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Herr Botschafter,

Wie Sie wissen, ist unsere Vereinigung fortwährend darum bemüht, das Ansehen der Schweizer Banken im Ausland zu erhalten und zu verbessern. Den periodischen kritischen Stimmen gegenüber unserem Bankgewerbe versuchen wir immer wieder in geeigneter Weise entgegenzutreten und sie zu korrigieren. Die grösste Bedeutung kommt dieser Frage im Verhältnis zu den USA zu, weshalb wir verschiedene Aktionen vornehmlich auf dieses Land konzentrieren.

In der vergangenen Sommersession der eidg. Räte hatte Bundesrat Celio in Beantwortung eines Postulates Hubacher grundsätzliche Ausführungen über das Bankgeheimnis gemacht und zu dieser Institution in sehr positiver Weise Stellung genommen. Diesen Ausführungen kommt umso grösserer Wert zu, als sie von unserem eidg. Finanzminister stammen. Wir haben sie daher ins englische übertragen lassen und möchten sie namentlich in den USA in den hiefür geeigneten Kreisen zur Verbreitung bringen. Da wir von früher her wissen, dass Sie derartige Aktionen ebenfalls als zweckmässig erachten und sie unterstützen, ersuchen wir Sie wiederum um Ihre Mithilfe. Wir legen Ihnen daher einige Texte Celio bei und lassen mit separater Post eine grössere Anzahl an Sie versenden. Weitere Exemplare halten wir Ihnen gerne zur Verfügung.

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Indem wir Ihnen für Ihre wertvolle Unterstützung, die wir sehr zu schätzen wissen, zum voraus verbindlich danken, bitten wir Sie, Herr Botschafter, den Ausdruck unserer vorzüglichen Hochachtung zu genehmigen.

SCHWEIZERISCHE BANKIERVEREINIGUNG

Beilage erwähnt

THE HISTORY, STRUCTURE AND FUNCTION OF BANKING IN SWITZERLAND

Comment by Dr. Nello Celio,
Chief of the Federal Department of Finance,
on the Hubacher Postulate concerning Banking Secrecy,
put forward during the 1970 Summer Session

The Federal Council is prepared to receive the Postulate. Last autumn the Federal Finance and Customs Department circulated a draft proposal for the revision of the Banking Law to representatives from government and the economy for comment. The Federal Council will submit the draft revision to the Federal Assembly in the near future. In the course of the debate on this revision, the questions raised by National Councillor Hubacher will also have to be examined.

It should be noted that Article 47 of the Banking Law does indeed make all persons subject to fine or imprisonment who in their capacity as an official, clerk or employee of a bank, an auditor or auditor's assistant, a member of a banking commission, or a clerk or employee of its central office violate, induce to violate or attempt to induce to violate banking secrecy or professional secrecy. This does not say anything, however, about the scope of the obligation to maintain secrecy and, in particular, does not define the relationship between the obligation to maintain secrecy and the legal obligation to testify and to give information.

In my opinion it is highly important to stress that even now banking secrecy is not unlimited and constitutes no cover-up for offenses. As a matter of fact, banking secrecy as well as all professional secrecy which is punishable under Art. 321 of the Swiss Penal Code are subject to the federal and cantonal provisions regarding the duty to testify and to give information to the authorities. Art. 321, § 3 of the Swiss Penal Code expressly states this in respect of the professional secrecy of ministers, lawyers, notaries, physicians and other medical personnel safeguarded by the Penal Code as well as auditors who are under obligation to maintain secrecy under the Swiss Code of Obligations. The same provision also applies to banking secrecy, as a special legal supplement to Article 321 of the Penal Code. The Banking Law therefore does not restrict the duty to testify and to provide information to the authorities; the revelant federal or cantonal adjective law determines whether a banker is obliged to testify or to give information (cf. in this context Hafter, Swiss Penal Code, Special Section, pp. 860/61; Schwander, Swiss Penal Code, 2nd edition, p. 402).

The banks' duty to provide information is quite extensive. I wish merely to refer to the following:

Under **civil law** banks are obliged to provide information about the assets of the testator to legal guardians regarding the ward's assets and to heirs, individually as well as collectively, to their representatives, to executors of wills and administrators of estates (Federal Court Decision 89 II 93 E 6).

Under the **Debt Collection and Bankruptcy Law** banking secrecy does not relieve banks from the obligation to provide information in case a bank declares bankruptcy (Federal Court Decision 86 III 117).

In **proceedings under the Federal Code of Civil Procedure** only persons mentioned in Art. 321, § 1 of the Penal Code are legally entitled to refuse to testify about facts which fall within the province of professional secrecy according to this provision. Judges may release witnesses from revealing other professional secrets — such as bank secrets — if the witness' interest in preserving the secret outweighs the interest of the person presenting evidence in revealing it.

In the **Federal Code of Criminal Procedure** only ministers, lawyers, notaries, physicians, pharmacists, midwives and their professional assistants are accorded the right to refuse testimony about secrets that were entrusted to them in the course of their official or professional duties (Art. 77 of the Federal Code of Criminal Procedure). Banks are therefore under unrestricted obligation to testify.

Under the federal **tax law** third parties are in general under no obligation to provide information in assessment proceedings. Under the Federal Income Tax Law, for example, only the taxpayer himself can be held to give information and to submit attestations.

In the **prosecution of tax offenses** the rule applied is different. Whenever fiscal offenses are prosecuted, as for instance in the prosecution of stamp tax and customs offenses, in accordance with the provisions of the Federal Code of Criminal Procedure governing the prosecution of fiscal offenses (Art. 279 ff. of the Federal Code of Criminal Procedure), only the professional secrets of ministers, lawyers, notaries, physi-

cians, pharmacists, midwives and their professional assistants may take precedence; in other words, a bank cannot invoke banking secrecy (Art. 290, § 1, Federal Code of Criminal Procedure).

The **Federal Law on Administrative Proceedings** of December 20, 1968, authorizes the Federal Council as a whole and its Departments, the Department of Justice as well as the Federal Commissions of Appeal and Arbitration, to have witnesses examined whenever the facts of a case cannot be adequately elucidated in any other manner. This law transcends both the Federal Code of Civil Procedure and the Federal Code of Criminal Procedure in that it authorizes a person possessing professional or business secrets to refuse to testify, unless another federal law makes it mandatory for him to do so (Art. 16, Federal Law on Administrative Proceedings). Insofar as no special provisions exist — such as in the case of the aforesaid provision of the procedure governing the prosecution of fiscal offenses — a bank will continue not to be required to abrogate professional secrecy in respect to testimony concerning administrative matters.

The aforesaid makes it clear that, by comparison with other countries, it is hardly the legal definition of banking secrecy as contained in Article 47 of the Banking Law which is at the root of the difficulties. Even without this provision, Swiss banks would be neither duty-bound nor authorized to provide foreign authorities with information about their customers, their financial situation and transactions. As a matter of fact, even Article 273 of the Penal Code makes anyone providing a foreign authority with access to a business secret subject to a jail term or imprisonment in a penitentiary. Giving information to a foreign fiscal or foreign exchange authority is precisely one of the offenses made punishable under this provision (Federal Court Decision 65 I 47; 74 IV 102). Only within the framework of bilateral legal assistance treaties can a private person be entitled or duty-bound to give information to foreign authorities.

Switzerland has concluded **legal assistance treaties** with numerous countries, especially in regard to civil and criminal cases. It has also ratified the European Agreement on Legal Assistance in Criminal Cases of April 20, 1959 (Official Record 1967, 805 and 831). There is a growing tendency for the more recent treaties to extend legal assistance to administrative cases also.

However, even within the framework of legal assistance treaties, the obligation to provide testimony or information cannot be greater abroad than it is in Switzerland. This means that the pertinent Swiss adjective law determines whether or not a bank is obligated to give information.

In other words, a bank is as a rule obliged to give information whenever legal assistance is provided in ordinary criminal proceedings. The situation is different in the field of administrative law, where even in Switzerland the banks are required to provide information only to a limited extent. Finally, Article 11 of the Federal Law dated January 22, 1892, concerning extradition excludes legal assistance when foreign tax laws are violated. The fact that the European Agreement on Legal Assistance in Criminal Proceedings, concluded between the members of the Council of Europe on April 20, 1959, and which has been in force in Switzerland since March 20, 1967, provides for the refusal of legal assistance in the prosecution of tax offenses (Art. 2, lit. a of the Agreement), shows that the Swiss concept continues to predominate in Europe.

In my opinion, the reservation shown by Swiss legislators continues to make good sense. Switzerland cannot commit itself to assist blindly in the application of foreign administrative laws in Switzerland and to participate in the punishment imposed for their violation.

As you know, certain difficulties exist at present in relations between Switzerland and the United States. Inasmuch as the first round of talks took place not long ago, it would be premature to enter into the details, for I hope that a solution satisfactory to everyone may be found by way of negotiations. However, even at this stage, I can say that these difficulties are not merely the consequence of banking secrecy or a lack of willingness on the part of Switzerland to grant legal aid.

As far as legal aid in criminal matters under public law is concerned, there are no obstacles to the conclusion of a legal assistance treaty from the point of view of Switzerland. In the field of taxation, the Swiss-American Double Taxation Agreement of 1951 provides in Article XVI that the competent authorities of the two countries will exchange information of the kind available under the existing national legislation and which is necessary for the prevention of offenses such as fraud, etc. and, generally speaking, those which involve taxes covered by the Agreement. As a result, Switzerland actually provides the United States with legal assistance which goes far beyond the scope of that given to other countries, without, however, obliging the banks to give information.

The intensification of international trade and the growing economic interdependence of countries will **per force** lead to increased administrative collaboration and thus to the expansion of mutual legal assistance. However, even in a modern economy, the citizen has a legitimate right to the protection of his personality and his privacy. To strike a balance between these rights and the legitimate requirements of society is a problem constantly facing us in one way or another.

In conclusion, I should like to recall that banking secrecy is not a phenomenon that is peculiar to Switzerland. Throughout Western Europe at least, civil law prohibits the banker from providing any information about his customers' financial situation or relations without their express permission, unless there are specific legal provisions obliging him to do so. In other words, not only in Switzerland does the maintenance of secrecy as an expression of trust constitute one of the banker's professional duties. A number of countries have even stipulated the maintenance of secrecy under the law, such as France in the case of its nationalized banks.