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Internal Transfer of Confidential Information within a Banking Group against the Backdrop of Swiss Banking and Business Secrecy

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The restrictions imposed by the rules of Swiss banking secrecy and business secrecy generally apply to relations between banks that are part of the same group of affiliated entities. However, pursuant to article 4^{quinquies} of the Swiss Banking Act as well as the general principles of corporate law as they pertain to affiliates, the parent's duty to supervise its subsidiaries on a consolidated basis may justify an extensive internal transfer of confidential information within the group.

By Christoph B. Bühler / Alexandre-C. Manz

In order to carry out effective, comprehensive consolidated group management, boards or internal audit functions require information on certain qualitative aspects of the business of subsidiaries for which they are responsible. In the case of a banking group, however, the requirements of Swiss banking and business secrecy rules potentially restrict the transfer of certain information, such as client data, among separate legal entities.

The following is an attempt to provide an overview of the relevant exceptions to bankers' obligations to respect their clients' privacy as well as to the business secrecy restrictions that apply to the individual companies of a banking group.

1) Legal Basis and Scope of Swiss Banking Secrecy and Business Secrecy

a) Banking Secrecy

Article 47 of the Swiss Banking Act (BA) contains a secrecy provision that makes a banker's disclosure of confidential information a criminal offense. Accordingly, this secrecy provision does not have its legal basis in the BA; the BA simply provides additional regulatory protection using the instrument of criminal law. Swiss banking secrecy is an obligation grounded in private law, as specifically provided for in

(i) the ***individual contract*** (either explicitly stipulated or tacitly assumed as a secondary contractual duty) between the bank and the client;

(ii) the ***implied accessory duty under contract and agency law*** (article 398 (1) Swiss Code of Obligations (CO)), and

(iii) the ***right of personality of the client*** (article 28 Swiss Civil Code (CC); *right to privacy*).

Article 47 BA protects the confidential information of the bank's client and banking secrecy is, therefore, the client's right and the bank's obligation. Banking secrecy covers all data relating to the business relationship between the client and the bank.

b) Business Secrecy

Business secrecy on the other hand, as set forth in article 162 of the Swiss Criminal Code, constitutes an obligation to keep secret the business information of a company; it thus pertains to confidential information of ***the bank itself.*** It originates in the ***contractual duties*** (*e.g.* employment contracts, *see* article 321a (4) CO) or in statutory law itself, *e.g.* the duty of confidentiality of (i) the agent (article 418d (1) CO), (ii) authorized officer (article 464 CO), or (iii) directors and officers in accordance with the general provisions of company law.

Article 717 CO provides that members of a board of directors, as well as any third parties engaged in the management of a company shall carry out their duties with ***due care*** and must act in the best interest of the company. There is a common understanding in doctrine that this duty of care incorporates the obligation not to disclose ***business secrets*** to third parties. Furthermore, under article 697 (2) CO, company information which shareholders would otherwise be entitled to in connection with the exercise of their shareholder rights may be withheld if releasing such information would jeopardize ***business secrets*** or other company interests worthy of protection.

While there is no legal definition of "business secrecy" or the information subsumed by the term, the common understanding of "business secrecy" generally presupposes two conditions:

(i) The information must be *"secret", i.e.*

- the relevant facts must be non-public;
- the beneficiary's interest in maintaining confidentiality must be objectively legitimate;
- the beneficiary must have the will to keep the facts confidential.

(ii) Confidentiality must pertain to information that is truly ***relevant to the business,*** *i.e.* information that imparts an economical or competitive advantage, such as pricing information, business models etc.

2) Carve-out from Banking Secrecy for Purposes of Consolidated Supervision

Banking secrecy, as outlined above, pertains to the transfer of client data to ***third parties.*** Thus, in principle, it would also apply to the transfer of data between affiliated companies such as a parent and a subsidiary within the same group.

An ***exception*** to this general rule is set out in the BA itself. Article 4^{quinquies} BA specifically provides for a "carve out" from the Swiss banking secrecy provision for purposes of consolidated supervision. A bank, whose parent company is supervised by the banking or financial market supervisory authorities, may provide the parent company with any such non-public information or documents as deemed necessary to exercise consolidated supervision, so long as:

(i) the information is used exclusively for internal control or direct supervision of banks or other financial intermediaries subject to a banking license;

(ii) the parent company and the authorities responsible for consolidated supervision are subject to official or professional confidentiality;

(iii) the information is not transmitted to third parties without the bank's prior permission or is transmitted based on a blanket authorization contained in an international treaty.

Therefore, if the foreign parent company that is regulated by a foreign banking or financial market supervisory authority asks for information and documents for purposes of consolidated supervision (*e.g.* a group internal audit), its Swiss subsidiary would be permitted to disclose the required information. However, if the foreign bank is not the

direct parent company, but rather the parent's parent company, from a ***formal*** point of view, article 4quinquies (1) BA, which refers to "parent companies", does not appear to apply. Nevertheless, from a ***functional*** perspective, one might argue that the Swiss sub-subsidiary is a subsidiary by virtue of consolidation of the foreign parent's parent company, which is regulated by the foreign banking or financial market supervision, ***provided,*** that

(i) the regulated foreign parent's parent company has the lead for purposes of the group internal audit; and

(ii) all the other shareholders of the Swiss subsidiary are also regulated and audited by foreign banking or financial market supervisory authorities.

It, therefore, would appear to be in line with the ***legislative intent*** of the specific provision of article 4quinquies BA, for a group company to be permitted to request certain confidential information or documents, if the requesting company is under the control of a top group company that is supervised by banking or financial market supervisory authorities, as required by article 4quinquies BA ***("substance over form"-principle).***

In order to carry out effective, comprehensive consolidated group management, boards or internal audit functions require information on certain qualitative aspects of the business of subsidiaries for which they are responsible. In the case of a banking group, the board must also ensure the monitoring of the subsidiary's liquidity and prevent excessive reliance on a small number of third party sources of funding, *i.e.* reliance on only a few clients. While recognizing that there are legitimate reasons for protecting ***clients' privacy,*** secrecy laws should not impede the ability of the parent company's board or management to ensure ***effective consolidated group management.***

However, with respect to ***client data,*** information should be provided on a ***"need to know"-basis*** only. In principle, internal auditors have no need to know the identity of individual depositors or customers. Their interest in any deposits is primarily related to ***liquidity;*** what they typically need to know is whether there are any ***global deposit concentrations*** and, if so, the amounts involved. Accordingly, aggregate information on deposits that significantly exceed a threshold as compared to the deposit base, balance sheet or capital base of the respective institution, along with some information on the geographic source of such deposits, should usually suffice for internal auditors to perform their task.

Notwithstanding the foregoing, group internal auditors may also wish to verify whether or not a given depositor is among the large depositors in order to monitor deposit concentrations or the funding risk posed by the withdrawal of a specific large deposit. They may also want to be able to track all the transactions made by, or on behalf of, a single large client, which may represent a group of related companies. Under such

well-defined circumstances, group internal audit may be justified in requesting access to individualized client data such as a depositor's name and to specific deposit account information.

When in doubt as to whether the Swiss Financial Market Supervisory Authority (FINMA) shares the view of the parent company's board of directors regarding permissible disclosure of client data, article 4^{quinquies} (2) BA explicitly provides that banks may request a directive (or, rather, a "ruling") from FINMA to permit or prohibit the release of specific information.

3) Internal Transfer of Data within a Group Protected by Business Secrecy?

Article 697 CO states that when a shareholder requests certain information at the shareholders' meeting, the board is required to provide it under two conditions:

(i) the information is ***relevant*** to the exercise of shareholders rights, and

(ii) the information does not jeopardize legitimate ***business secrets*** of the company.

From a formal point of view, under this rule, it would appear that a company would hardly ever be required to disclose information containing any kind of business secrets. Such interpretation, however, seems too restrictive. One should bear in mind that the parent company, in a group context, is generally not asking the subsidiary for information simply in its capacity as a ***shareholder*** in order to exercise its shareholder rights; more likely, the parent is asking for the data in question in order to carry out its duty of ***consolidated supervision*** in its role as ***controlling parent company.*** In fact, in order to qualify as a controlling parent of a subsidiary, it is not required that a parent company holds ***all*** shares of the respective subsidiary. Instead, what determines whether a parent is deemed the ***controlling parent*** in a group is the fact that ***multiple companies were subordinated to an integrated group management by a majority vote*** or by some similar means (*see* article 663e (1) CO).

The board of directors of the subsidiary in this scenario would not be permitted to refuse the disclosure of the requested documents or information, even if they contained business secrets. As part of a group under common control, the subsidiary may not merely act in its own best interests as a separate legal entity, it must also consider its ***affiliation with the group*** and act in accordance with the interests of the group as a whole. As a result, if the disclosure to the parent of the requested documents or information is necessary to carry out ***effective, comprehensive consolidated group management,*** and so long as it does not cause material harm to its specific interests,

the subsidiary would be required to disclose the data, even if it could reasonably be deemed a business secret of the subsidiary.

Christoph B. Bühler (c.buehler@boeckli-bodmer.ch)
Alexandre-C. Manz (alex@manz.cx)