

Legacy: from self-regulation to statute

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The history told in this chapter can be read as a sequence of shocks and responses. The Chiasso affair of 1977 produced the due diligence agreement. The Lebanon Connection and the Kopp affair of 1988 produced the criminal offences of 1990. The FATF evaluations and the recognition that risks were moving outside the banks produced the Anti-Money Laundering Act of 1997. The Abacha report of 2000 produced the risk-based ordinance of 2002 with its rules on politically exposed persons. The Duvalier case produced the legislation of 2010 and 2015 on potentate funds. Each step extended the reach of the previous one, and each was adopted in the familiar Swiss manner: after consultation with the industry, with a strong element of self-regulation and with an effort to preserve as much of banking secrecy as possible.

The role of self-regulation deserves particular emphasis. In 1977 self-regulation was the only instrument available, because there was no statutory basis for rules on customer identification. In 1997 the legislature made self-regulation a pillar of the statutory system by recognising self-regulatory organisations. The banking agreement survived as a code that the supervisor recognised as a minimum standard. The Swiss approach thus combined state law and private rule-making in a way that is unusual among the major financial centres. Its advantages were speed, proximity to practice and a high degree of acceptance in the industry. Its disadvantages became visible whenever an organisation's sanctions proved weaker than those of a state supervisor or when the rules of different organisations diverged. The integration of the Control Authority into FINMA in 2009 marked a shift towards stronger state supervision, which the later reforms continued.¹

The relationship between money laundering law and banking secrecy is the second theme of the legacy. The 1977 agreement presented customer identification as a complement to banking secrecy: the bank had to know

its customer precisely because it promised to protect the customer's privacy. The reporting duty of 1997 went further, because it required the bank to disclose its knowledge to the state when suspicions arose. Yet for two decades Swiss law drew a sharp line between the proceeds of crime, which were to be reported and confiscated, and undeclared foreign money, which could be accepted as long as the bank did not actively assist evasion. That line lasted until the tax offence of Article 305bis paragraph 1bis, applicable where evaded taxes exceed 300,000 francs per tax period, entered into force on 1 January 2016.² The collapse of the distinction between money laundering and tax evasion belongs to the story of the end of banking secrecy for foreign clients, which Part G tells.

For Zurich the legacy is visible in its institutions and in its professional landscape. The Swiss Bankers Association's supervisory board for the due diligence agreement continues to sanction breaches. Self-regulatory organisations in the city audit thousands of financial intermediaries. FINMA, whose headquarters are in Bern, maintains a large office in Zurich. The Zurich prosecution service and the Office of the Attorney General of Switzerland conduct money laundering investigations that regularly reach the Federal Criminal Court. The compliance departments of the banks and insurers, and the lawyers and consultants who advise them, form a professional community that did not exist fifty years ago. When foreign clients ask a Zurich adviser about the reliability of the Swiss financial centre, the answer today rests to a large degree on this infrastructure.

1 Notes

1. Control Authority for the Prevention of Money Laundering, "FINMA" (above). ↩
2. Swiss Criminal Code, Article 305bis para. 1bis (above), added by the Federal Act of 2014 and in force since 1 January 2016. ↩

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