REGENTS' LECTURES

Comments on Switzerland's Insider Trading, Money Laundering, and Banking Secrecy Laws

by
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Insider Trading
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I. INTRODUCTION

The new Insider Bill of Switzerland1 ("Insider Bill" or "Bill") was drafted in May of 1985. It entered into force on July 1, 1988, and was accepted by our Parliament basically in the form in which it was proposed.

Until today, about two years later, the Swiss authorities have had only two cases interpreting the Bill. However, various international insider trading actions have arisen and have been dealt with under the auspices of our Insider Bill. Moreover, while we have had only two Swiss cases dealing with the Bill, experts have not failed to think and write about it. It is thus important that I discuss the Swiss legislator's will and expose to this international audience the basis of our two year-old Insider Bill.

I discuss the Swiss Bill not merely because I am Swiss. The real reasons are that (1) the Swiss Bill has become a model for European legislation—you will find the same definitions, you will find the same scope in the Council of Europe's Convention; and (2) our Swiss law is very often applied because many U.S. cases involve Swiss banks, and then Swiss law will apply. (Fortunately we can apply it because we now have a law). This does not mean that Swiss banks are less serious than other banks about insider trading, but about

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thirty percent of all foreign investment/securities pass through Swiss banks, and there is some misuse of our banking system. A banking system like ours, which is founded on privacy, is unfortunately attractive to insider traders.

In the remainder of this lecture, I will set out the text of the Insider Bill, I will discuss its purposes, and I will examine the significant provisions of the Bill. I will conclude by offering some comments on the effect of the Bill on insider trading.

II.
DISCUSSION

A. The New Insider Bill

The new article 161 of the Swiss Penal Code proposed by the Bill reads as follows:

(1) A person who, in his capacity as a member of the board, an officer, an auditor, or a mandated person of a company or of a corporation dominating this company or dominated by it, in his capacity as a member of a public authority or as a public officer, or in his capacity as an assistant to such persons, obtains for himself or a third party a pecuniary advantage through the exploitation of a confidential fact whose disclosure can be anticipated to have significant influence on the market price of the shares, other securities or negotiable instruments or interests of the company, or on the market price of options thereof, traded on or ancillary to any Swiss stock exchange, shall be punished by imprisonment or by a fine.

(2) A person to whom such a fact is communicated directly or indirectly by any person described in subsection (1), and who obtains for himself or a third party a pecuniary advantage through the exploitation of this information, shall be punished by imprisonment for not over year or by a fine.

(3) As a fact within the meaning of subsections (1) and (2) is considered an imminent issue of new profit sharing rights, a combination of companies, or similar circumstances of comparable importance.

(4) When it is envisaged to bring together two corporations, subsections (1) and (3) apply to both corporations.

(5) Subsections (1) through (4) apply by analogy when the exploitation of the knowledge of a confidential fact relates to shares, other securities, or negotiable instruments or interests, or options thereof, of a cooperative corporation or of a foreign company.2

The Bill serves a double purpose. First of all, it fills a striking gap in the Swiss Penal Code. Article 162 of our Penal Code, which involves violations of business secrecy, already covers the insider who passes confidential information to a tippee and the tippee who uses (misuses) this information. But the insider who uses the information for himself was not covered. The new Insider Bill covers such persons.

2. Id.
Second, the Bill is designed to facilitate international assistance. Thus, the Bill aids our national mutual assistance laws and the Mutual Assistance Treaty with the United States ("Treaty").

I have four particular points to discuss regarding our Insider Bill: the conduct that it prohibits, the categories of persons it includes, the transaction it covers, and the securities it subjects to regulation. I will discuss each of these points in turn.

1. **Proscribed Conduct**

The first point I want to examine is the conduct proscribed by the Insider Bill. Under the Swiss Bill, a condition of a violation is that the violator "knows a confidential fact whose disclosure can be anticipated to have a significant influence on the market price" of the securities covered by article 161. Thus, two conditions must be fulfilled.

The first condition is that the person know or should know that he is going to misuse confidential information. The Message by the Swiss Government to the Parliament ("Message") explains the wording of the provision by insisting on this knowledge requirement.

The second condition is that the fact must be confidential—it must be a confidential fact. As examples of facts covered by the Bill, the Message cites, inter alia, (a) plans for any type of combination of companies, (b) issues of profit-sharing rights or bonds, (c) real estate, business, or other important transactions of a corporation, or (d) that significant losses are expected in the near future.

This second condition has posed, from time to time, great difficulties. First of all, what exactly is a fact? Neither the Bill nor the Message gives a precise definition of a "confidential fact." We cannot simply enumerate these facts, for whenever there would be a new fact which is not mentioned in the Bill, the Bill would have to be amended to include this development. Instead, we define a "fact" as it relates to the concerns of the Swiss and European legislation. For instance, any type of combination of companies is a fact in the sense of our criminal laws. Issues of profit-sharing rights or bonds is another fact covered by the laws. Real estate business or other important transactions of a corporation is, a priori, considered as a fact subject to our laws. And, of course, the probability of significant losses in case of a future bankruptcy is considered a fact.

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3. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019. Mutual assistance, as its name suggests, is the process by which two or more countries cooperate in the exchange of information in order to aid in the criminal, civil, or administrative efforts of the respective nations.

4. BB art. 161.


6. *Id.*
A second problem exists, however. Neither in the United States, if we examine your law, nor in the convention of Europe, do we have any definition of confidential. What is confidential? We considered defining confidential in the Bill, but decided not to. We felt that it was not possible to get a properly-worded definition of confidential in the Penal Code. First of all, whenever you make an international convention or bilateral agreement, whenever you try to make something that is multinational or transnational, it becomes impossible to give definitions for every word in the convention or agreement. So, we decided to leave this question to the national law and the national courts. Thus, Germany, Austria, Spain, Switzerland, and all the European countries, should interpret the term confidential for themselves.

Moreover, it is difficult to define "confidential" because of the many different factual contexts that arise with respect to insider trading. A case example is illustrative. Recently, there was an important invention by a company producing pharmaceutical products and a specialized magazine wrote about this invention. So those who had read this specialized magazine knew there was a significant invention that would likely increase the price of the pharmacy company's securities. And when it became publicly known what this company had found, the price rose. There were insiders who bought a lot of securities in the time between the certification that the invention was a success and public knowledge of that invention. But in between, the specialized magazine had published the article about this invention and, indeed, the persons accused as insiders argued that it was not confidential. Is this a case of insider trading or not? My personal opinion is that there was not any insider trading. We will have to wait and see what the court holds, as this is an actual case. In any event, we can see the problems. I just demonstrated how difficult it is to find a definition of confidential. That is the reason why we did not try to make a definition in the law, because you cannot properly define the term. It is impossible. Despite these difficulties, we have nevertheless given in the Message and elsewhere some explanations as to what could be considered as confidential. For example, it is clear that it is the intention of the Swiss Government and drafters of the Bill that information is no longer confidential if it is made public. But what is "public?" Is it public whenever something is published in a specialized magazine? There are no specific statutory guidelines to this term, nor are there any obvious extrinsic aids to interpreting this term.

While there is no clear-cut definition, the tendency has been to require that to be public, information must be both widely-known and reliable. For instance, in the context of business secrecy, the Swiss Supreme Court defines a "secret" as any information that is neither public knowledge nor easily accessible. According to that definition, then, the disclosure of the invention in a specialized magazine would probably not put an end to its secret character.
Since one of the important goals of article 161 is to protect the public confidence in the Swiss securities markets, Swiss courts may adopt this interpretation of confidential in an attempt to prevent more insider trading.

Thus, when all the conditions are fulfilled, article 161 prohibits a broad range of acts. For insiders, the persons listed in article 161(1), it is forbidden to obtain a pecuniary advantage for themselves or third parties. They are forbidden to use their knowledge, a privileged knowledge, to their own advantage. The term "pecuniary advantage" is intended to cover losses avoided as well as profits gained. For example, where the market price of the security does not react as expected to the public disclosure of the news, the author is still guilty of an attempt to commit the offense.

In addition, it matters little that the insiders obtain—or try to obtain—the advantage for a third person and not for themselves. The disclosure of their knowledge to anyone is forbidden. Otherwise, the prohibition could too easily be avoided, for instance, by an insider who would transfer the advantage to members of his family.

The same rules apply to tippees, however, with an apparent restriction. Contrary to section 1, section 2 of the article does not, by its terms, prohibit tippees from passing the "tip" on to other persons. The Message suggests, however, that the basic prohibitions of article 161 are the same, whether the person involved is an insider or his tippee. Moreover, since article 161(2) clearly bans indirect tippees from trading, it cannot logically allow direct tippees to tip.

To sum up, the Swiss Bill provides for a broad prohibition of trading and tipping. Questions do arise, however, with respect to which tippers and tippees are covered. It is to these questions that I now turn.

2. Persons Covered by the Bill

I come now to the second part of the Insider Bill, the persons covered by the new Bill. The new article 161 tries to be most exact in defining who it covers. This exactitude is not only useful, but necessary. The basic criminal law principle, stated in article 1 of the Swiss Penal Code, declares that there can be no crime or punishment unless expressly provided for. In fact, not only the Swiss Penal Code, but all of the penal codes of continental Europe, dictate that there can not be any crime or any punishment unless expressly provided for. That is a general civil law rule. This rule means that only the persons mentioned in article 161 can be guilty of insider trading under the Bill. There is not any room for further interpretation. If he is not expressly mentioned in the Bill, he is not an insider under our insider laws.

7. Id.
8. Schweizerisches Strafgesetzbuch [StGB] art. 1 (Switz.).
I would like, now, to consider the particular persons mentioned in the Bill. Specifically, I would like to focus on the liability of four classes of persons: (a) classic insiders and their assistants, (b) tippers and tippees, (c) public officials, and (d) outsiders.

(a) Classic Insiders and Assistants

The Swiss Bill expressly applies to several groups of persons who can be categorized as "classic" insiders or their assistants: members of the board of directors of a company, auditors or other "mandated" persons, members of a public authority, public officers, and assistants of such persons. In drafting the Bill, we knew that in enumerating the classical insiders in subsection 1 we would not reach everybody who has access to privileged information. This is true because others work closely with classical insiders. We tried in Switzerland to get these people into the frame of our law in our second paragraph of subsection 1, by saying "or in this capacity as an assistant to such persons in the sense of the first paragraph."  

Now this phrase is very interesting. We used it, in part, because the concept of "assistant" is known elsewhere in our Penal Code. Used here, the term assistant covers all persons who work with classical insiders, such as secretaries or receptionists. In fact, all employees of the corporation are probably covered by article 161, whether or not they have an executive title, as long as they have access to inside information in their job. Thus, the term "assistant" is quite broad.

(b) Tippers and Tippees

Under the Insider Bill a tipper is subject to punishment if he or she receives a direct or indirect personal benefit from the disclosure. This benefit can be a financial one, but it can also materialize by way of future earnings. The "personal benefit" concept seems to me to be even more broad, however, since it could conceivably cover even a gift of confidential information to a trading relative or a friend. Moreover, according to article 161, the tipper is equally liable when only the tippee (and not the tipper) gains a pecuniary advantage.

This, too, is why we used the word assistant, because we have other laws where we speak about assistants and we can therefore get an interpretation of assistant without any difficulty. Generally, assistants are people working closely with the persons mentioned in subsection 1 of article 161.

As far as tippees are concerned, the Swiss Bill covers them in subsection 2 of the article. The tippee is liable under article 161(2) for insider trading only when the tipper has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee "knows or should

9. BB art. 161(1).
know" that there has been such a breach.\textsuperscript{10} In other words, the law requires that the tippee know or should know that the confidential information has been, from the outset, wrongly disclosed by an insider. If that condition is met, either an indirect or a direct tippee will be liable under the Bill.

(c) Public Officials

The Swiss Bill deals specifically with members of a public authority and public officers. Underlying the inclusion of these categories in the Bill is the idea that such officials should be held liable if they misuse confidential information obtained in their official capacity.

Suppose you are an agent of the tax administration or of the Securities and Exchange Commission ("SEC"), for example. By your occupation as a tax agent or inspector, you will have control of records, deposit books, and the like. If you get information there which might be inside information and you use (actually misuse) this information, you are liable under the Bill. Thus, the idea is basically the same as the assistants idea, though we felt it sufficiently important to speak directly of public officers.

(d) Outsiders (not acting on tips)

The classic case of trading by a non-insider (not based on tips) is trading in the target company by insiders of the bidder. In the Bill, article 161(4) settles this "tender offer problem" by preventing all insiders—of both the target and bidding companies—from trading and tipping.

On the other hand, under the Bill, the outsider who obtains the information by his own means, like an investment adviser who "does his homework," is clearly not liable. These outsiders and those others who have acquired information accidentally (with no knowledge) are not covered by the Insider Bill.

Thus, the Bill draws a careful line between many different categories of persons. In the end, the Bill covers some, but not all, persons using inside information. I turn now to the question of what it is to be "using" this information. In other words, let us ask: "What forms of dealings are covered by the Bill?"

3. Transactions Covered by the Bill

Article 161 only covers securities "traded on or ancillary to any Swiss stock exchange."\textsuperscript{11} This means that face-to-face transactions are not covered by the Insider Bill. They are, however, subject to other regulations of the Swiss Penal Code. In particular, such transactions may constitute fraud under article 148 of the Penal Code.\textsuperscript{12}

\textsuperscript{10} BB art. 161(2).
\textsuperscript{11} BB art. 161(1).
\textsuperscript{12} StGB art. 148.
The Swiss Bill includes securities traded either on a regular market or by way of pre-market trading. It excludes, however, over-the-counter trading. This exclusion is made clear in the Message.\textsuperscript{13} I believe, however, that it will be impossible for the courts to establish the difference between the continuously and regularly-traded stocks and those traded over-the-counter.

Despite this exclusion, on the whole the Bill should not be interpreted too narrowly. This is particularly true when one considers the relationship of the Bill to international transactions. Thus, the Message emphasizes that foreign, well-organized, over-the-counter markets could be considered as "ancillary" to the Swiss exchanges and thus fall under the auspices of the Bill.\textsuperscript{14} In this particular context, the Message expressly obligates Swiss authorities to consider the specificity of foreign markets in making this determination and to freely grant mutual assistance in strictly penal matters.

4. Securities Covered by the Bill

Finally, I would like to examine the types of securities covered by the Insider Bill. By its terms, the Bill covers "shares, other securities or equivalent negotiable instruments or interests . . .[or] the market price of options thereof."\textsuperscript{15} The meaning of each of these phrases needs to be unpacked before one can understand the full impact of the Bill.

While the meaning of "shares" under the Bill is obvious, the "other securities" mentioned in article 161 is less so. In interpreting this and the other phrases, one should follow a practical approach in order to serve both Swiss and international needs. Thus, the term "other securities" should include, among other things, participation certificates, dividend-right certificates, bonds, and investment trust shares. These securities are commonly traded in Switzerland and should be covered by the Bill whether or not they constitute true "securities" ("papier-valeurs").

Perhaps more importantly the phrase "equivalent negotiable instruments or interests" ("effets comptables correspondants") is designed to take into account future developments in the Swiss and ancillary markets. As the Message states, this flexible concept is intended to cover trading on rights or interests, in other words, "certificate-less" securities, that are already traded in other countries.\textsuperscript{16}

To sum up, article 161 applies to all types of securities, whether domestic or foreign, that are traded or might be traded in Switzerland. As a practical matter, such a flexible definition will probably preclude any refusal of international assistance. Even if a particular type of securities is not currently quoted on a Swiss exchange, a Swiss court could and should rule, at the very

\textsuperscript{13} Message, \textit{supra} note 5, at 84 n.1, no. 24.
\textsuperscript{14} \textit{Id.} at 85 n.1, no. 24.
\textsuperscript{15} BB art. 161(1).
\textsuperscript{16} Message, \textit{supra} note 5, at 84 n.1, no. 24.
least, that this technical failing does not affect the applicability of the Insider Bill.

III.

CONCLUSION

One can reasonably argue that most of the insider trading cases that may be prosecuted in American criminal and SEC administrative proceedings are covered by the Swiss Bill. In particular, insider trading in connection with impending mergers and tender offers, which has been a widespread problem, is adequately addressed by the provisions of article 161 covering affiliates. The Swiss Bill, however, goes beyond this basic situation. The Bill is not limited to corporate combinations, i.e., mergers or acquisitions, but also applies to other cases where material nonpublic information is misused. As we have seen, the persons covered by article 161 include accountants, lawyers, and investment bankers, as well as classic insiders.

In my view, the new Bill is undoubtedly better than the previous legal regime. As I have already pointed out, the Bill is broader in scope than previous law. But perhaps even more importantly, the new Swiss legislation confirms the Swiss willingness to grant international assistance in insider trading. Let me end my discussion by adding a few words about this fact and the notion that the bill could be some sort of a *lex americana*.

It is true that the United States exerted pressure on Switzerland to introduce insider legislation. I believe it is not entirely improper for the United States to use her influence, at times, in order to protect her interests. But let me assure you that the only influence the United States had on Swiss authorities in this case was to induce us to accelerate our efforts on the Bill. Thus, American influence was only felt on timing. Substantively, the United States had no real influence on the Bill. While our law interacts well with international and, in particular, American law, the Swiss Bill was nonetheless really "made in Switzerland." As I have shown you, the Bill is based on past Swiss legislation, on Swiss ideals and goals, and on Swiss tradition.

We have found a common solution to the difficult problem of insider trading and the relationship between Switzerland and the United States is thriving. In fact, there are other common problems that we have tried to address. One such problem is our next subject, international money laundering. I am looking forward to speaking to you next about our efforts concerning money laundering and organized crime. I will demonstrate how good the relationship between the United States and Switzerland is in this area as well.

17. BB art. 161(1).
Money Laundering
(October 24, 1990)

I.
INTRODUCTION

Money laundering is the only aim of drug trafficking. The drug traffickers are acting exclusively in order to make money; "laundering" is the way to turn the illegal money (illegal as the product of a crime) into legal money by undertaking different transactions. Such transactions involve banks, financial institutions, companies, insurance groups, and even law firms. These transactions can be done by innocent persons in good faith. Money laundering is, therefore, in simple and popular language, the action of drug traffickers in order to conceal the illegal origin of money or other assets.

But money laundering is not limited to drug traffickers. All sorts of criminals, from counterfeiters to swindlers, from bank robbers to gamblers, engage in money laundering. So, too, criminal groups are often involved in laundering. It is just recently that the bulk of laundering activity has involved drug traffickers.

The rest of this lecture will discuss the different theories and proposals concerning money laundering. First, I will discuss with you the several definitions that are theoretically possible for "money laundering." I will then outline the Swiss Money Laundering Act (the "Act") and discuss its more salient features. I will conclude by offering some general ideas on money laundering in the international community.

II.
DISCUSSION

A. The Theoretical Possibilities for a Practicable Legislative Definition of Money Laundering

The questions here involve what has to be protected and how to achieve this protection. From the point of drafting workable legislation, I believe that the following four methods of defining "money laundering" could be adopted:

(1) Money laundering can be defined simply as a product of drug trafficking. This method creates a direct link between money laundering and drug trafficking. This is the basic philosophy of France and the United Kingdom.

(2) Money laundering can alternately be seen as a product of various crimes, including, but not limited to, drug trafficking. Such a definition could (and perhaps should) include an enumeration of special crimes like counterfeiting, robbery, extortion, and terrorism. In this way the United States, for example, tries to combat money laundering.

(3) A third method would be to make money laundering a crime, not in the context of drug trafficking or enumerated, special crimes, but as a result
of money laundering itself. In other words, whoever deals with money or other assets that he knows or must assume are the product of a crime meets the legal definition. This is the main thrust of the Swiss Act, which I will discuss in detail below.

(4) A fourth possibility—and for me the best one—is to include as money laundering any action by which somebody acquires, keeps, and/or maintains money or other assets that he knows or should know belongs to a criminal organization. Money laundering is one of the most frequent activities of and impetus for criminal organizations. This method of legislation recognizes this important fact. Moreover, other advantages of this more inclusive approach are that the authorities need not prove that the money is the result of a crime, and that such a definition covers both legal and illegal assets belonging to a criminal organization. The Swiss Act, in part, follows this approach.

B. The Swiss Money Laundering Act

This act came into force August 1, 1990. It includes two new articles of the Swiss Penal Code (articles 305bis and 305ter) which prohibit money laundering. The Act provides that:

(1) Whoever commits an act designed to obstruct the establishment of provenance, the discovery or the confiscation of assets which he knows, or must assume, to be derived from a crime will be punished with imprisonment or a fine.

(2) In serious cases the punishment will be penal servitude up to five years or a prison sentence. The sentence will be combined with a fine of up to one million Swiss Francs. A case is considered serious in particular if the offender:
   (a) acts as a member of a criminal organization;
   (b) acts as a member of a gang which was formed for the purpose of continual money laundering;
   (c) acts as a professional money launderer, thereby producing a large turnover or substantial profit.

(3) The offender will also be punished if the principal offense was committed abroad in a jurisdiction where it is also punishable by law.\(^\text{18}\)

A related proposal, article 305ter, addresses the lack of due diligence in handling assets. The article provides that:

Whoever accepts, deposits, helps to invest or to transfer assets of a third party on a professional basis and fails to verify the identity of the beneficial owner with the diligence that can reasonably be expected under the circumstances will be punished with imprisonment up to one year, detention, or a fine.\(^\text{19}\)

In the remainder of this lecture I will discuss some of the more salient features of this legislation. In particular, I will touch on who is a money launderer under the Act, what objective elements are required by the legislation, and what are the subjective elements of the offense. I will also discuss the purposes behind the qualified offense in article 305bis(2) and the lack of

\(^{18}\) STGB art. 305bis.
\(^{19}\) STGB art. 305ter.
due diligence offense of article 305ter. I will then conclude by offering some
genral comments on international money laundering.

1. Who is a Money Launderer?

Under the Act, a money launderer is any person who acts with the intent
to avoid the seizure or discovery of money or other assets that are the product
of a crime. The Act, therefore, is not directly concerned with the property or
proprietary interests of the owner as is the case with the crime of receiving
stolen property.

2. The Objective Elements of the Offense

The main requisite of the crime is either money or other assets that are
liable to be seized by the authorities. The conduct prohibited by the Act is
that which aims to impede the penal seizure of the money or assets. There
are various specific acts by which one can attempt to conceal the origin of ill-
gotten gain, whether money or assets. For example, a money launderer may
have money changed from one currency into another or into other forms of
legal tender. He may secretly transport the money or assets. Or he may have
recourse to short term investments as a way of laundering the money.

Still, traces of the unlawful origin of the money or assets can usually be
found indirectly. For instance, the authorities may discover the origin of the
money or assets by means of the place and date (where and when) a payment
has been booked, or by the amount of the money or the kind of legal tender.
This is why a money launderer often tries to disassociate the object of his or
her act as far as possible from the person having acquired it by way of the
crime.

Money laundering is punishable irrespective of whether the perpetrator
is successful. In fact, the notion of “designed” in the Act\(^\text{20}\) is a neutral one.
It can even include an omission by the launderer.

By definition, money laundering presupposes another offense which I
will call the “main offense.” In my view, money laundering should not be
prosecuted if the main offense is minor. The range of the punishable offenses
for money laundering should be limited to the most dangerous forms of crim-
ninality. Following this reasoning, the Act requires that the main offense be a
“crime.”\(^\text{21}\) In Swiss Law, “crimes” are found in article 9 of the Penal Code\(^\text{22}\)
and only include relatively major offenses. Most frequently, the main offense
or crime will be robbery, extortion, drug trafficking, or counterfeiting.

\(^{20}\) StGB art. 305bis(1).
\(^{21}\) Id.
\(^{22}\) StGB art. 9.
3. **Subjective Elements of the Offense**

Money laundering, in its basic form, presupposes acting with intent. Thus, the Act requires that the launderer "knows[] or must assume"\(^2\) that what he or she is doing is money laundering. This general intent requirement separates guilty from innocent parties who act reasonably but are nonetheless duped by a money launderer.

The Act also requires a more specific form of intent: the offense links the knowledge of the launderer with the identity between the object of money laundering and the material elements of the main offense. In other words, the launderer must know that he is trying to conceal something that was the product of a crime! Thus, both general and specific intent are required by the Act.

4. **The "Qualified Offense" of Article 305bis(2)**

Article 305bis(2)\(^2\) establishes a "qualified offense" with respect to money laundering. Such a qualified offense appears to be necessary because practical experience shows that money laundering is very often carried out by gangs or on a professional basis. Thus, money laundering involves the correspondingly high profits that often accompany collective action. It is, therefore, important to single out the cases that are enumerated as examples in the above article.

5. **The Lack of Due Diligence Offense of Article 305ter**

In my view, penal law ought to include, as money laundering, similar acts undertaken without the requisite knowledge but with gross negligence. The "lack of due diligence offense"\(^2\) embodies this concept. Why did we include gross negligence and not simple negligence? The basic idea is that, for most of the professions concerned, rules of conduct have been set up that determine the measure of diligence a member of the profession has to observe. This simultaneously means two things: (1) such professionals are on notice of what conduct is to be expected and it is thus not unfair to hold them to that standard, but also (2) that some independent sanction already exists against them. Since these facts are true, and in order to not extend punishment too much, only cases of gross negligence are included, and simple negligence is excluded.

When Switzerland adopted this Act it became the first (and the only) country that had a gross negligence standard in its money laundering laws. And, while we have in the Swiss Money Laundering Acts the only gross negligence standard, it is not completely unique. While in the United States the legislation on money laundering covers only acts undertaken with "scienter"

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23. *Id.* art. 305bis(1).
24. *Id.* art. 305bis(2).
25. *Id.* art. 305ter.
or intent, let us not forget the American legislation that supports your money laundering laws. For example, reports required in the United States on domestic coins and currency transactions, the new American anti-drug Act, the American definition of "conspiracy," and several other American laws and regulations all embody a gross negligence concept or its equivalent. Thus, the Swiss Money Laundering Act, while unique in this field, is not completely without precedent.

III.

CONCLUSION

To sum up, the Swiss Money Laundering Act is an important effort at stopping the laundering of illegal proceeds, but it is just a beginning. These provisions, articles 305bis and 305ter, are first steps. There will be other steps in the future, and when other provisions are drafted, we will have a comprehensive legislative solution to the problem of money laundering. I will conclude by outlining some of these future steps.

One step will be to establish an obligation to declare money and assets in excess of 100,000 Swiss francs or its equivalent that is brought in or out of Switzerland. This will make the legislation similar to U.S. legislation. It will help to trace funds that are the products of illegal activities.

Another step is special legislation concerning criminal organizations. We will need to define criminal organizations, and to say that the fact that a person is a member of this organization, or is keeping money or other assets for this organization, or is working or assisting this organization, is criminal. Due to the increasingly collective nature of international crime, this step could be quite significant in combatting money laundering.

An additional step is to institute criminal proceedings against a company whose business activity consists of committing crimes, such as the concealment of money or assets from a crime, or a corporation that was formed specifically to launder money. Use of the corporate form often enables launderers to evade detection and this legislation would correspondingly "raise the stakes" of such a maneuver.

A final step may involve a change in banking laws to allow a banker to cooperate more fully with Swiss and foreign authorities. In the United States, bank officials are obligated to cooperate with the authorities in pursuing money launderers. Swiss bankers, however, are not normally permitted to cooperate. The next lecture deals specifically with this topic, that is, mutual assistance and Swiss banking secrecy.
Almost every week an international criminal case hits the headlines of our newspapers: a drug trafficker’s ring, a multimillion dollar insider fraud, a dishonest former head of state, a terrorist attack, or an export of chemical weapons. We all read about them, know the cases, and often wonder how far criminals will go today. In particular, the scope of international drug trafficking is immense. Recent sources estimate an annual revenue of ten billion dollars to organized drug rings. The same sources believe that two billion dollars are spent by these criminals in order to bribe police and other authorities. The turnover of international drug trafficking is estimated to reach 125 billion dollars. Organized crime has become an economic power! Being organized internationally, this crime can no longer be fought on national levels. It must be fought internationally. International cooperation and, in particular, international mutual assistance efforts, have thus become of paramount importance.

However, there still are many difficulties with efforts at mutual assistance. First, there are fundamental differences between continental European law and Anglo-Saxon common law. Common law theorizes that criminal proceedings are a pure process undertaken by two equal parties. The Americans are even proud of the fact that their system does not have investigating magistrates. In the American system, representatives of the state and of the defense confront each other on an equal basis. The taking of evidence may be done at any time by either party. Only if coercive measures are necessary to prod a recalcitrant party does the court become directly involved.

The Swiss system, drawn from civil law origins, differs dramatically in its approach to these issues. Under the Swiss model, the gathering of evidence is always an official act to be undertaken by the proper authorities. Also, plea bargaining does not fit neatly into the Swiss notion of the “rule of law” (“Rechtstaatlichkeit”). Finally, there are important differences concerning the rating of the severity of certain acts. Specifically, the two systems often clash over the severity of monetary crimes. These differences make mutual assistance difficult between the United States and Switzerland.

In the remainder of the lecture, I will address both mutual assistance in general and assistance as related to banking crimes and Swiss banking secrecy. First, I will discuss the origins of international efforts at mutual assistance and special provisions involving organized crime. Then I will examine the Swiss system of banking secrecy and its relation to mutual assistance. I will conclude the lecture by offering some general comments on the future of international mutual assistance and banking secrecy.
II.

DISCUSSION

A. Mutual Assistance

1. The Origins of Mutual Assistance

Historically, extradition has always been the main focus of international cooperation and assistance. It is still the most spectacular element of mutual assistance, which also involves other elements, such as transfer of proceedings and prisoner exchanges. Interestingly, extradition was originally regarded as a neutral form of foreign policy and mainly involved the extradition of political offenders, adventurers, or opponents back to the requesting state. Similarly, the opposite of extradition, political asylum, was regarded as an additional means of foreign policy. Remnants of these ideas can be found today in many countries, whose governments may deny extraditions or other forms of cooperation for political reasons.

Thus, mutual assistance was originally regarded as merely involving extradition. Only after World War II did mutual assistance evolve into a separate field of international cooperation. The Treaty between Switzerland and the United States in 1973\footnote{See note 3, \textit{supra}.} and a Swiss Law on Mutual Assistance in Criminal Matters in 1981\footnote{Federal Act of International Mutual Assistance in Criminal Matters of the 20th of March, 1981.} are some examples of this evolution.

Today, mutual assistance has become more important than extradition in total cases as well as in the effect of specific cases. The reason for this may be found in the continually expanding globalization of trade and markets of all types, including the illegal markets for drugs, weapons, and dubious money transactions. As much of this trade is undertaken by organized groups, mutual assistance efforts often involve special provisions against organized crime. It is to these provisions to which I now turn.

2. Mutual Assistance and Organized Crime

Organized crime is the most significant point at which mutual assistance steps in. Swiss authorities have long realized that close international cooperation is necessary in order to succeed against organized crime. For example, when Switzerland began negotiations with the United States on the Treaty, we were the first nation of continental Europe to undertake such a venture. Moreover, the Treaty was unique because it contained a complete chapter of provisions dealing only with organized crime.\footnote{Treaty, \textit{supra} note 3, at 2031-34.} The parties of the Treaty agreed to assist each other in the fight against organized crime with all the means at their disposal. Under the Treaty, compulsory measures may even be utilized in order to produce evidence concerning acts not punishable under
Swiss law. This Treaty has been a model for other agreements and remains significant today.

A great number of American requests under the Treaty and other applicable mutual assistance laws deal with the lifting of Swiss banking secrecy. As many myths surround this topic, it is important to take a close look at what banking secrecy in Switzerland is all about. In the remainder of this lecture, I will examine banking secrecy in Switzerland. First, I will discuss the substantive bases for Swiss banking secrecy. Next, I will discuss the exceptions under which banking secrecy is lifted. Finally, I will comment on the future of banking secrecy and mutual assistance.

B. Swiss Banking Secrecy

The worldwide myth that Swiss banking secrecy is as impregnable as the Pope is not justified. There are a number of cases when banking secrets can be disclosed. I shall come back to these cases. First, I want to outline the history of Switzerland’s banking secrecy and point out what banking secrecy really means in Switzerland.

1. The Origin of Swiss Banking Secrecy

The Swiss banking secrecy regime can be viewed merely as a part, albeit a significant part, of our historic tradition of protecting all secrets. Our Swiss law expresses a general commitment to the preservation and protection of the individual’s right of privacy. This right of privacy is viewed as encompassing economic as well as purely personal affairs. Thus, Swiss concepts of personal property extend not only to such personal matters as relationships with physicians and lawyers, but also to personal economic affairs, such as relationships with bankers. The formal adoption of article 47 of the Swiss Banking Act in 1934\textsuperscript{29} and adoption of the predecessor of Swiss Penal Code article 273 in 1935,\textsuperscript{30} both of which I will discuss shortly, emphasized the importance of these privacy rights by providing criminal sanctions for privacy violations.

Both of these provisions were also adopted in order to protect individuals against the efforts of neighboring countries, particularly Nazi Germany, at finding out information which could be used against their own citizens and Swiss residents. It is important to remember that at the time the Banking Act was adopted, 1934, foreign nations were attempting to confiscate Jewish property. Foreign agents were sent into Switzerland to find bank accounts of Jews and other dissidents. Therefore, the Swiss banking secrecy laws must also be understood against this horrible historical background.

\textsuperscript{29} Schweizerisches Bankengesetz [BANKG] art. 47 (Switz.).
\textsuperscript{30} The current citation is StGB art. 273.
2. The Substantive Bases of Swiss Banking Secrecy

(a) Article 47 of the Swiss Banking Act

Article 47 of the Swiss Banking Act provides severe penal sanctions for employees or agents of a bank who disclose a secret of a customer without the customer's consent or without a decision order disclosure by a Swiss cantonal or federal authority. The English translation of article 47 reads as follows:

(1) Anyone who, in his capacity as an officer or employee of a bank, or as an auditor or his employee, or as a member of the Banking Commission of as an officer or employee of its Board, violates his duty of confidentiality or his professional rule of conduct of confidentiality, or anyone who induces or attempts to induce a person to commit any such offense, shall be subject to a fine of up to 50,000 Swiss francs or to imprisonment for up to six months.

(2) If an offender of section (1) acted negligently, he shall be subject to a fine of up to 30,000 Swiss francs.

(3) The violation of the obligation of confidentiality remains punishable even after the assignment or employment of the violator has terminated, or where the person charged with the obligation of confidentiality no longer engages in his profession.

(4) The provisions of federal and cantonal law providing for the obligation to report to the authorities and to give evidence in legal proceedings are reserved. 31

Under article 47, therefore, the banker's duty of confidentiality is defined very broadly. The duty includes confidentiality of the customer's name; the fact of the banker's relationship with the customer; the type of account and transactions; any information given by the customer concerning his financial situation, including his relationship with other banks; and any information concerning the bank's own transactions with the customer.

It is also clear that article 47 protects the privacy interests of any bank customer, whether or not he is a Swiss citizen or resident. In addition, article 47 is an ex officio offense, which means that prosecution may take place without there being a complaint filed by an injured party. The ex officio nature of the offense indicates the broad purpose of the statute, which is the protection of banking secrecy against any kind of intrusion. So, too, the seriousness of purpose is reinforced by the fact that article 47 provides that even negligent disclosures are punishable.

Secret information required by foreign authorities generally falls within the scope of article 47. Thus, bank officials would have to violate the Swiss Banking Act and be subject to prosecution in order to disclose the information requested, unless they first obtain customer consent or an official order requiring disclosure. The matters of customer consent and official requirement of disclosure are discussed later in this lecture. Before turning to these exceptions to the general rule of confidentiality, I will first examine other substantive bases of Swiss banking secrecy.

31. Bankg art. 47.
(b) Article 273: Economic Information in the Interest of a Foreign Country

Disclosure of confidential information could also involve the provisions of article 273 of the Swiss Penal Code, which makes it a crime for anyone to make available secret business information to a foreign authority or to its agents. This article also takes the form of a blanket rule against disclosure, subject only to the consent and official direction exceptions. Translated into English, article 273 reads as follows:

Any person who seeks to discover a manufacturing or business secret with a view to making it available to a foreign official or private organization or to a foreign private enterprise or to the agents thereof or any person who makes available a manufacturing or business secret to a foreign official or private enterprise or to the agents thereof shall be punished by imprisonment or in serious cases to 'reclusion.' The judge may, in addition, impose a fine. 32

Interpreting this statute as early as 1959, the Swiss Federal Supreme Court in the Blunier case 33 stated that the article does not protect private interests alone, but also protects the interest of the state in defending persons under its territorial sovereignty. Thus, for purposes of the article, it does not matter by what means the defendant acquires knowledge of the secret; article 273 is triggered in any event.

Like article 47, article 273 establishes an ex officio offense. Again, the ex officio nature of the offense indicates its serious purpose, namely the protection of Swiss sovereignty against intrusions by foreign agencies seeking to get secret information. Reinforcing this point, article 273 is part of the thirteenth title of the Swiss Penal Code, entitled “Crimes Against the State and National Defense.”

Closely following the article's language and purpose, the Federal Supreme Court in the Brugger case 34 held that article 273 prohibited false reports of investments in Switzerland given to German foreign exchange control agents. The Court held that this disclosure not only violated privacy interests but was a violation of Swiss territorial sovereignty as well.

In the Bodmer case, 35 the Federal Supreme Court went on to define a “secret” within the meaning of the predecessor of article 273 of the Penal Code. According to the Federal Supreme Court,

The term ‘business secret,’ in this connection, is not understood in a narrow sense, merely as an operating secret of an economic enterprise; but it includes any data of economic life, provided there is a legitimate interest in keeping the secret. Consequently, the term may also include relations and transactions of private economy concerning property and income. 36

32. StGB art. 273.
34. Judgment of July 6, 1945, Bundesgericht, Switz., 71 BGE IV 217 (Highest Court, Criminal case).
36. Id.
Furthermore, it is well established in Swiss law that banking information is regarded as a business secret within the meaning of article 273. The article thus prohibits anyone from transmitting confidential banking information to a private or official foreign organization. The penalty is severe—imprisonment for a period up to twenty years.

(c) Civil Tort and Contract Liability

Violation of a client's confidences by a bank would also subject it and its officials to civil liability under tort and contract theories. Both of these theories involve the violation of the client's privacy rights. The two theories do differ, however, with reference to some specifics of the right and the remedy.

Swiss tort law recognizes an individual's right to privacy, which includes an intangible property right in the secrecy of financial affairs. Under article 28 of the Swiss Civil Code, anyone wrongfully injured in his personal affairs may sue for injunctive relief, as well as for monetary damages. Article 28 provides that "[w]hoever suffers unlawful harm in his personal interests may bring an action for an injunction. An action for damages or for payment of a sum of money as compensation may be brought only in the cases stated in the statute." The statutes referred to in article 28, on which an action for damages or monetary compensation could be based, are articles 41 and 49 of the Swiss Code of Obligations. Article 41 allows any person to sue for damages another who, either intentionally or negligently, causes him harm. Article 49 gives a person wrongfully injured in his personal affairs the general right to sue for damages.

In addition to the above forms of tort liability, a Swiss bank's breach of customer confidentiality also establishes a claim for monetary damages based on contract theory. Under Swiss law, an agency relationship arises between the bank and the customer. This relationship is governed by the Swiss Code of Obligations, particularly article 97. In order to meet the requirements of the Code, the banker must maintain secrecy in order to fulfill his "contract" with the customer. Otherwise, the banker would be liable to the customer under contract theory for monetary damages resulting from the contractual breach.

Therefore, a bank customer whose secrets had been revealed can sue the bank for civil damages under article 28 of the Swiss Civil Code and under articles 41, 49, and 97 of the Swiss Code of Obligations. These sections encompass both contract and tort theories of liability and differ to some degree in the right and remedy afforded the customer. They all reflect, however, the seriousness with which the Swiss approach the topic of banking secrecy.

37. ZGB art. 28
38. Id.
39. Schweizerisches Obligationenrecht [OR] art. 41, 49 (Switz.).
40. OR art. 97.
A final form of sanction rounds out the Swiss banking secrecy regime: administrative sanctions. It is to this final, substantive basis for liability that I now turn.

(d) Administrative Sanctions

In addition to criminal and civil sanctions, disclosure of a customer's confidences would expose a bank to administrative sanctions imposed by the Swiss Banking Commission. Under the Swiss Banking Act, particularly articles 2, 23(3), and 23(5),\textsuperscript{41} the sanctions could include a possible revocation of the bank's authority to do business. Thus, a knowledge of the administrative sanctions is important to an understanding of the overall framework of Swiss banking secrecy.

Article 23(3) of the Swiss Banking Act authorizes the Swiss Banking Commission to take a number of actions which may seem appropriate in light of the particular circumstances at hand. Revocation of banking authority is specifically provided for by article 23(5), paragraph 1, of the Swiss Banking Act which, translated, provides that "the Banking Commission shall withdraw a bank's permit to do business in Switzerland when the conditions required for the business are not met or a serious violation of its legal obligations has been committed by the bank."\textsuperscript{42}

The "obligation" of preserving confidences is one of the important legal duties of a bank as defined by article 47 of the Swiss Banking Act.\textsuperscript{43} Thus, the Swiss Banking Commission may withdraw the authority to do business from any bank which fails to preserve its customers' secrets, particularly if disclosure constitutes a "serious violation" of the bank's obligations.

The Swiss Banking Commission could also impose other administrative sanctions for violation of bank secrecy obligations. For example, the Commission could order a Bank to replace or suspend an executive convicted of violating banking secrecy.\textsuperscript{44} Thus, the Banking Commission enjoys great flexibility in imposing sanctions designed to enforce the Swiss banking secrecy regime. The Swiss Banking Commission, with these extraordinary powers and the will to use them, reinforces the criminal and civil mechanisms for the enforcement of Swiss banking secrecy.

3. Exceptions to Swiss Banking Secrecy

Under Swiss law, two circumstances may relieve a bank of its obligation to preserve customer confidences protected by the foregoing statutes: (1) the consent of the customer involved, or (2) the requirement of disclosure by certain Swiss authorities. I will discuss each of these exceptions in turn.

\textsuperscript{41} BankG art. 2, 23(3), 23(5).
\textsuperscript{42} Id. art. 23(5).
\textsuperscript{43} Id. art. 47.
\textsuperscript{44} Id.
(a) Customer Consent

Consent to disclosure by the customer generally relieves a bank of its secrecy obligation. This is true because the secret is seen under Swiss law as belonging to the customer, not to the bank. Consent therefore relieves a bank of both civil and criminal liability for disclosure. However, while a customer's written consent to disclosure will protect a bank against criminal penalties under article 47 and against private civil liability, it is not clear that consent will relieve the obligation of secrecy imposed by article 273. To reiterate, article 273 is aimed at the protection of Swiss sovereign interests from foreign encroachments, rather than the mere protection of individual interests. It is therefore unclear whether an individual can and should be able to consent to a waiver of these structural interests as well as his individual interests.

Finally, customer consent must be evidenced by an affirmative act. In the absence of an affirmative act, like a written waiver, the confidentiality of the customer's affairs must be respected and maintained.

(b) Disclosure Required by Certain Swiss Authorities

In the absence of affirmative consent, a bank may generally disclose the customer's secrets only pursuant to an order by proper Swiss authorities. This requirement is codified in the fourth paragraph of article 47, which subjects a bank's obligation to preserve secrets to "the provision of federal and cantonal law providing for the obligation to report to its authorities and give evidence in legal proceedings."45 The proper way for a foreign court or agency to request evidence located in Switzerland is by sending a request for mutual assistance in the form of "letters rogatory" to the competent Swiss authority. Swiss law regards any compulsory attempt to secure evidence without pursuing official Swiss assistance as an intrusion upon Swiss sovereignty.

Still, this exception to the general rule of confidentiality in banking relationships is limited and emphasizes again the importance of the policy reflected in the general rule. Only by examining the particular areas in which Swiss banking secrecy is set aside can one realize the serious nature of secrecy in Swiss society.

First, I must mention the broadest exception to the general rule of secrecy: in criminal proceedings, banking secrecy is set aside. The federal and cantonal penal procedures do not provide secrecy. This obligation to disclose the banking secrecy exists towards judges, prosecutors, attorneys, but not the police.

On the other hand, the banking secrecy will not generally be disclosed in most civil proceedings. In fact, Swiss law regarding civil disclosure is, at best, mixed. In Switzerland's federal domain, judges decide on a case-by-case basis

45. BANKG art. 47.
whether or not to set aside banking secrecy. Generally, secrecy is preserved by the federal judiciary. Moreover, in six cantons, the rules are similar to the federal civil procedures. Beyond this, eight cantons protect banking secrecy absolutely, while twelve other cantons do not recognize the banker's right to refuse disclosure at all.

Our banking secrecy will naturally be set aside as far as bankruptcy is concerned. This means that secrecy "falls away" in the following cases: (1) in a seizure against a natural person; (2) in a general or collective execution of a bankruptcy order; and (3) in a sequestration. In the case of sequestration, however, the judge cannot force the banker to disclose banking secrets, but rather if the banker does not give the information, he will lose his own rights against the debtor.

Tax matters constitute a special case for Swiss banking secrecy. Under Swiss tax procedure, neither the federal fiscal law nor any cantonal law allows disclosure of banking secrets. Even in cases of tax evasion banking secrecy remains firm. Only if the customer desires disclosure and consents will the bank be allowed to disclose in such cases.

However, in the case of tax or duty fraud, banking secrecy will be set aside. This is true because the elements of tax or duty fraud are considered as equivalent to general fraud, a crime subject to the aforementioned exceptions. The law includes such maneuvers and artifices as using counterfeit or altered ledgers, false balance sheets or fake salary slips as "fraudulent conduct." Also fraudulent for purposes of disclosure of banking secrecy are the use of false inventories and deals done without invoices or with inflated invoices. On the other hand, if the situation merely involves incorrect statements made on an income tax return it is not considered to constitute "fraud" for the purposes of disclosure.

To sum up, secrecy is a right of the customer, not the bank. It is, in that respect, similar to the attorney-client privilege. Banks have no discretion as to whether to keep or disclose the secret. However, the secrecy of bank accounts is not absolute. It can be lifted. Exceptions to the general secrecy rule include (1) client waiver and (2) criminal proceedings against the client or a third party, when a Swiss magistrate or other official issues an order to this effect. Generally, such an order will not be given in civil proceedings. Also, investigations by tax authorities are generally not sufficient to lift the veil of secrecy. A possible way around this is the fraud exception, but its use has been limited by statute and by the courts.

III. CONCLUSION

As you can see, mutual assistance does not only promote the understanding of foreign solutions to newer forms of crime, but may also have considerable effects on uniquely national legislation. I would like to conclude
my Regents’ Lectures with a few remarks on the future of mutual assistance and of other collective solutions to international dilemmas.

What will the future bring for mutual assistance? Certainly, the procedures for mutual assistance will have to be improved and simplified. Although it will always be necessary to have a request with the appropriate information, perhaps the channels of transmission can be shortened. So, too, the addition of a central authority as a sort of clearinghouse may prove valuable.

A wide field of possible future cooperation lies in assistance in administrative matters which, to date, have remained largely unregulated. Another field for possible improvement is mutual assistance in civil matters. That field is currently in an uproar. A general understanding that internationally agreed-upon methods for gathering evidence should be respected and that the instruments for mutual assistance should be used, whenever possible, would be a welcome development.

Perhaps the biggest changes will not be so spectacular: a good development might be simply an increase in the sheer number of cases of mutual assistance. It helps to promote the use of mutual assistance when not only the most spectacular, complicated, or political cases are presented, but when there is a slowly increasing stream of requests.

Finally, it should be noted that the mutual assistance granted by the Swiss authorities is much more generous and also much quicker than usually acknowledged. It is interesting to note that complaints often emanate from foreign authorities who do not even use the official channels for requesting assistance. On the other hand, regular users are very positive about the possibilities of assistance and appreciate Swiss assistance very much.

Mutual assistance is not only important in fighting international organized crime or in lifting the veil, when appropriate, of Swiss banking secrecy. All forms of assistance are significant. Mutual assistance is an important mechanism for a wide variety of attempts at solving a diverse number of international problems. We have, in fact, seen terrific efforts at mutual, international solutions to international problems in areas as diverse as insider trading and money laundering.

Still, there is no doubting this fact: international crime threatens each of our societies and attacks the “rule of law” at its roots. It is the fundamental duty of any free nation to protect its citizens, their legal transactions, their rights, and their very lives, from this threat. The more international crime grows, the more we must act internationally. This is not only in our common interest, but also in the individual interest of every state wanting to maintain freedom and independence. In the end, these are the goals, freedom and independence, which we all share.