

The arbitration commission and the penalties

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The agreement created its own enforcement mechanism. Violations were investigated and judged by an arbitration commission (*Schiedskommission*), whose secretariat was run by the National Bank.¹ A bank found to have violated the agreement could be ordered to pay a contractual penalty, which under the later versions could reach CHF 10 million and was paid to a charitable purpose.² The commission informed the Federal Banking Commission of its decisions. The Commission, in turn, stated that a violation of the agreement would regularly lead it to examine the case itself and to take the measures required under the Banking Act, and that violations were reportable to it.³ In this way a private sanction was linked to a public one. A bank that violated the agreement risked a penalty under the contract and a finding by the supervisor that its managers no longer offered the guarantee of irreproachable conduct.

The legal nature of the agreement was tested before the Federal Court in 1983. The Swiss Fiduciaries' Association (*Schweizerischer Treuhänder-Verband*) had asked the National Bank to treat its members like the members of the Swiss Chamber of Fiduciaries and Auditors (*Treuhand-Kammer*) under Article 6 of the revised agreement of 1982, which allowed certain holders of professional secrecy to withhold the identity of beneficial owners. When the National Bank declined, the association appealed. In its judgment of 3 June 1983, the Federal Court held that the agreement was the result of intensive negotiations between the National Bank and the Bankers Association and concretized the requirement of irreproachable business conduct under Article 3(2)(c) of the Banking Act. It was nevertheless a contract under private law, since the banks could have adopted the same rules without the National Bank, and the National Bank's letter was therefore not an administrative decision subject to appeal.⁴

1 Why a private agreement?

The choice of a contract between private banks and the central bank, instead of a statute, had practical and political reasons. A private agreement could be concluded within weeks, while an amendment of the Banking Act would have required a consultation procedure, a message of the Federal Council, debates in both chambers and the possibility of a referendum. The agreement could also regulate matters that a statute would have found difficult to define, such as the difference between accepting flight capital and actively assisting its transfer, or the circumstances in which a bank should doubt that its client was the beneficial owner. Because the banks drafted the rules themselves, they could adapt them to the realities of their business, and because they had signed them, they could hardly dispute their legitimacy when the arbitration commission applied them.

The arrangement also had a political function. In the summer of 1977 the banks faced a public debate in which the left demanded constitutional limits on banking secrecy and the power of the big banks. By committing themselves to identify their clients and to refrain from the most visible forms of assistance to capital flight, the banks showed that they could correct abuses without legislation. The Federal Council relied on exactly this argument when it recommended rejection of the banking initiative in 1982. The cost of the arrangement lay in its limits. The agreement bound only banks, leaving out the fiduciaries, asset managers and lawyers of Lugano who administered domiciliary companies for Italian clients. It addressed the identity of clients but not the origin of their funds, and it prohibited only active assistance, so that the passive acceptance of flight capital remained permitted. These gaps defined the agenda of the following two decades, which ended with the extension of due diligence duties to the whole financial sector by the Anti-Money Laundering Act of 1997.

For a Ticinese observer, the agreement of 1977 also changed the relationship between the Lugano banks and their Italian clients in a less visible way. Before 1977, a relationship manager could open an account for a Liechtenstein establishment or a Panamanian company on the instructions of a fiduciary without asking who the client was. After 1977, the bank's file had to contain a name. That name was protected by banking secrecy and was not passed to any authority, but its presence in the file meant that the bank could no longer claim ignorance if the money later turned out to be connected with a crime. The obligation to know, even without an obligation to tell, was the decisive innovation of the agreement.

Essentials. The agreement of 2 June 1977 (CDB 77), in force on 1 July 1977, was concluded between the Swiss banks and the Swiss Bankers Association

on one side and the Swiss National Bank on the other. It obliged banks to verify the identity of their clients, to obtain a declaration on the beneficial owner (Form A) in cases of doubt, to refrain from active assistance in capital flight and to refrain from assisting tax evasion through misleading attestations. An arbitration commission with a secretariat at the National Bank enforced it through contractual penalties, and the Federal Banking Commission treated violations as relevant to the guarantee of irreproachable business conduct. The Federal Court classified the agreement as private law in 1983.

2 Notes

1. EBK, Jahresbericht 1979 (above), 27: "Die Bankenkommission erhält regelmässig vom Sekretariat der Schiedskommission VSB, das von der Nationalbank geführt wird, deren Entscheide"; EBK, Jahresbericht 1977 (above), 18–20 (Schiedskommission obliged to inform the EBK). ↩
2. CDB 98 (above) (fine of up to CHF 10 million); SBA, Tätigkeitsberichte der Aufsichtskommission zur VSB 2001–2005, 7, [https://www.swissbanking.ch/_Resources/Persistent/e/a/e/d/eaedd1b0cdf733de4325341a67b00879d87d4757/T%C3%A4tigkeitsberichte%20der%20Aufsichtskommission%20zur%20VSB %202001%20-%202005%20%28PDF%29.pdf](https://www.swissbanking.ch/_Resources/Persistent/e/a/e/d/eaedd1b0cdf733de4325341a67b00879d87d4757/T%C3%A4tigkeitsberichte%20der%20Aufsichtskommission%20zur%20VSB%202001%20-%202005%20%28PDF%29.pdf) (penalties transferred to the International Committee of the Red Cross). ↩
3. EBK, Jahresbericht 1979 (above), 27 and 30 ("Eine Verletzung der Vereinbarung hat daher regelmässig zur Folge, dass die Bankenkommission sich ebenfalls mit dem Fall befassen und die erforderlichen Massnahmen ergreifen wird"). ↩
4. Federal Court, judgment of 3 June 1983, Schweizerischer Treuhänder-Verband v. Schweizerische Nationalbank, BGE 109 Ib 146, <https://servat.unibe.ch/dfr/b1109146.html> (VSB as result of intensive negotiations; concretization of Art. 3(2)(c) BankA; private law; inadmissibility of the appeal). ↩

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