

The Banking Act of 1934 and banking secrecy — overview and summary

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Few Swiss statutes have acquired a reputation that reaches so far beyond their text as the Federal Act on Banks and Savings Banks of 8 November 1934. For most of its life the Act was a sober piece of prudential legislation, dealing with audits, liquidity, capital ratios and the publication of accounts. A single penal clause, Article 47, which made the breach of professional secrecy by bank employees a criminal offence, turned it into a symbol. Across the world “Swiss banking secrecy” came to stand for discretion, for flight capital and eventually for tax evasion on an industrial scale. In Switzerland itself the same words came to stand for the protection of the private sphere, for the independence of a small country and for the prosperity of its financial centre. This chapter separates the layers of that reputation and places Article 47 back in the statute from which it emerged.

The story matters for Zurich in a very direct way. The two great commercial banks whose history runs through this book, the Schweizerische Kreditanstalt and the Schweizerische Bankgesellschaft, were among the institutions whose balance sheets were shaken by the crisis of the early 1930s and whose leaders helped to shape the new law. The Federal Banking Commission, created by the Act, supervised Zurich’s banks for more than seven decades before it was merged into the Swiss Financial Market Supervisory Authority. The private banks and asset managers of the Bahnhofstrasse built their foreign business on the protection that Article 47 provided, before losing a large part of that business when the protection was withdrawn for foreign tax authorities after 2009. Even today, a Zurich bank employee who passes client data to an unauthorised person commits a criminal offence under a provision whose core dates from 1934.

The chapter proceeds in ten sections. It opens with the banking crisis of 1931 to 1934 and with the long line of failed attempts to create a federal

banking law. The content of the Act of 1934 and the institution it created, the Federal Banking Commission, form the second section. Article 47 itself, with its original wording and its later amendments up to the extension to data traders in 2015, is examined in the third. The fourth section confronts the legend that banking secrecy was introduced to protect Jewish clients from the Gestapo with the documented history established by Sébastien Guex, Peter Hug, Robert Vogler and the Independent Commission of Experts. The fifth distinguishes secrecy as a civil-law duty of the bank from secrecy as a criminal norm. Sections six and seven describe banking secrecy as a business model and as a political symbol. The eighth traces the evolution of the Federal Banking Commission until 2009. A brief outlook on the turning point of 2009, which belongs to Part G of this book, and a practitioner's assessment of what Article 47 still protects today close the chapter.

1 Conclusion

The Banking Act of 1934 was born of a crisis that had exposed the weakness of Swiss banks and the absence of any federal authority able to see into their books. Three decades of proposals, from the misgivings of 1914 through the drafts of Landmann, Huber, Hoffmann and Schulthess, had failed against the resistance of the banks. What finally made legislation possible was the combination of the Volksbank rescue, which cost the Confederation a quarter of its annual budget, the collapse of the Geneva Diskontbank and the bankers' own recognition that some form of supervision had become unavoidable. The Act that emerged was moderate in its ambitions. It relied on private audit firms, laid down simple rules on capital, liquidity and publication, and created a small independent commission to watch over the system.

Article 47 was, in the understanding of its authors, a condition of that settlement. The bankers accepted supervision on the understanding that it would reinforce secrecy. The government, which shared their view that foreign capital was essential to the Swiss economy, inserted the secrecy clause into the first draft and defended it without debate. The motives were fiscal, monetary and commercial: the Paris affair of 1932, the pursuit of flight capital by neighbouring states and the fear of losing foreign deposits. The humanitarian account that emerged in the 1960s, according to which the provision was designed to protect Jewish clients from the Gestapo, has no basis in the sources and is contradicted by the Federal Council's concessions to German tax flight rules in January 1934. The work of Guex, Hug and Vogler, and the findings of the Independent Commission of Experts, leave no room for doubt on this point.

The legacy of 1934 nevertheless extends well beyond the exposure of a legend. The Act gave Switzerland a supervisory institution that developed over seventy-three years into a modern financial market authority and passed its tasks to FINMA in 2009. Article 47, stripped of its protective function against foreign tax authorities, remains the criminal core of a duty of confidentiality that Swiss law grounds in contract and in the protection of personality. For Swiss residents, banking secrecy vis-à-vis the domestic tax authorities has survived every attempt at reform, sustained by a political majority that regards it as part of the relationship of trust between citizen and state. For bank employees, data traders and, within limits, journalists, it remains a live criminal risk. The Zurich financial centre of today, which competes on the quality of its advice, the stability of its institutions and the reliability of its legal order, still carries the imprint of the settlement of 1934 in its supervisory architecture and in the discretion that its clients continue to expect.

2 In five sentences

1. The Federal Act on Banks and Savings Banks of 8 November 1934, in force from 1 March 1935, was the response to a banking crisis in which the Confederation had to rescue the Volksbank with 100 million francs and the Geneva Diskontbank collapsed, after three decades of failed attempts to create federal banking supervision.
2. The Act established a moderate supervisory regime based on audits by recognised private firms, rules on capital, liquidity and publication, and the Federal Banking Commission, which grew into a general financial market supervisor and was merged into FINMA on 1 January 2009.
3. Article 47 added a criminal sanction to a duty of secrecy that already existed in custom and civil law, at the demand of bankers who feared that supervision and foreign tax investigations, dramatised by the Paris affair of the Basler Handelsbank in 1932, would drive away foreign capital.
4. The story that banking secrecy was introduced to protect Jewish clients from the Gestapo first appeared in 1966 and has been refuted by the research of Guex, Hug and Vogler, while the distinction between tax evasion and tax fraud and the exclusion of fiscal matters from mutual assistance made secrecy the legal basis of a business model built on undeclared foreign money.

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5. Although the turning point of 2009 ended its protection against foreign tax authorities, Article 47, extended to data traders in 2015, still protects Swiss residents against their own tax authorities in the ordinary assessment procedure and exposes bank staff, data buyers and whistleblowers to real criminal risk.

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