer.

¹²² *Id.* art. 2, ¶ 1(c)(5).

¹²³ *See supra* note 106.

¹²⁴ Swiss-U.S. Treaty, *supra* note 118, art. 5, ¶ 1.

¹²⁵ *Id.* art. 4.

¹²⁶ *Id.* art. 4, ¶ 3.

¹²⁷ Aubert, *A protection des secrets bancaire, de fabrication et d'affaires et le Traité d'entraide judiciaire en matière pénale entre la Suisse et les Etats-Unis*, 67 FICHES JURIDIQUES SUISSES 12.

¹²⁸ Swiss-U.S. Treaty, *supra* note 118, art. 3, ¶ 1(a).

¹²⁹ Loi fédérale relative au traité conclu avec les Etats-Unis d'Amérique sur l'entraide judiciaire en matière pénale (Implementing Federal Law of the Swiss-U.S. Treaty), RS 351.93 (1975) [hereinafter Implementing Law].

¹³⁰ CP, RS 311, art. 273.

¹³¹ Implementing Law, RS 351.93, art. 20, ¶ 1.

¹³² AUBERT, KERNEN & SCHÖNLE, *supra* note 9, at 345. Message of the President of the United States transmitting the Swiss-U.S. Treaty to the Senate, 94th Cong., 2d Sess. (Feb. 18, 1976). *Id.* at 39.

¹³³ Implementing Law, RS 351.93, art. 6.

In certain cases the assistance will be granted only upon the condition that the United States request a protective order for evidence which involves a secret, the disclosure of which could be damaging for the Swiss economy.¹³⁴

(ii) In order to reinforce the protection of the private sphere, a special provision has been introduced in the Treaty which is designed to safeguard confidential information or information protected by bank secrecy, relative to a "third party uninvolved" in the prosecution of the offense mentioned in the request for assistance.

Only under specific circumstances enumerated in the Treaty¹³⁵ may such confidential information (professional, industrial secrets or information protected by bank secrecy) concerning a third party be disclosed.¹³⁶ The Swiss Federal Council has ruled that with respect to these three conditions the protection of the private sphere of an apparent uninvolved third party is sufficiently guaranteed.¹³⁷

It should, however, be noted that the concept of the uninvolved third party has received a very restricted construction. Certain legal writers are even asking whether this concept is a ghost which has no real application.¹³⁸

Status as an uninvolved third party has been refused to any person as soon as there exists a direct relationship with one of the persons or facts described in the request for assistance, independent of:

- any criminally or civilly punishable action of the third party,
- the standing of the party in the foreign procedure,
- the existence of the name of the third party in the request for assistance.¹³⁹

The status as an uninvolved third party has in particular been refused to the person acting as intermediary in the payment of a bribe,¹⁴⁰ to a corporation whose principal shareholder was the accused¹⁴¹ or to its

¹³⁴ *Id.* art. 20, ¶ 3(a).

¹³⁵ Swiss-U.S. Treaty, *supra* note 118, art. 10, ¶ 2.

¹³⁶ The conditions are the following:

- a) The request of assistance relates to an offense qualified as serious.
- b) The disclosure of secret information is important on the search for an essential element of the prosecution.
- c) The United States should prove that they have utilized other means to attempt to obtain the requested information in their country, but were unsuccessful.

¹³⁷ Message du Conseil Fédéral concernant le traité (Message of the Federal Council Concerning the Treaty) II FF (1974), at 586.

¹³⁸ Bernasconi, DROITS ET DEVOIRS DE LA BANQUE ET DE SES CLIENTS DANS LA PROCÉDURE D'ENTRAIDE JUDICIAIRE INTERNATIONALE EN MATIÈRE PÉNALE, IN BEITRÄGE ZUM SCHWEIZERISCHEN BANKENRECHT 365 (1987) [hereinafter BERNASCONI].

¹³⁹ *Id.* at 366 (see especially unpublished court decisions).

¹⁴⁰ 105 Ib ATF, *supra* note 47, at 418.

¹⁴¹ *Id.* at 107 Ib, 258.

directors,¹⁴² to the wife or mistress of the accused who had a power of attorney on the bank account of the accused, and to the lawyer of the account-holder with the power of attorney.¹⁴³

b. Provisions Regarding Organized Group of Criminals

In the presence of an organized group of criminals, as defined in the Treaty,¹⁴⁴ assistance may be granted in tax matters, specifically in offenses under the income tax legislation as well as in securities and anti-trust matters.¹⁴⁵

Under such circumstances Switzerland does not condition its cooperation on a requirement that the offense be punishable under its own law¹⁴⁶ but does request that the person prosecuted be suspected of occupying an important position in the criminal organization. In addition, the United States must demonstrate that the evidence already in their possession is insufficient to establish a relationship with the organization, and that the information furnished by Switzerland will permit the conviction and a severe term of imprisonment for the offender which will durably injure the organization.¹⁴⁷

Thus, under this special procedure for the prosecution of organized groups of criminals, Switzerland has abandoned some of the basic principles applied when acting in cooperation with a foreign state: double incrimination and non-assistance in tax matters. The Federal Council stated that this was justified by the importance of the fight against this particular type of criminality.¹⁴⁸

3. Federal Law on International Assistance in Criminal Matters¹⁴⁹

The Federal Law on Assistance entered into force on January 1, 1983.¹⁵⁰ The object of this Law is to provide assistance for extradition of persons condemned or prosecuted in a foreign state, cooperation in the course of a foreign criminal prosecution, and for enforcement of foreign judgments.¹⁵¹

Its main feature is the generalization, in the absence of any treaty, of

¹⁴² BERNASCONI, *supra* note 138, at 366 (citing an unpublished decision of the Federal Tribunal, Apr. 11, 1979).

¹⁴³ *Id.* (citing an unpublished decision of the Federal Tribunal, Feb. 8, 1984).

¹⁴⁴ Swiss-U.S. Treaty, *supra* note 118, art. 6, ¶ 3.

¹⁴⁵ *Id.* art. 2, ¶ 2, art. 7, ¶ 2.

¹⁴⁶ *Id.* art. 7, ¶ 1.

¹⁴⁷ *Id.* art. 7, ¶ 2.

¹⁴⁸ Message of the Federal Council Concerning The Treaty, *supra* note 137, at 587.

¹⁴⁹ Loi fédérale sur l'entraide internationale en matière pénale (Federal Law on Assistance in Criminal Matters), RS 351.1 (1981) [hereinafter Federal Law on Assistance].

¹⁵⁰ Arrête du Conseil Fédéral (Decree of the Federal Council), RO 1982 (1982), at 877.

¹⁵¹ Federal Law on Assistance, RS 351.1, art. 1, ¶ 1.

a compulsory procedure for judicial assistance. One of its novel aspects is the introduction, for the first time, of international assistance in cases of tax fraud offenses. We have seen that with the Swiss-U.S. Treaty, such assistance was limited to the prosecution of organized groups of criminals.¹⁵² In the Double Taxation Agreement with the United States, the exchange of information designed to prevent tax fraud offenses was limited to information short of actual judicial assistance.¹⁵³

Swiss cooperation is not an international obligation; Switzerland may therefore refuse to cooperate with countries whose concept of criminal law is in complete contradiction with essential Swiss legal principles.¹⁵⁴ Even if not clearly set forth in the Federal Law on Assistance, it is admitted that all countries, including those which have entered into a treaty with Switzerland, may request the assistance of Switzerland through this Federal Law¹⁵⁵ on a reciprocal basis.¹⁵⁶

As a preliminary condition for the granting of assistance, Switzerland requires that the request of the foreign state relates to a criminal prosecution in which recourse to a judicial authority is possible.¹⁵⁷ Thus, it has been held that violations of administrative regulations constitute criminal cases, provided that the matter can be brought before a judge. In this context, the Federal Tribunal has recognized that the U.S. Securities and Exchange Commission ("SEC") is an authority which can request Swiss assistance since it can denounce the violation of the law to a judicial authority.¹⁵⁸

The Federal Law on Assistance contains the usual limitations observed by Switzerland when granting international assistance. In particular, Switzerland will refuse to cooperate in political or military matters¹⁵⁹ (with the exception of a political offense which tends to exterminate a race or involves terrorism).¹⁶⁰ Switzerland also reserves the right to refuse its assistance when its sovereignty, security, public order or other essential interests could be injured.¹⁶¹ Switzerland continues to refuse to cooperate when the act prosecuted is a tax evasion offense or a violation of regulations concerning the monetary, commercial or economic policy of the foreign requesting state.¹⁶²

¹⁵² Swiss-U.S. Treaty, *supra* note 118, art. 2, ¶ 2, art. 7, ¶ 2.

¹⁵³ See *supra* pt. II. B. 2.

¹⁵⁴ Federal Law on Assistance, RS 351.1, art. 1, ¶ 4.

¹⁵⁵ Gremaud, *supra* note 94, at 207.

¹⁵⁶ Federal Law on Assistance, RS 351.1, art. 8.

¹⁵⁷ *Id.* art. 8, ¶ 3.

¹⁵⁸ *Ib* ATF, *supra* note 47, at 47.

¹⁵⁹ Federal Law on Assistance, RS 351.1, art. 3, ¶ 1.

¹⁶⁰ *Id.* art. 3, ¶ 2.

¹⁶¹ *Id.* art. 1, ¶ 2.

¹⁶² *Id.* art. 3, ¶¶ 1, 3.

While the Federal Law on Assistance authorizes for the first time the granting of cooperation with respect to the prosecution of a tax fraud offense,¹⁶³ as distinct from a tax evasion offense,¹⁶⁴ such assistance constitutes *minor* assistance limited to the transmission of information, documents, and the testimony of witnesses and not *major* assistance such as the extradition of an offender or the enforcement of a foreign decision on this subject in Switzerland.¹⁶⁵

Article 24 of the Implementing Ordinance to the Law¹⁶⁶ defining the concept of tax fraud, refers to article 14, paragraph 2 of the Federal Law on Administrative Criminal Law.¹⁶⁷ The concept of tax fraud in the Federal Law on Administrative Criminal Law (which is applied in prosecutions of offenses against the Withholding Tax Law, the Stamp Tax Law and the Importation Tax Law)¹⁶⁸ is less restrictive than the concept of tax fraud in the Federal Law on Income Tax.¹⁶⁹ Under the Federal Law on Assistance, prosecution for a foreign income tax fraud could proceed where such prosecution would not be possible under Swiss procedure. Assurances have, however, been given that assistance would only be granted when the tax fraud would comply with the definition given by article 130*bis* of the Federal Law on Income Tax.¹⁷⁰

Various legal writers are of the opinion that the application of the Federal Law on Assistance to Tax Matters will raise numerous problems, chiefly because the distinction between tax evasion (which is not grounds for Swiss assistance) and tax fraud is a typically Swiss concept generally unknown to foreign legislatures.¹⁷¹ This problem is compounded by the fact that article 24 of the Implementing Ordinance to the Law on Assistance¹⁷² states that a request cannot be rejected merely because Swiss law does not impose the same type of tax or does not contain the same type of regulation in tax matters. In order to try to eliminate this problem, when there is confusion the Federal Police Office may request the advice of the

¹⁶³ *Id.* art. 3, ¶ 3 *in fine*.

¹⁶⁴ See *supra* notes 63 and 66 (on the distinction of a tax fraud and tax evasion).

¹⁶⁵ See Federal Law on Assistance, RS 351.1, art. 3, ¶ 3 which provides that assistance in case of tax fraud is given according to the third part of the law. Extradition and enforcement of foreign decisions are included in the second and fifth part of the law, respectively. Therefore, they are not applicable for assistance in tax fraud prosecution.

¹⁶⁶ Ordonnance sur l'entraide internationale en matière pénale (Implementing Ordinance to the Law on Assistance), Feb. 24, 1982, RS 351.11 [hereinafter Implementing Ordinance to the Law on Assistance].

¹⁶⁷ Federal Law on Criminal Administrative Law, RS 313.0.

¹⁶⁸ See *supra* notes 69-71.

¹⁶⁹ AIFD, *supra* note 57.

¹⁷⁰ See Gremaud, *supra* note 94, at 212-13.

¹⁷¹ AUBERT, KERNAN & SCHÖNLE, *supra* note 9, at 317.

¹⁷² Implementing Ordinance to the Law on Assistance, RS 313.0.

Federal Tax Administration whose opinion shall be binding.¹⁷³

Finally, the Federal Law on Assistance provides that assistance will be refused if the offense does not justify the procedure.¹⁷⁴ In tax fraud matters it has been held that the amount of the fraud in Swiss francs should have at least five figures. It is, however, not clear whether assistance will be granted for SFrs. 10,000.¹⁷⁵

In order to ensure the respect for the Swiss principles under which international assistance is granted, the Federal Law on Assistance includes the rule of specialty¹⁷⁶ and of double incrimination when the foreign request for assistance implies the taking of coercive measures.¹⁷⁷

Respect for the private sphere is guaranteed by various provisions covering the right to refuse to testify,¹⁷⁸ the conduct of investigations of documents,¹⁷⁹ and the protection of uninvolved third parties.¹⁸⁰ The possibility of disclosing information about an uninvolved third party which is of a confidential nature and/or protected by a professional secret in the sense of article 273 of the Criminal Code¹⁸¹ or covered by bank secrecy, is treated in a manner similar to that espoused by the Swiss-U.S. Treaty.¹⁸²

When the conditions for such disclosure are not fulfilled, any reference to the information relating to the third party, which may appear in other documents transmitted to the requesting state, shall be eliminated.¹⁸³

In addition, in order to grant effective protection to uninvolved third parties, the Federal Law on Assistance provides that until a decision to transmit the information relating to the private sphere of these third parties is made, all other participating persons are excluded from the cooperation procedures to prevent them from gaining knowledge of these

¹⁷³ *Id.* art. 24, ¶ 3.

¹⁷⁴ Federal Law on Assistance, RS 351.1, art. 4.

¹⁷⁵ Gremaud, *supra* note 94, at 210.

¹⁷⁶ Federal Law on Assistance, RS 351.1, art. 67. This law provides that the information obtained through the assistance cannot be used for investigation purposes or produced as evidence in criminal proceedings for which assistance would be refused.

¹⁷⁷ *Id.* art. 64. This provides that coercion measures can only be taken when the facts exposed in the request for assistance constitute a criminal offense under Swiss law.

¹⁷⁸ Article 9 of the Federal Law on Assistance refers to the common provision on the right to refuse to testify. See Federal Law on Criminal Procedure, RS 312.0, arts. 74, 77.

¹⁷⁹ Article 9 of the Federal Law on Assistance, RS 351.1 (citing art. 69 of the Federal Law on Criminal Procedure, RS 312.0, according to which the investigations of documents should be limited to the documents important for the procedure and the private and confidential information preserved when possible.

¹⁸⁰ *Id.* art. 10.

¹⁸¹ CP, RS 311, art. 273.

¹⁸² See *supra* notes 138-43.

¹⁸³ Federal Law on Assistance, RS 351.1, art. 82, ¶ 2.

facts.¹⁸⁴

In conclusion, two famous cases which have received much press and in which Switzerland has adopted a very different attitude must be mentioned.

The Marc Rich & Co., S.A. Matter

In this matter which occurred in 1983 and 1984, a Swiss company, Marc Rich & Co., S.A., was subpoenaed by a U.S. Federal District judge to produce documents and records under threat of a U.S. \$50,000 a day fine. Switzerland took a firm position against the attempt of the U.S. authorities to obtain information from a Swiss company by compulsion which disregarded the international rules on Mutual Assistance (the Swiss-U.S. Treaty or the Federal Law on Assistance). When Marc Rich & Co., S.A. finally agreed in front of witnesses to hand over the subpoenaed documents and records voluntarily, the Swiss Federal Attorney General¹⁸⁵ opened an investigation against Marc Rich & Co., S.A. for the unlawful passing of business secrets to foreign officials¹⁸⁶ and on this basis seized the documents before their transmission to the U.S. authorities. A year later, the U.S. authorities were obliged to present to the Swiss authorities an official request for assistance based on the Federal Law on Assistance. The request for assistance was accepted by the Swiss authorities on the condition that the fines imposed on Marc Rich & Co., S.A. be waived.

The Marcos matter

This matter gave rise to considerable criticism in Switzerland due to the fact that assets in Switzerland of former President Marcos were blocked before any request from the Philippines Government had been presented to the Swiss authorities. On March 26, 1986, a Swiss bank advised the Federal Banking Commission that a representative of Mr. Marcos wanted to withdraw a substantial amount of funds. The same day, on the basis of article 102 of the Federal Constitution, the Federal Council blocked the assets of Mr. Marcos and his relatives which were deposited in six Swiss banks.¹⁸⁷

By a March 26, 1986 letter, the Federal Banking Commission notified all banks concerned that it would violate the diligence imposed by the legal requirement of irreproachable conduct of business, which is a

¹⁸⁴ *Id.* art. 82, ¶ 1.

¹⁸⁵ Ministère Public Fédéral (the Federal Attorney General Office).

¹⁸⁶ CP, RS 311, art. 273.

¹⁸⁷ CST art. 102(8) provides that the Federal Council is in charge of the interests of the Swiss Confederation abroad and supervises the observance of its international relationships.

prerequisite for all banking licenses under the FBL,¹⁸⁸ to allow the withdrawal of assets of Mr. Marcos or relatives before the situation was clarified through international assistance.¹⁸⁹ In April 1986, an official request for assistance was presented by the Philippines authorities and the provisional measures taken by the Federal Council and the Federal Banking Commission were replaced by a provisional measure based on article 18 of the Federal Law on Assistance.¹⁹⁰ Currently, the Swiss judicial authorities are examining whether the legal conditions, upon which assistance is granted, are fulfilled.

According to the Federal Banking Commission the measures taken by the Federal Council and the Federal Banking Commission were designed to prevent a later request of assistance from the Philippines authorities from being deprived of any effect.¹⁹¹ By taking these measures the Federal Council and the Federal Banking Commission have affirmed their willingness to respond to the reproaches that Swiss financial institutions are a haven for funds of unlawful origin.¹⁹² In this matter, the Federal Banking Commission took the position that even if a formal request for assistance was not yet presented, but only announced, banks could not consent to the withdrawal of significant amounts of funds.¹⁹³

Thus, the Federal Banking Commission is of the opinion that banks should now act in accordance with this general principle, even in the absence of any preventive action of the Federal Banking Commission as taken in the Marcos' matter. This opinion stems from the obligation of the banks to comply with the duty of diligence as set forth by the FBL.¹⁹⁴

The attitude of the Federal Council and the Federal Banking Commission was clearly motivated by political considerations to avoid or defeat the criticism periodically voiced against Swiss bank secrecy. It is extremely difficult to foresee how the Swiss banks will be able to follow the rules set forth by the Federal Banking Commission in the Marcos case, especially to block assets prior to the filing of any request for assistance by a foreign State. It is therefore to be hoped that the Marcos case will remain unique. As a matter of interest in the matter of Duvalier, the former President of Haiti, provisional measures were taken on the basis of the Federal Law on Assistance only after the authorities of Haiti had duly presented a request for assistance.

¹⁸⁸ FBL, art. 3, ¶ 2(c).

¹⁸⁹ 1986 FEDERAL BANKING COMMISSION REP. 127 [hereinafter 1986 BANKING REPORT].

¹⁹⁰ *Id.* at 128.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 128-29.

¹⁹⁴ FBL, *supra* note 1, art. 3, ¶ 2(c).

V. RECENT EVOLUTION

A. *Insider Trading*

The Federal Council submitted to the Swiss Parliament on May 1, 1985, a proposal to add to the Criminal Code a specific provision on the exploitation of confidential information.¹⁹⁵

This new provision, which at this time is still under examination by the Parliament, would read as follows:

(CP) Article 161:

1. Whoever, in his capacity as a member of the board, an officer, an auditor or a mandatory of a company, or of a company that controls or is controlled by the latter, in his capacity as a member of a public authority or a public officer, or in his capacity as an assistant to any of them knows a confidential fact, whose disclosure is likely to influence the market price of shares, securities or other instruments of such company, or which is likely to influence substantially the market price of options on such shares, securities or instruments, traded either on a Swiss exchange or over the counter, and obtains for himself or for a third party a pecuniary profit by using this information, or discloses such a fact to a third party and, by doing so, obtains for himself or for a third party a pecuniary profit, shall be punished by imprisonment or a fine.

2. Whoever having learned of such a fact, directly or indirectly, from one of the persons described under (1), and who, by using this information, obtains for himself or for a third party a pecuniary profit, shall be punished by imprisonment up to one year or a fine.

3. When a combination between two companies is projected, (1) and (2) shall apply to both companies.¹⁹⁶

As stated by the Federal Council,¹⁹⁷ at this time insider trading operations, although morally reprehensible, are not unlawful as such although certain aspects of such conduct may fulfill the conditions of criminal offenses described in the Criminal Code.¹⁹⁸

This situation creates a problem especially with regard to international judicial assistance, since Switzerland subjects the taking of coercive measures, such as the lifting of bank secrecy, to the condition that the act described in the request for assistance satisfy the objective criteria of a criminal offense under Swiss law.

In January 1983, the Federal Tribunal in the case relating to the

¹⁹⁵ Message Concernant la modification du Code Pénal (Message Concerning the Amendment of the Criminal Code) FF II (1985), at 70.

¹⁹⁶ CP, RS 311, art. 161.

¹⁹⁷ *Id.* at 72.

¹⁹⁸ CP, RS 311, arts. 148 (fraud), 159 (dishonest management), and 162 (disclosure of business secrecy).

takeover of Santa Fe International Corporation by Kuwait Petroleum Corporation,¹⁹⁹ confirmed that when the insider is a *director* of the company and uses the information for his own benefit, this action is not punishable under Swiss criminal law.²⁰⁰

In contrast, if the insider reveals to a third party a business secret in the sense of article 162 of the Criminal Code,²⁰¹ both may be punished²⁰² and bank secrecy may be lifted in the course of a procedure of assistance based upon the Swiss-U.S. Treaty.²⁰³

In order to resolve the conflict of legislation between the United States and Switzerland on this point, the competent authorities of both countries entered into a Memorandum of Understanding²⁰⁴ which explored the present situation of the Swiss legislation and the means of requesting assistance under the Swiss-U.S. Treaty²⁰⁵ for misuse of inside information.

This memorandum is coupled with a private agreement entered into by and between the signatory banks and the Swiss Bankers' Association,²⁰⁶ the Convention XVI which, for cases where the Swiss-U.S. Treaty is not applicable, will enable the participating banks to disclose the identity of a client and certain other relevant information under specified circumstances in response to a request made by the U.S. Department of Justice on behalf of the SEC.²⁰⁷

In order to preserve the clients' confidentiality and the sovereignty of Switzerland, Convention XVI provides a procedure pursuant to which an independent Commission of Inquiry, when satisfied that the SEC has reasonable grounds to make a request, shall demand a report from the bank involved in the relevant transactions.²⁰⁸ The bank shall then inform the client of the procedure and request that evidence be furnished to prove the transactions concerned were not in violation of the U.S. laws on insider trading. The Commission of Inquiry will then transmit to the

¹⁹⁹ 109 Ib ATF, *supra* note 47, at 47.

²⁰⁰ The Federal Tribunal made a complete examination of all the provisions of the Criminal Code which may be applicable; *see* CP, RS 311, arts. 148, 159.

²⁰¹ CP, RS 311, art. 162.

²⁰² 28 Etudes Suisses de droit Européen 308, "L'avant projet de loi fédérale sur les opérations d'initiales" (1984) (unpublished decision of the Federal Tribunal of Jan. 23, 1983).

²⁰³ Swiss-U.S. Treaty, *supra* note 118.

²⁰⁴ Memorandum of Understanding to Establish Mutual Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, U.S.-Switz., *reprinted in* 22 I.L.M. 1 (1983) [hereinafter Memorandum of Understanding].

²⁰⁵ Swiss-U.S. Treaty, *supra* note 118.

²⁰⁶ Swiss Bankers' Association Agreement with regard to the handling of requests for information from the Securities Exchange Commission (SEC) on the subject of misuse of insider information of Aug. 31, 1982, *reprinted in* 22 I.L.M. 7 (1983) [hereinafter Convention XVI].

²⁰⁷ Memorandum of Understanding, *supra* note 204, pt. III (1).

²⁰⁸ Convention XVI, *supra* note 206, art. 4.

Swiss Federal Office of Police a report to which the evidence called for in the U.S. request is attached unless the Commission of Inquiry has been convinced by the bank or the client that there has been no misuse of inside information.²⁰⁹

The clients of the Swiss banks are duly informed of the existence and contents of Convention XVI. At the opening of an account with a Swiss bank the text of Convention XVI is submitted to the clients, who have to state expressly whether they agree to be bound by its provisions. If they refuse, the bank will then not carry out any transactions for their account on U.S. Stock Exchanges.

Convention XVI is a private agreement which currently supplements other U.S. means for obtaining international assistance. It is also temporary and its effects will cease when the proposed addition to the Criminal Code on misuse of inside information is adopted by the Swiss Parliament.

B. Agreements Relating to Due Diligence

In 1977, the "Agreement Relating to the Due Diligence to be applied by the banks when accepting funds, and to the practice of the bank secrecy" was signed by and between the Swiss Bankers' Association and the Swiss National Bank.²¹⁰

The original Agreement on Due Diligence was of a private nature and the Swiss banks were free to abide by it. In fact, all the banks operating in Switzerland, Swiss or foreign-owned, as well as all the private bankers have declared to be bound by it.²¹¹ The original Agreement on Due Diligence came into effect on July 1, 1977, and was amended and renewed for five years starting October 1, 1982.

In 1985, the Swiss National Bank announced its decision to no longer be a party to the original Agreement on Due Diligence after 1987. Its position was justified by the fact that it was responsible for monetary policy, not for banking ethics.

Faced with the threat of having some of the obligations imposed by the original Agreement on Due Diligence incorporated in the FBL,²¹² the Swiss Association of Bankers decided to maintain the Agreement af-

²⁰⁹ *Id.* art 5.

²¹⁰ Agreement Relating to the Due Diligence to be Applied by the Banks When Accepting Funds and to the Practice of Bank Secrecy (entered by and between the National Bank of Switzerland and the Swiss Bankers' Association on July 1, 1977; renewed and amended on July 1, 1982), reprinted in 16 I.L.M. 767 [hereinafter original Agreement on Due Diligence].

²¹¹ Aubert, *La convention relative à l'obligation de diligence lors de l'acceptation de fonds et le secret bancaire*, *Der Schweizer Treuhänder*, Mar. 1978, at 40.

²¹² *Journal de Genève*, Sept. 19, 1985. The Swiss National Bank proposed to introduce in the Federal Banking Law some of the provisions of the Agreement on Due Diligence. The Federal Finance Department was willing to introduce in the Federal Banking Law a criminal provision

ter 1987.²¹³ A new Agreement on Due Diligence was therefore signed on July 1, 1987, by and between the Swiss Association of Bankers and the signatory banks.²¹⁴ It came into force on October 1, 1987.

C. *The Original Agreement of 1977 as Amended in 1982*

The purpose of the original Agreement on Due Diligence was to preserve the renown of Switzerland as a financial center and to attack economic criminality by compulsory rules on banking ethics.²¹⁵ These objectives were to be achieved through a strict identification of account-holders, by observing due care in renting safe deposit boxes so that they could not be used for illegal purposes, and by preventing assistance for capital flight and tax evasion.²¹⁶

In order to comply with the original Agreement on Due Diligence the banks had to establish the true identity of the beneficial owner of the deposited assets, whether the holder of the account was an individual, a corporation, foundation, trust or any other entity.²¹⁷ The duty to identify the client was not limited to the person or legal entity opening the account but extended to the true beneficial owner of the assets deposited with the bank and, for so-called domiciliary corporations, to the dominant person.²¹⁸ The same procedure applied for the renting of safe deposit boxes. In addition, proof of identity was required for all teller operations exceeding SFrs. 500,000.²¹⁹

Article 6 of the original Agreement on Due Diligence reserved for the Swiss holders of professional secrecy (principally attorneys and auditors) the right to open bank accounts in their own names but in a fiduciary capacity. Therefore, in such circumstances the names of the clients were not disclosed to the bank. The secrecy-bound persons were however required to sign the "Form B" by which they acknowledged that they knew the client's name and that they were unaware of any intended use of bank secrecy contrary to the original Agreement on Due Diligence.²²⁰ The importance of this provision was considerable as the pro-

punishing the banks found guilty of the violation of not having identified their clients or for having assisted them with the transfer of funds from countries where it is illegal.

²¹³ *Id.* (Interview of Jean-Paul Chappuis, member of the board of directors of the Swiss Bankers' Association).

²¹⁴ Agreement Relating to the Due Diligence to be applied by the banks concluded by and between the Swiss Bankers' Association and the signatory banks on July 1, 1987. [hereinafter new Agreement on Due Diligence].

²¹⁵ Original Agreement on Due Diligence, *supra* note 210, art. 1.

²¹⁶ *Id.* art. 2.

²¹⁷ *Id.* art. 3.

²¹⁸ Implementing Rules of the original Agreement on Due Diligence edicted by the Swiss National Bank and the Swiss Bankers' Association relating to arts. 3, 4, and 5.

²¹⁹ *Id.* art. 3.

²²⁰ Original Agreement on Due Diligence, *supra* note 210, art. 6.

fessional secrecy of an attorney-at-law cannot be lifted even in a criminal procedure.²²¹ This provision has been attacked by the Federal Banking Commission which has found it inadmissible that a client may remain anonymous to his bank by interposing a person bound by professional secrecy.²²²

Finally, by adhering to the original Agreement on Due Diligence the banks agreed not to assist clients with capital flight and to abstain from actively assisting their clients in deceiving Swiss or foreign authorities through incomplete or misleading statements. Compliance with this provision of the original Agreement on Due Diligence was assured by a control effected by the auditing firms which regularly audit the bank.²²³

An Arbitration Committee formed by representatives of the Swiss National Bank and the Swiss Bankers' Association was set up, with the powers to conduct investigations and to impose fines up to SFrs. 10 million upon the bank found guilty of a violation of the original Agreement on Due Diligence.²²⁴

D. Preparation of the New Agreement on Due Diligence

Prior to the expiration date of the original Agreement on Due Diligence, the Federal Banking Commission clearly expressed its views on the construction of the privilege which was reserved to the persons bound by a professional secrecy. According to the Federal Banking Commission,²²⁵ the duty to verify the true identity of the beneficial owner of the assets deposited with a bank is derived from article 3, paragraph 2(c) of the FBL.²²⁶

On that occasion, the Federal Banking Commission respected its previous recommendation²²⁷ according to which in case of a credit relationship with a client a bank has to know who its debtor is in order to evaluate the risks taken.²²⁸ The bank cannot accept the intervention of a person bound by professional secrecy.

The conclusion was that a private agreement, such as the original Agreement on Due Diligence, could not differ from the construction given by the Federal Banking Commission to the FBL. Going one step further, the Federal Banking Commission stated that what was true for a credit relationship should also apply to the deposit of funds, stating that

²²¹ See Federal Law on Criminal Procedure, RS 312.0, art. 77.

²²² 1985 FEDERAL BANKING COMMISSION REP. 23 [hereinafter 1985 BANKING REPORT].

²²³ Original Agreement on Due Diligence, *supra* note 210, art. 12.

²²⁴ *Id.* art. 13.

²²⁵ 1985 BANKING REPORT, *supra* note 222, at 23.

²²⁶ FBL, art. 3, ¶ 2(c) provides that the persons in charge of the direction and management of the banks are to be of good reputation and shall present the guarantee of an irreproachable activity.

²²⁷ Bulletin of the Federal Banking Commission Fascicule, July 15, 1985, at 14.

²²⁸ 1985 BANKING REPORT, *supra* note 222, at 22.

“the banks cannot in all cases be satisfied by a declaration of a person bound by professional secrecy and refuse to identify its clients.”²²⁹

In a neat *non sequitur*, the Federal Banking Commission adopted the view that if, under the FBL, secrecy was subject to federal and cantonal procedural rules regarding the duty to testify, that provision made it a duty for bankers to make their testimony as informative as possible. Thus, if the beneficial owner could stay anonymous towards the bank by interposing a third person bound by professional secrecy, the bankers’ “duty” would be less effective.²³⁰

The Federal Banking Commission’s refusal to accept that persons bound by professional secrecy, such as attorneys-at-law, may act as fiduciaries has been reaffirmed on various occasions, namely in a letter addressed on October 2, 1986, to the President of the Swiss Lawyers Association²³¹ and in the Commission’s annual report for the year 1986.²³²

The Federal Banking Commission reaffirmed that it was not bound by rules of ethics adopted by private parties, and that it “could” require the banks under its supervision to identify the clients represented by attorneys-at-law by means of compulsory regulations edicted by circulars.²³³ The Federal Banking Commission added that while its purpose was not to attack the professional secrecy of attorneys or notaries, it could not accept, and would not tolerate their professional secrecy being used to reinforce bank secrecy in favour of anonymous deposits. Therefore, it announced that unless the exception, at that time provided by the original Agreement on Due Diligence, in favor of the persons bound by professional secrecy was not strictly limited in the future the Commission would bring the case before the Federal Tribunal in order to have the construction of the FBL determined by the Supreme Court.²³⁴

In the opinion of the Federal Banking Commission, the cases in which the intervention of the holder of professional secrecy is admitted are limited to such an extent that the “Form B” becomes of no practical effect.²³⁵ Above all the Federal Banking Commission wants to eliminate the possibility for lawyers and notaries, who benefit from the privilege of

²²⁹ *Id.* at 21.

²³⁰ *Id.* See 109 Ib ATF, *supra* note 47, at 151, ground 2(d).

²³¹ Letter from the Federal Banking Commission to Dr. Felix H. Thomann, president of the Swiss Lawyers’ Association (Oct. 2 1986).

²³² 1986 BANKING REPORT, *supra* note 189, at 124.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 125-26 where the Federal Banking Commission declares that attorneys should invoke their professional secrecy only when they open bank accounts in relation to their specific professional activity. The examples cited are in the course of the partition of an estate, or in the course of arbitration proceedings.

refusing to testify even in criminal proceedings, to sign the "Form B" when their activity involves managing funds on behalf of their clients.²³⁶ The Federal Banking Commission has recently found support for its opinion that the professional secrecy of attorneys and notaries cannot cover the activity of managing clients' funds, in a decision by the Federal Tribunal expressing the same position.²³⁷

E. The New Agreement on Due Diligence

Under pressure from the Federal Banking Commission, the Swiss Association of Bankers prepared the new Agreement on Due Diligence which restates the essential provisions of the original Agreement, reinforcing some points and clarifying others. The most drastic amendment concerns the new conditions under which a person bound by professional secrecy, or the auditors, can open accounts in a fiduciary capacity for their clients, that is, to sign the new "Form B."

According to the new Agreement on Due Diligence,²³⁸ the person bound by professional secrecy and the auditors will have to confirm, in addition to the previous requirements already set forth in the original Agreement²³⁹ (that they know the beneficial owner and certify that there is no abusive recourse to the bank secrecy), that they are acting in the scope of their professional capacity as attorneys and notaries, respectively auditors, that their mandates are not temporary and have not for principal purpose to keep secret the name of the beneficial owner towards the bank.

The new "Form B," to be signed by attorneys and notaries requires them to certify that their mandate is not chiefly for the management of funds. On the contrary, the "Form B" to be signed by auditors expressly requires confirmation that the account is opened with a mandate of managing funds.

The Federal Banking Commission, through its president Mr. Hermann Bodenmann, has declared²⁴⁰ that the Commission will accept that the ethic rules provided by the new Agreement on Due Diligence constitutes the "minimum standard" regarding irreproachable activity. It reserves, however, its rights to prohibit abuses by its edicting circulars.

The new Agreement on Due Diligence entered into force on October 1, 1987; therefore, at this time it is difficult to determine exactly how it will be applied in practice and what measures will effectively be taken by

²³⁶ *Id.* at 126.

²³⁷ *L'avocat Suisse*, No. 110, Sept. 1987, at 12 (Decision of the Federal Tribunal, Dec. 29, 1986) (Swiss Federation of Swiss Lawyers ed. 1987).

²³⁸ New Agreement on Due Diligence, *supra* note 214, art. 5, ¶ 1.

²³⁹ Original Agreement on Due Diligence, *supra* note 210, art. 6.

²⁴⁰ *Journal de Genève*, Apr. 15, 1987 (see interview).

the Federal Banking Commission to ensure that its interpretation of banking diligence is respected. The banks party to the new Agreement on Due Diligence have until September 30, 1988, to mention in their files the identity of the beneficial owners of the accounts and deposits, and of the clients whose names are known *de facto* by the banks although they do not appear officially in the bank records because they are represented by a person bound by a professional secrecy.²⁴¹

In addition, all the presently existing "Form B's" will have to be replaced by new "Form B's" on or before March 31, 1989.²⁴² The Federal Banking Commission will certainly not wait until the end of this transitory period to check whether the new Agreement on Due Diligence is applied in accordance with its principles.

The control of the application of the new Agreement on Due Diligence provisions shall be exercised by the auditing firms which regularly audit the banks; they shall verify the observance of the new Agreement through tests. The auditing firms will have to denounce the violations²⁴³ to the five member supervisory committee instituted by the Swiss Association of Bankers.²⁴⁴

This supervisory committee is empowered to conduct investigations and may impose, in the event of a violation, a fine on the concerned bank up to an amount of SFrs. 10 million.²⁴⁵ An arbitration procedure is provided when the bank refuses to pay the fine.²⁴⁶

F. Other Provisions of the New Agreement on Due Diligence

The new Agreement on Due Diligence obliges the banks to identify a client for teller transaction of SFrs. 100,000,²⁴⁷ whereas previously this obligation was only imposed for cash operation of SFrs. 500,000 or above.

The provisions concerning the prohibition against assisting a client in transferring funds from a country whose legislation limits such transfer,²⁴⁸ and against assisting a client with tax evasion operations by remitting incomplete or misleading statements to deceive foreign authorities²⁴⁹ have been kept in the new Agreement on Due Diligence. Obviously, as in the past, the new Agreement on Due Diligence and the obligations

²⁴¹ New Agreement on Due Diligence, *supra* note 214, art. 15, ¶ 1.

²⁴² *Id.* ¶ 2.

²⁴³ *Id.* art. 10, ¶ 1.

²⁴⁴ *Id.* art. 12, ¶ 1.

²⁴⁵ *Id.* art. 15, ¶ 1.

²⁴⁶ *Id.* art. 13.

²⁴⁷ *Id.* art. 2.

²⁴⁸ *Id.* art. 6.

²⁴⁹ *Id.* art. 7.

contained therein fully apply to numbered accounts.²⁵⁰

G. *Impact of the New Agreement on Due Diligence on Bank Secrecy*

The new Agreement, like the original Agreement on Due Diligence, does not modify the right of confidentiality to which a client is entitled from his bank.²⁵¹ However, due to the obligations binding the banks upon signing the new Agreement on Due Diligence they cannot pretend to ignore factual information which is known to them.²⁵²

Therefore, when the bank secrecy is lifted, the banker who is under the duty to identify the beneficial owner of the account and to know the origin of the funds, will have to reveal the exact position of the account-holder and his identity. For instance, when fiduciary relationships exist between the account-holder and the beneficial owner of the assets deposited, the bank will have to provide information relating to the holder of the account²⁵³ and also information relating to the principal, since the bank has the duty to acknowledge the real relationships existing regarding the assets deposited with it.²⁵⁴ The information which the banker is obliged to know, and may therefore be obliged to disclose under the new Agreement on Due Diligence, will most likely be extended due to the limited cases in which the use of the new "Form B" will be authorized.

VI. CONCLUSIONS

The recent evolution demonstrates that whereas Switzerland is willing to preserve what it considers to be a fundamental principle of its legal order, that is the protection of the private sphere of individuals and corporations, it has decided to provide itself with the means to participate in international cooperation.

By entering into bilateral and multilateral agreements and by promulgating internal rules on international assistance, Switzerland can answer positively to legitimate foreign requests for assistance without having to waive the principles it finds essential. This attitude is dictated by the necessity to protect Switzerland's renown as a financial place which may, in the long run, be damaged by continuous criticism of its institutions and, in particular, of the bank secrecy which has often been construed abroad as essentially granting protection and anonymity to the holder of assets acquired illegally.

²⁵⁰ *Id.* art. 8.

²⁵¹ AUBERT, KERNEN & SCHÖNLE, *supra* note 9, at 188.

²⁵² *Id.* at 192.

²⁵³ 1982 II JT, *supra* note 12, at 80. 1971 JT, *supra* note 12, at 342 (where the Federal Tribunal has held that the fiduciary agent should be considered as the real owner).

²⁵⁴ 1937 II JT, *supra* note 12, at 87, 90; 1972 II JT, *supra* note 12, at 27 (where the Federal Court held that the use of fiduciary relationships should not be permitted to hide assets).

However, it is to be hoped that Switzerland will not go too far in its willingness to please foreign countries and will effectively acquire the respect for the aforementioned principles. Despite the continuous assurances given to the Swiss community by the political powers, it should be noted that Mrs. Elisabeth Kopp, Swiss Minister of Justice, has declared that all the requests for assistance presented by the United States in 1987 were accepted.²⁵⁵

²⁵⁵ *Neue Zürcher Zeitung*, Nov. 11, 1987.

