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Switzerland: banking secrecy "not exportable"

Switzerland, followed by the United States, is the most secretive financial centre in the world, according to the 2018 Financial Secrecy Index published by the Tax Justice Network, a civil society organisation.

Swiss banking secrecy draws on several sources. In line with the Code of Obligations (CO), confidentiality is an ancillary obligation of the bank towards its customer. As set out in Art. 398(2) CO, an agent is liable to the principal for the diligent and faithful performance of the business entrusted to him. Under this liability regime, the bank (i.e., the agent) has a legal obligation to maintain the confidentiality of the information related to its customer (i.e., the principal). The protected information comprises (i) information about the existence of a banking relationship, (ii) information about specific details of the relationship, and (iii) information about the customer's assets. What is more, the aforementioned norm of the CO imposes on the bank the obligation to safeguard the customer's personality rights according to Art. 28 of the Civil Code (CC). Finally, the criminal law provision of Art. 47 of the Banking Act of 8 November 1934 (BA) establishes a further layer of protection of banking secrecy.

In a decision it handed down in October 2018, the Supreme Court of Switzerland had to examine the geographical scope of Art. 47 BA (ATF 145 IV 144). The case before the federal judges involved Rudolf E., a Swiss national who had begun to work for the bank Julius Baer & Co Ltd. in Zurich ("JBZ") in the 1980s. In 1994, he was transferred to the Cayman Islands where he became Chief Operating Officer at Julius Baer Bank & Trust Company Ltd. ("JBCI"), an overseas unit of JBZ. In the period 1999-2002, an expatriate agreement between JBZ and Rudolf E. essentially covered insurance-related issues. As of 2002, a contract concluded with JBCI set out most of E.s rights and obligations.

In 2011, the Zurich district court sentenced Rudolf E. on the basis of Art. 47 BA for repeated violations of the banking secrecy, which he was said to have committed, *inter alia*, by disclosing client data from JBCI to WikiLeaks, a whistleblower website. The cantonal court of appeals reversed the ruling of the lower court, whereupon the Zurich prosecutor appealed to the Supreme Court.

Pursuant to Art. 47(1)(a) BA, shall be imprisoned for up to three years or fined whoever intentionally discloses confidential information entrusted to them in their capacity as a member of an executive or supervisory body, employee, agent, or liquidator of a bank or a person in accordance with Article 1b, as member of a body or employee of an audit firm or that they have observed in this capacity. With respect to the material scope of the law, the provision only applies to Swiss banks but not to their foreign branches, as the Supreme Court had noted in an earlier decision (ATF 143 II 202). By way of consequence, JBCI was not subject to the rule at issue. As to the personal scope, Art. 47 BA refers, among others, to "employees" and "agents". In light of the fundamental criminal law principle of *nulla poena sine lege*, the Supreme Court adhered to a

restrictive interpretation of the two terms. After analysis of the expatriate agreement, the judges concluded to the absence of an employment contract within the meaning of Art. 319 et seq. CO. In fact, JBZ was not in the position to give instructions to Rudolf E. and, more generally, there was no relationship of subordination between the two parties. Subsequently, the Supreme Court looked at the notion of the "agent". In practice, banks do not always provide all services they offer to their clients but frequently outsource part of them (to the extent authorised under banking law). In principle, the outsourced services (e.g. external IT support) are also subject to banking secrecy. However, in the event that the bank outsources an entire category of services to a third party not governed by the BA, the database pertaining to the clients concerned is outside the scope of this legislation. Such is the case of a foreign branch of a Swiss bank. The same applies when a bank complements the services it offers by acquiring services provided by another entity, on the condition, however, that these services are legally and economically independent. When considering the collaboration between JBZ and JBCI, the Supreme Court noted that the latter acted as a trustee for the former's clients who, in their quality as settlors, set up trusts on the Cayman Islands. The federal judges held that, although the overseas unit was under the control of JBZ, the complementary activity provided by the former was legally and economically autonomous with respect to the asset management undertaken by the latter. As a result, the overseas unit did not act as an agent of the Swiss bank. Hence, the employees of JBCI were not subject to Art. 47(1)(a) BA. Consequently, the Supreme Court upheld the acquittal of Rudolf E. as regards the charge of breaching banking secrecy.