

## Adjusting to the new world without banking secrecy – How we can help!

By Eric Fiechter, Singapore 30.10.2015

**“Scrutinizing and Reporting clients”** are the new words that describe the banking and financial industry of today, not only in Asia or in Latin America but of course even more so in Europe and in the USA.

Behind the reassuring words of “compliance department” are departments of banks that have grown tremendously. The main function of these departments is to screen clients and transactions to find those to be reported to the competent authorities.

Very expensive and sophisticated software is being implemented for that same purpose all over the world.

But the effects of these two words “Scrutinizing / Reporting” are completely different depending on the country where they are implemented.

The countries where a lot of suspicious transactions are reported are not those acting on it. And those with less reports being filed are among the top countries in numbers of effective follow-up proceedings leading to subsequent seizure of assets or sentencing.

The difference could for instance not be bigger than between France and Switzerland.

In France suspicious transactions are reported in huge quantities but lead rarely to an investigation and practically never to a criminal conviction.

By contrast, in Switzerland relatively few transactions are reported but a high

percentage of those is followed-up by a criminal investigation, leading to seizure of assets and in some cases to formal sentencing.

This reflects the strengths and weaknesses of the various public administrations.

In France, the public servants are masters in designing bright policies and sophisticated processes, but since those in charge of implementing those clever thoughts are not as bright as those who conceived them the result is often frustrating in terms of ultimate efficiency.

Switzerland with its limited means must structure its public administration so as to deliver a maximum of results with a minimum of resources. This tends to lead to a more efficient, very down to earth, administration.

### **What does that mean for clients of Swiss financial institutions?**

It means that the clients will be protected by an overall safer and more efficient handling of their assets, with fast international transfers to practically any country in the world, but if those clients fail to meet the Swiss standards of integrity and tax compliance, they may run into serious problems or even lose all their assets; by the time they find out that their way of conducting business was not in line with Swiss laws, it may be too late to salvage their deposits.

For instance choosing the name of a beneficial owner based on convenience

rather than naming the actual beneficial owners is criminal, and if no other wrong doing can be identified, the authorities are likely to focus on this fact to neutralize the target of their investigations.

*Clients of Swiss banks often underestimate or ignore the risks of criminal prosecution for filling-in bank forms carelessly.*

**Here is an example taken from real life to illustrate the point:**

A large Brazilian group with lots of international purchases and sales used an offshore company with a Swiss account to book most of these purchases and sales thereby avoiding the lengthy approval processes or cumbersome reporting duties to which they would have been subject if the Brazilian headquarters had booked the transactions through the Brazilian subsidiaries.

The offshore company also paid private life insurance premiums in favor of the family members of the Brazilian shareholders. The shareholding in the offshore company was however duly included in the accounts of the Brazilian holding company.

Because of a nasty family conflict among the shareholders in Brazil, a report was filed by one of them with a falsified video claiming to show a discussion about a bribe to a state official to secure a lucrative contract, and the allegation was that the bribe had been paid by debit of the Swiss account of the offshore company.

The information about the preliminary investigation (which later on proved that the video was a fake) was immediately leaked to a Brazilian newspaper.

A publication – including on the newspaper's webpage, with names of the

persons allegedly involved - followed. This publication was in turn sent anonymously to the Swiss bank.

The compliance department of the Swiss bank verified that the website was indeed the newspapers website and on this basis they immediately reported possible suspicious transactions on the Swiss account to the Swiss authorities.

The Swiss authorities opened a criminal investigation, froze all assets on the named Swiss account and on a related Swiss bank account that had benefited from transfers from the first account. Then they sought the help of the Brazilian authorities to clarify the facts related to the Swiss account, thereby pointing out its existence and its use to said authorities.

The initial unjust and anonymous accusation in Brazil lead to a lengthy detailed analysis of all transactions conducted through the Swiss bank account, with all assets blocked for years.

It was also discovered that a change of beneficial owner had not been communicated to the bank by its client following the subsequent transfer of some shares of the Brazilian holding company to the descendants of the shareholders who had caused the accounts to be opened at the Swiss bank.

Often these criminal cases are ultimately settled by confiscation of all or part of the assets and by the waiver of further criminal proceedings, without any wrongdoing ever being proven.

**How can we help?**

Once the damage is done, i.e. once the assets are frozen, we can help minimize the damage, by ensuring that the

prosecutor understand the transactions and by trying to persuade him that no criminal transactions were conducted through the Swiss bank account.

Ultimately we will be negotiating the best possible terms for the release of all or of at least of some of the frozen assets.

The more important help we can provide is however before the risk materializes, **by conducting a legal audit on how the business linked to a Swiss account is conducted and by advising clients on how to minimize risks**, for instance by keeping proper accounts and supporting documents.

The goals of the clients are practically always legitimate.

The challenge is to ensure that these goals are achieved through means which are complying with the relevant laws.

Trustee companies and financial intermediaries (e.g. banks asset managers, etc.) are normally not equipped to check these legal issues.

Taking shortcuts can be very counterproductive, with initial savings turning out to be very costly!

As indicated in previous articles in relation to Swiss banking secrecy, the key is to keep the companies in good standing and implementing good corporate governance principles even at the level of offshore companies.

It does have a cost, but in case the risk of seizure materializes, the cost of doing things right from the start would have been much less than the cost of trying to fix the problems afterwards.

We assist also clients in minimizing tax risks by seeking tax rulings whenever possible or by ensuring to the extent possible that the records kept by the banks' compliance departments are correct.

This is necessary because the compliance departments of financial intermediaries (banks but also trustee companies) tend to accumulate a lot of information of which the clients are not aware, which information is only checked by third parties when it is too late to correct possible mistakes.

With the automatic exchange of information in tax matters as the new world standard, understanding how the confidential client data will be disseminated and detecting critical errors early is essential.

No banker, nor trustee will call the clients' attention to this risk.

This is why seeking **independent legal advice** at an early stage and on an ongoing basis is critical in today's world of systematic transnational exchange of confidential information.

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