



## Financial Markets Criminal Law

LL.M. in International Banking and Finance Law 2014/2016

University of Zurich, Faculty of Law

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Peter Honegger / Thomas Frick

# Swiss Financial Markets Criminal Law

## Legal Basis

- ⇒ Stock Exchange Act?
- ⇒ Banking Law?
- ⇒ FINMA Act?
- ⇒ Financial Market Infrastructure Act?
- ⇒ Criminal Code?

## Enforcement Authority

- ⇒ Canton State Attorney?
- ⇒ Federal Prosecutor?
- ⇒ Federal Finance Department?

«Aufgehoben werden können zudem sämtliche heute im Börsengesetz enthaltenen Marktverhaltensregeln (Bestimmungen über die Offenlegung von Beteiligungen, Bestimmungen über die öffentlichen Kaufangebote und Bestimmungen über den Insiderhandel sowie die Markt- bzw. Kursmanipulation). Alle diese Bestimmungen werden aufgrund ihres engen Sachzusammenhangs ebenfalls ins FinfraG überführt.» Erläuternder Bericht EDF vom 29. November 2013 [https://www.admin.ch/ch/d/gg/pc/documents/2287/FinfraG\\_Bericht\\_de.pdf](https://www.admin.ch/ch/d/gg/pc/documents/2287/FinfraG_Bericht_de.pdf)

- ➔ **Insider Legislation, Market Manipulation**
- ➔ **Disclosure of Share Holdings**
- ➔ **Bank Secrecy**
- ➔ **Compliance**
- ➔ **Attorney-Client Privilege**
- ➔ **Arts. 271/273 Criminal Code**
- ➔ **Corruption Legislation**

- ➔ **«Lase Law approach»**
- ➔ **30 (Real) Cases ...**
- ➔ **Constituents Elements of Criminal Legislation**
- ➔ **International Context ...**
- ➔ **particularly US-Context**



# Insider Criminal Law Provision



- ➔ **lex americana**
- ➔ Art. 154 Financial Market Infrastructure Act (FMIA)
- ➔ **Up-date Insider-Directive!**
- ➔ **Listing in Switzerland («Trading Venue»)**
- ➔ Price-sensitive Information
- ➔ **Confidentiality of the Information**
- ➔ Capable of Substantially Influencing Market Price
- ➔ **Pecuniary Advantage**
- ➔ Predicate Offence to Money Laundering
- ➔ **Federal Enforcement (Art. 156 Para. 1 FMIA)**

# In-house Information

## In-house Information

- ⇒ Considerable Personnel Changes
- ⇒ Considerable Changes Regarding (Capital)Structure
- ⇒ Significant Alliances
- ⇒ Acquisitions, Mergers, Reorganizations
- ⇒ Essential Changes of Profit Situation
- ⇒ Closures of Facilities, Reorganizations
- ⇒ Unexpected Events (Class-action)

# Outside Information

## FINMA Circular on Market Conduct Rules 2013:

«Facts external to the company, such as knowledge of:

- ➔ a financial analysis awaiting publication,
- ➔ a large customer order,
- ➔ a license or authorization that is to be granted or refused or
- ➔ a planned terror attack.

are also deemed to constitute information.»

# Insider Administrative Law Provision

- ➔ **Art. 142 Financial Market Infrastructure Act (FMIA)**
- ➔ **Supervisory** Interdiction
- ➔ **Largely Corresponds with Criminal Law**
- ➔ No Pecuniary Advantage Required
- ➔ Intent of Financial Gain not Required
- ➔ **Subjective Fault not Required**
- ➔ **Front-, Parallel-, After-Running**
- ➔ **Scalping: Buy Recommendation Without Hint to OP**
- ➔ Safe Haven Exceptions: Pre-acquisition etc.
- ➔ **FINMA Supervision erga omnes**

# The New CEO

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## Case 1

You are a member of the board of the SIX listed company A. On the occasion of today's meeting of the Board of Directors you learn that the outperforming CEO of the German subsidiary will leave the company. Subsequently, you sell A shares and call options on A shares. Key issues?

## Approach

**„Insider information“ in the sense of Art. 2 lit. j FMIA  
How important is the German market for the company?**



# Implementation of Transaction

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## Case 2

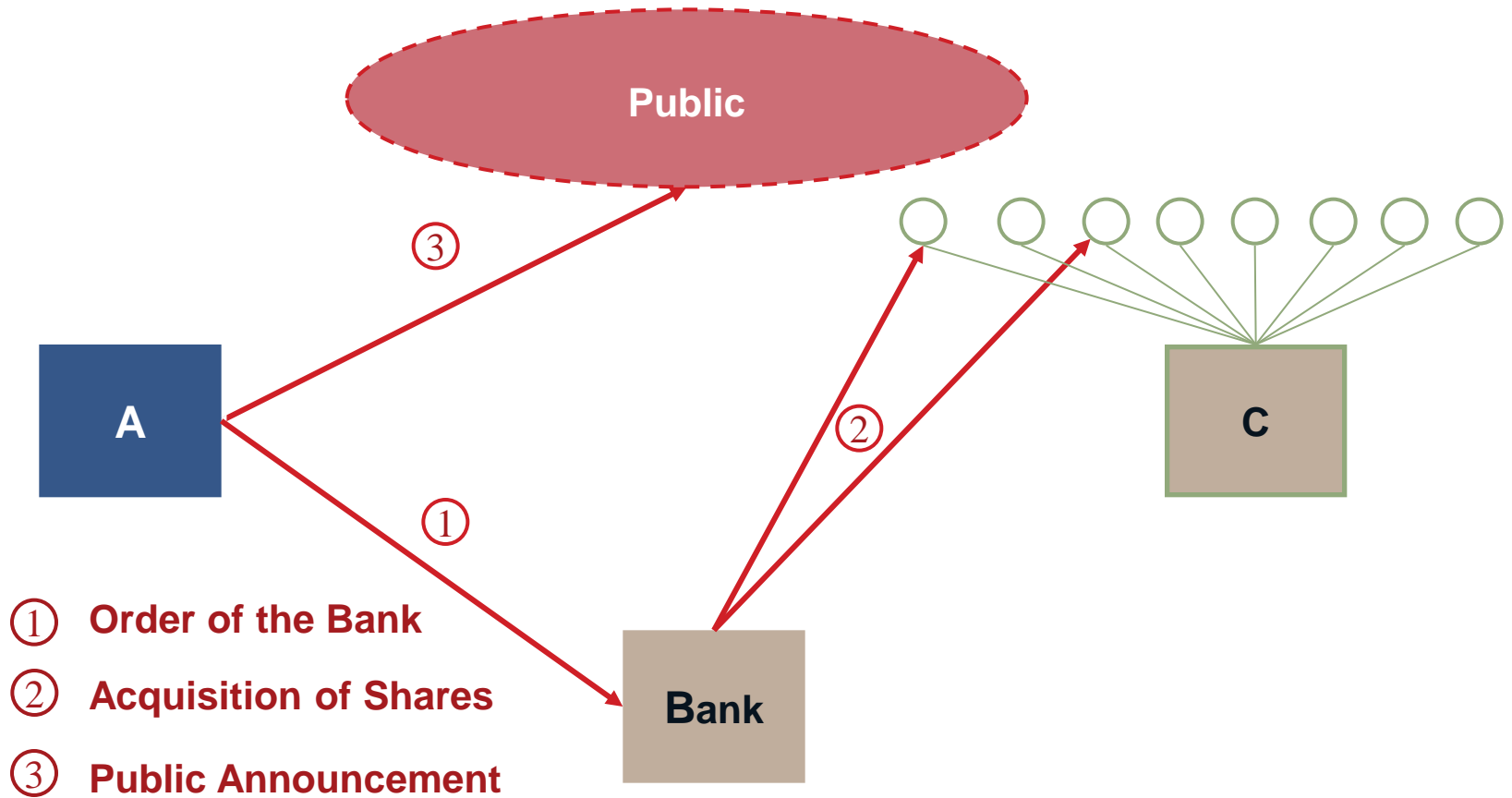
**Company A decides to acquire 35% of the shares of company C, which is listed at SIX Swiss Exchange (company C has an opting-out clause). The acquisition is handled via bank B. Key issues? Solutions?**

## **Approach**

**Axiom „Nobody can be his own insider “**

**Art. 127 para. 1 lit. a FMIO**

# Implementation of Transaction



# Information of Anchor Shareholder

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## Case 3

**You work as in-house counsel of a stock quoted company. On grounds of age the founder of the company has resigned as organ, however, he still holds roughly 20% of the company. May he be granted access to confidential information within the meaning of Arts. 142 / 154 FMIA?**

## **Approach**

**Art. 128 FMIA-Ordinance:  
Rather no (text next slide).**

# Admissible Communication of Insider Information

## Art. 128 FMIO: Admissible Communication of Insider Information

The communication of insider information to a person does not fall under Article 142 paragraph 1 letter b of the FMIA if:

- a. this person requires the insider information in order to fulfil his or her **statutory or contractual obligations**; or
- b. the communication is required with regard to the **conclusion of a contract** and the information holder:
  1. makes it clear to the information recipient that the insider information may not be exploited, and
  2. documents the disclosure of the insider information and the clarification under item 1 above.

# Price Manipulation: Penal Sanctions



- ➔ **lex americana**
- ➔ Art. 155 Financial Market Infrastructure Act (FMIA)
- ➔ **Listing in Switzerland («Trading Venue»)**
- ➔ Disseminating of Misleading Information
- ➔ **So called „Fictitious“ Securities Trading**
- ➔ Intention of Considerable Stock Price Manipulation
- ➔ **Intention of Gaining Pecuniary Advantage**
- ➔ Predicate Offence to Money Laundering
- ➔ **Federal Enforcement (Art. 156 para. 1 FMIA)**

# Market Manipulation Regulatory Law

- ⇒ **Art. 143 Financial Market Infrastructure Act (FMIA)**
- ⇒ **Supervisory Interdiction**
- ⇒ **Largely Corresponds with Criminal Law**
- ⇒ **No Intent of Pecuniary Advantage Required**
- ⇒ **Prohibition of Sham Transactions**
- ⇒ **„Ramping, „Camping“, „Pegging“, „Squeeze“, „Corner“, „Spoofing“**
- ⇒ **Exceptions (Ord. FC): Price Stabilization, Market Making, Nostro-Nostro In-house Crosses**
- ⇒ **Example: Bank Coop**

# Market Manipulation

## ⇒ Example: Bank C

### Finma-Rüge für die Bank Coop

*Berufsverbot von drei Jahren für ehemaligen Chef Waespi*

Bank C purchased own shares with the objective to counter price pressures. Particularly before and during publication of financial results as well as end-months and end-years the bank stabilized the market price of its bearer shares.

**NZZ, 30 October 2014, p. 31**

# Stabilization of Market Price

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## Case 4

**Facing a bad business development and major losses, company A intends to stabilize the market price. To this end the company executes so called support purchases. Key issues? Solutions?**

### **Approach**

**Stabilization of trading?**

**Support purchase?**

**Art. 659 CO. Taxes?**



# Price Fraud

- ⇒ no lex americana
- ⇒ Securities Transactions
- ⇒ Trading Profit of Bank
- ⇒ No Risk for the Bank
- ⇒ Commission Business vs. Real Purchase
- ⇒ Block Trades
- ⇒ Art. 146 Criminal Code
- ⇒ Art. 3 Banking Law



# Stock Exchange Notification Duties

- ⇒ **Breach of Notification Duties (Art. 151 FMIA)**
- ⇒ Notification Duties (Arts. 120/121 FMIA)
- ⇒ Thresholds, significance of Options
- ⇒ «Acting in Concert with Third Parties»
- ⇒ **Breach of Duty to Make an Offer (Art. 152 FMIA)**
- ⇒ Duty to Make an Offer (Art. 135 FMIA)
- ⇒ **Breach of Duty by Target Company (Art. 153 FMIA)**
- ⇒ **Enforcement by FDF (Art. 156 para. 1 FMIA)**

# Acting in Concert

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## Case 5

**Together with relatives you hold 14% of company F that is listed at SIX Swiss Exchange. One of your friends buys 2.5% of F shares, further he buys cash-settled options that authorize the purchase of 2.5% of F-shares. Key issues?**

## Approach

**Art. 120 para. 1 FMIA, Art. 12 et seq. FMIO FINMA  
Relatives and friends as «group». Quadrant case.**

# Transaction Planning With Anchor Shareholders

## Case 6

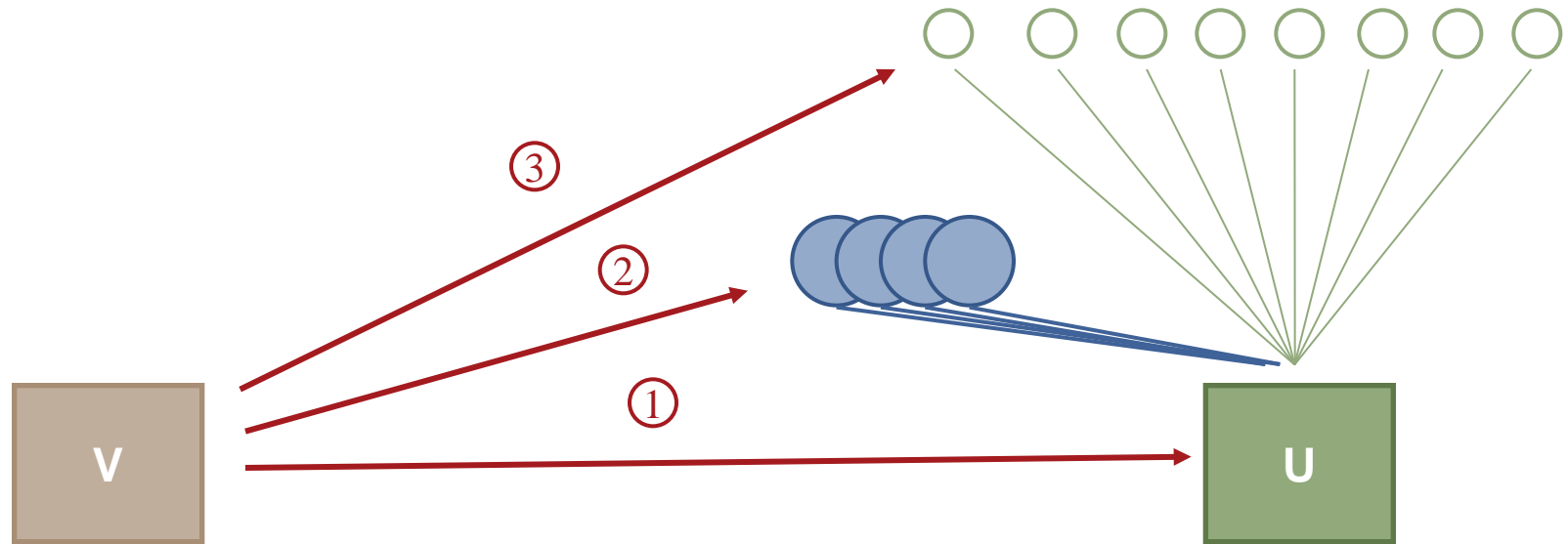
You are the lawyer of investor V. V wants to acquire company U that is listed at SIX Swiss Exchange, on the one hand by signing a share purchase agreement with the anchor shareholders, on the other hand by a public offer addressed to all other shareholders. Initially, V will conduct a due diligence. Key issues?

## Approach

**Art. 127 para. 1 lit. a FMIO**

**«Nobody can be his own insider». Pre-acquisition**

# Transaction Planning With Anchor Shareholders



- ① Due Diligence
- ② SPA with Anchor Shareholders
- ③ Public Offer

# Coordination Before the AGM

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## Case 7

**You hold 1.5% on a small cap with a „sleeping car management“. In preparation of the Annual General Meeting you agree with other unhappy shareholders to replace the board of directors. Key issues?**

## **Approach**

**Art. 12 para. 1 FMIO FINMA**

**Shareholders democracy; proxy fight**

**«just once does not hurt»?**

# Indirect Acquisition

## Case 8

**You work in the Enforcement Division of FINMA. SIX advises you that Investor V increased his share position in SIX listed company U from 2.9% to over 20% within four stock exchange days. Key issues?**

## **Approach**

**Art. 120 para. 5 FMIA, Art. 11 FMIO FINMA**

**„park and call“.**

**Block trades?**

# Penal Settlement?

## Case 9

You work at the legal service of the Federal Department of Finance (FDF). How do you learn about violations of disclosure obligations? The lawyer of Investor V asks you to suspend the criminal proceedings in exchange for a payment of CHF 500'000. Key issues?

**Approach: «Reparation» under Art. 53 Criminal Code:**

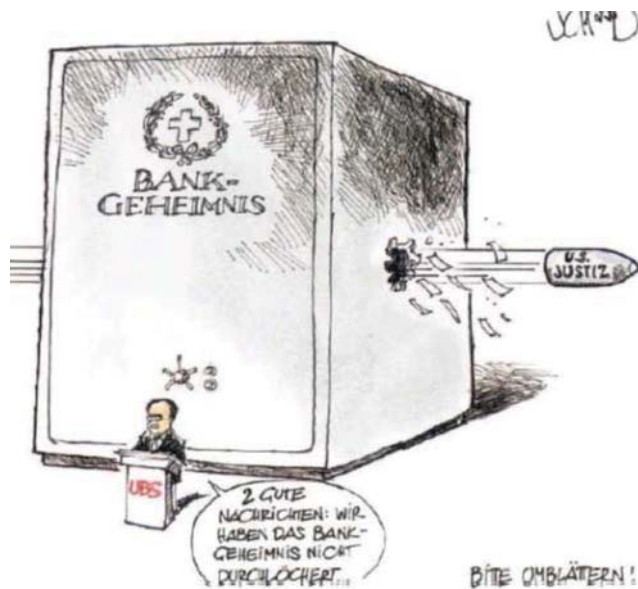
- **OC Oerlikon (Vekselberg et al.)**
- **Orell Füssli (Dieter Meier)**
- **SIA Abrasives (Giorgio Behr)**



# Banking Secrecy: Genesis & Scope

- ➔ anonymous accounts
- ➔ legal basis?
- ➔ examples

- ➔ relevant data
- ➔ crime abroad
- ➔ renunciation of protection
- ➔ annulment of protection



Tages-Anzeiger 20/02/2009



# Acceptance abroad?

⇒ Banking secrecy is part of Swiss law:

**Civil Code 28; Code of Obligation 398; Data Protection Act; Penal Code 162 and 273; Stock Exchange Act 43; Collective Investment Schemes Act; Financial Market Infrastructure Act 147; draft Financial Institutions Act 65**

⇒ no «blocking statute»

**Jed Rakoff (US District Judge, Southern District of New York), 2014 [Motorola v. Uzan]:**

***«..policy is not only protective of private interests but expressive of a public interest..» «..balancing of interests strongly favors denying the release of the subpoenaed information...»***

# Banking Secrecy – Information rights (1)

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- ➔ **Bank customer**
- ➔ **Agents**
- ➔ **Spouse?**
- ➔ **Heirs?**
- ➔ **Examples**

# Negative response

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## Case 10

**You work as a lawyer at a Cantonal Bank. A good client (at the same time Chairman of the Board of Directors of a Company which is not a client of the Bank) asks you to confirm that the Company does not have an account at your bank.**

### **Approach**

**Principle: no negative information. However, client can demand a confirmation (discussion); BoD member is not identical to the company.**

# Banking Secrecy – Information rights (2)

## Case 11

You work in the Legal Department of a major Bank. The Front Office enquires whether it is allowed to provide information to the heirs in the following case:

A deceased client had an account in his name. A female person with another family name has account authorization. Shortly before the client died the authorized person had withdrawn a large sum of money.

**Approach: Each heir has a comprehensive right to information, also about transaction that took place before the date of death**

# Banking Secrecy – territorial application

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## Case 12

**You work at an international Law Firm. A foreign bank wants to know whether the client data of its subsidiary in Switzerland / its branch in Switzerland are subject to banking secrecy.**

### **Approach**

**Subsidiary: if banking license: art 47 BankingLaw. Branch: art. 47 applies by analogy – scope unclear**

# Banking Secrecy - Securitization

## Case 13

**A clause in the General Business Conditions of a bank (not highlighted) reads as follows:**

**«The client accepts disclosure of his/her data to third parties, if the bank has a legitimate interest in doing so.»**

**The bank asks you whether it is allowed to assign contractual claims against clients in connection with a securitization project.**

**Approach: Client consent must be specific and concrete: “informed consent”. Hence, probably insufficient wording.**

# Banking Secrecy – Providing information to Swiss authorities (1)

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- ➔ **Principles**
- ➔ In penal proceedings
- ➔ **In civil proceedings**
- ➔ In administrative procedures / tax evasion procedures
- ➔ **In enforcement and attachment proceedings**
- ➔ Examples



## Case 14

**You work in the Legal Department of a Cantonal Bank. Front Office informs that it received an attachment order (“Arrest”) on the portfolio of a client and asks for instructions.**

### **Approach:**

- **blocking of portfolio/account**
- **Info of account holder, request permission to provide information to the authority; if refused:**
- **deadline to provide security to Bank**
- **client shall inform about legal remedies taken**
- **Information to the authority that no information will be provided.**

# Banking Secrecy – Information to foreign authorities

## Case 15

In the General Terms of a Bank there is the following clause:

«The account holder acknowledges that the Bank is obliged according to the law of various countries to provide the competent authorities upon request with all customer data. Furthermore, the account holder releases the Bank from its obligations under Banking Secrecy insofar as it is necessary to safeguard justified interests of the Bank.»

**Problems?**

**Approach: Issue is specification: similar as with retrocessions: consent must be informed and specific. Hence, probably insufficient.**

# Banking Secrecy – Example of General Terms and Conditions

## «Data Protection, Bank Customer Secrecy and other secrecy provisions

[...] The Client hereby releases the Bank, its Agents, Employees and Representatives from their duty of confidentiality and waives Bank client confidentiality,

- (a) insofar as it is necessary to safeguard the legitimate interests of the Bank, in particular in the event of the client threatening legal measures against the Bank;
- (b) in case of transactions and services the Bank provides for the Client in particular if they relate to foreign countries. In connection with such transactions, the Bank is entitled and mandated to disclose data vis-à-vis third parties involved in such transactions and services within Switzerland and abroad.»

# Banking Secrecy in Undertakings / Groups

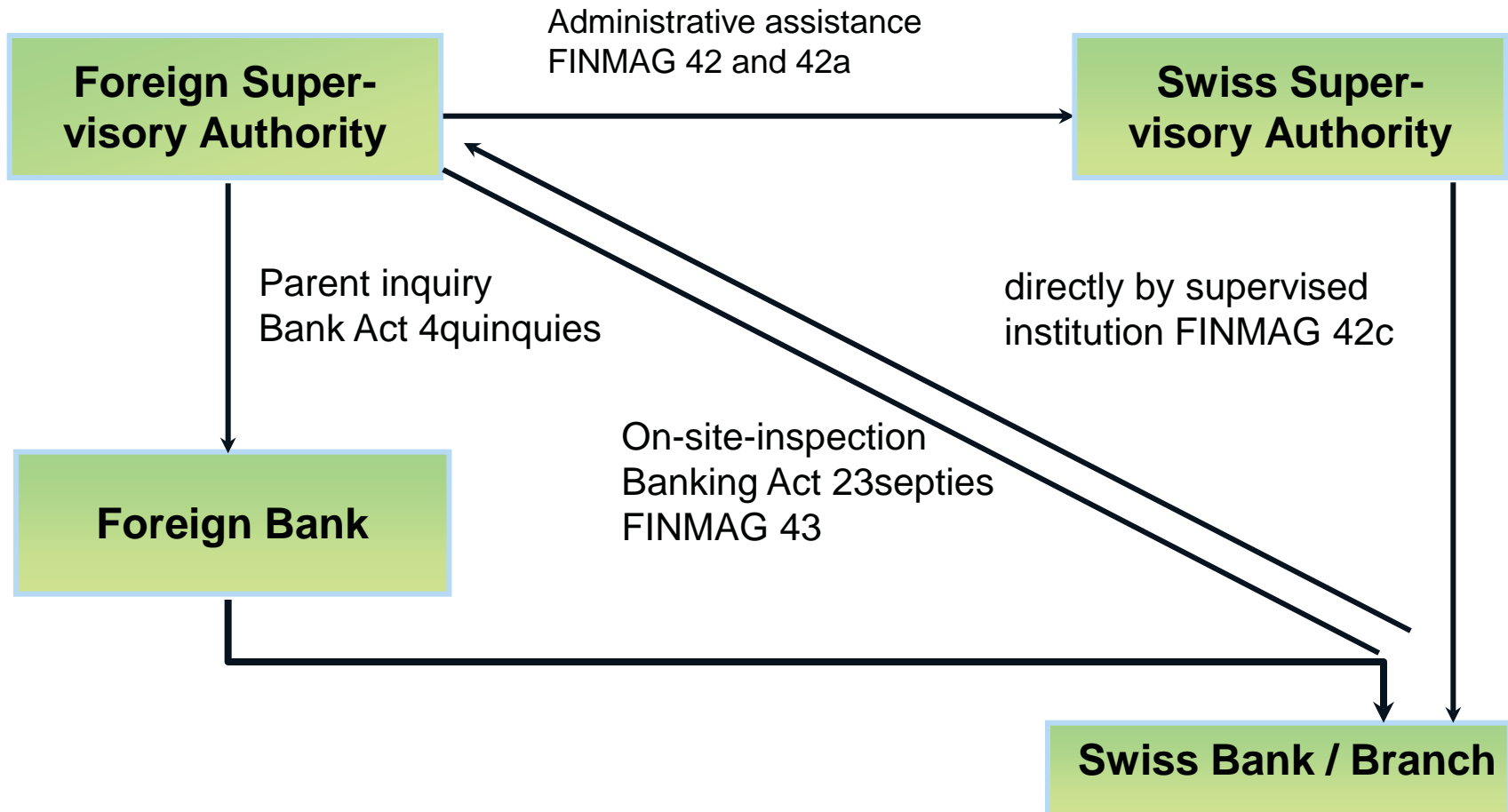
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- ➔ **Basis: Banking Act, Data Protection Act, FINMA-Circulars**
- ➔ **Outsourcing: FINMA and others!**
- ➔ **Take-overs**
- ➔ **Consolidated Supervision**
- ➔ **On-Site-Inspections**
- ➔ **Examples**

# Basis: Not only the Banking Act

- ⇒ FINMA-Circular 08/21: Operational Risks Banks, Annex 3: Handling of electronic customer data: CID
- ⇒ **Various levels of secrecy; protective measures; deletion of data**
- ⇒ Note 21: Need to know-Principle: «Persons may only have access to information required for the performance of their tasks.»

# Banking Secrecy: Data flow to foreign supervisor



# Banking Secrecy: Outsourcing

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## Case 16

**You work as Legal Adviser at a Private Bank. The General Manager enquires whether parts of the back office can be outsourced to an IT company in Germany / in India.**

### **Approach**

**Banking Law 47; Stock Exchange Act 43; Collective Investment Schemes act (if fund); Data Protection Act 6 (requirements for transmission abroad) – country list of Federal Data Protection Officer: Germany better than India. Outsourcing Circular of FINMA.**

# Banking Secrecy: Take-overs

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## Case 17

**You work at a Law Firm. Your Client intends to acquire a small Swiss Bank (Ltd.) or - optionally - its assets only.**

**Which relevant factors result from Swiss Banking Secrecy?**

**Approach: Asset Deal: difficult, access to customer data only with customer consent. Share Deal easier. Due diligence: performed by auditors of target, then anonymized report to buyer.**



# Banking Secrecy: Global Compliance

## Case 18

You work at the Legal Service of a global Bank Group in Zurich. The fight against money laundering and terrorism shall be supervised globally.

- (a) The Auditing Company of the main office located abroad wants access to individual business relationship data.
- (b) Furthermore, a centralized data storage including client names and beneficial owners shall be set up abroad.

**Problems? Solutions?**

**Approach: art 6 para. 4 Money Laundering Ordinance  
FINMA.**

# Financial Markets Criminal Law and Risk Management

## Financial Markets Criminal Law as part of the Risk Landscape:

«legal risk has become the key risk category for big global companies» (P. Kurer, former Chairman of UBS, 2015)

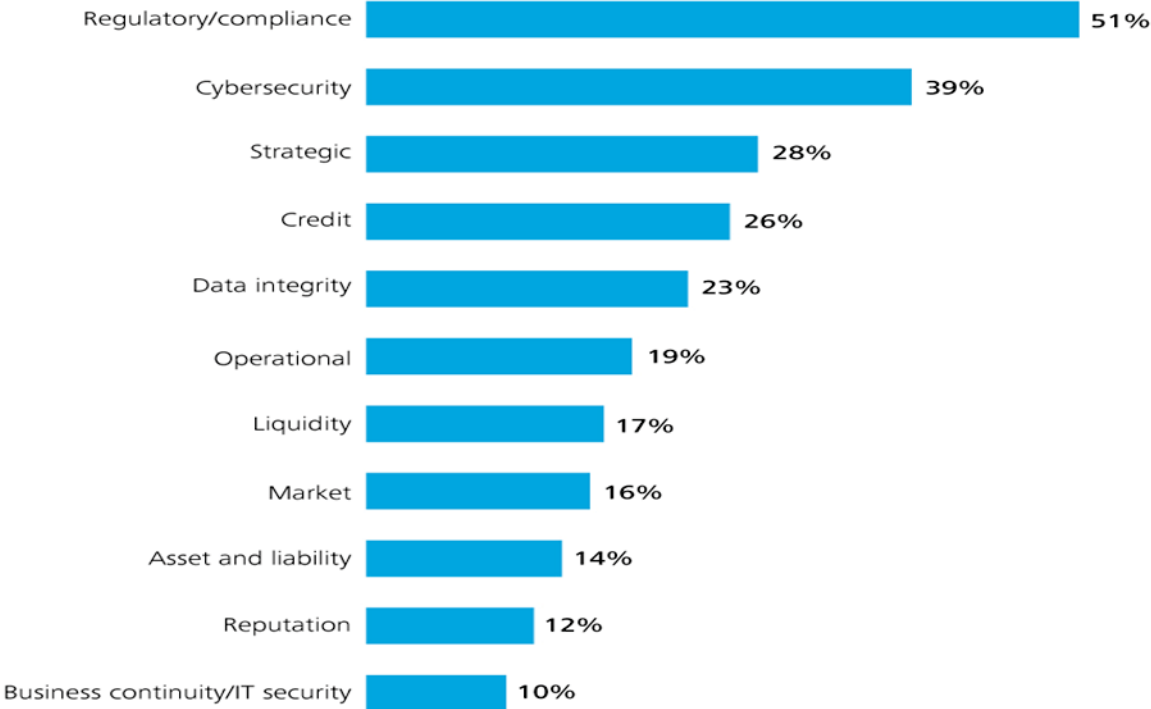
**GCs Report “Astounding” Rise in Regulatory Risk (Corporate Counsel, January 29, 2016)**

## Examples from the Finance Industry:

- ⇒ **BNP Paribas 2014: Settlement over USD 9'000 mio. because of breach of US Sanctions against Sudan, Iran and Cuba**
- ⇒ **UBS: 2009 US Tax Fraud USD 780 mio.; 2012: Libor case CHF 1'400 mio.; 2013 Settlement Subprime Mortgages USD 885 mio.; 2014 US/UK/CH FOREX Rigging USD 802 mio.**
- ⇒ **CS: 2014: 2'600 mio. fine, US Supervisor at CHF 22 mio./month**

# Compliance and Risk Management (1)

**Figure 16. Over the next two years, which three risk types do you think will increase the most in their importance for your business?**



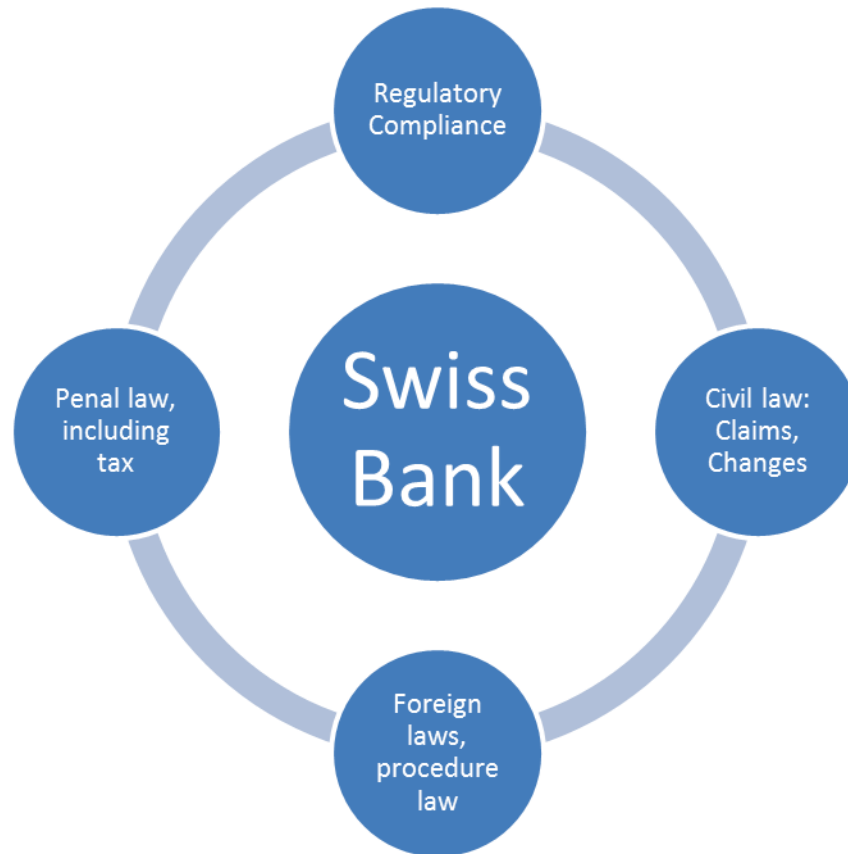
Note: Only the highest-rated risk types are shown. Figures reflect the percentage of respondents who ranked each risk type in the top three.

Graphic: Deloitte University Press | DUPress.com

Source: Deloitte Touche Tohmatsu Global Risk Management Survey, ninth ed, ed. E. Hida, May 13, 2015

# Compliance and Risk Management (2)

## Legal and Compliance Risks of a Bank:



# Compliance and Risk Management (3)

## Current criminal law topics of the finance industry from a risk point of view:

- ⇒ Regulatory proceedings / AMLA / Tax / Enforcement
- ⇒ Competition Law and Dawn Raids
- ⇒ Corruption and Anti-Bribery Laws
- ⇒ Sanctions and Embargos
- ⇒ internal and external Investigations; topics include Attorney-Client Privilege, Arts. 271 and 273 Swiss Criminal Code

# Competition Law Risks (Finance Industry) (1)

«Enforcement of competition provisions in the Finance Industry is among the top priorities of the Commission ever since the beginning of the crisis.» (EU Report on Competition Policy 2014)

**In Switzerland currently:**

- ⇒ **2012: Investigation LIBOR / TIBOR: potential agreements on interbank interest rates; potential agreements on interest derivatives (Spreads)**
- ⇒ **2013/2014: Investigation against various Banks because of potential agreements on Forex-Trading**
- ⇒ **2014: Investigation Car Leasing (potential information exchange on conditions)**

# Competition Law Risks (Finance Industry) (2)

**Sanctions: 10% of turnover over the last three years**

**(Banks: gross proceeds)**

**Preconditions: agreements (incl. information exchange),  
abuse of a dominant position, concentration**

**Dawn Raids:**

- **Presentation of the search warrant**
- **Information about the opening of an investigation  
(Competition Act 27)**
- **Information about legal remedies**
- **Form «Bonus Regulation»**

**(Information Sheet of WEKO's Secretaries Office, January 6, 2016)**

# Dawn Raid WEKO

## Case 19

**You are the internal lawyer of Company A. This morning, Representatives of WEKO with support staff showed up. The files in the legal department are being seized systematically (originals); furthermore, all data on personal computers and on the company servers are «mirrored».**

**What issues do you have to address? Solutions?**

**Approach: Cooperation. Potentially demand sealing of the files/hard disks. Bonus scheme: Weko: only if full cooperation. Submitting of form is time-sensitive.**



# Sanctions (1)

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## **OFAC - EU - Switzerland**

**Personal scope: Case BNP Paribas / current Iran Sanctions**

**Sanctions: 22 Countries; «Al Qaida» and Individuals**

**Regulations in Switzerland: Embargo Act and Ordinances:  
Prison up to 5 years**

**Information: [www.seco.admin.ch](http://www.seco.admin.ch)**

**Structure: e.g. Financial Sanctions Russia: Authorization  
Requirement / Notification Requirement / Prohibition**

# Sanctions (2)

## Case 20

**You are General Counsel of a Bank in Switzerland. Yesterday, it was informed that both the EU and the US issued sanctions against persons and segments of the economy of a country, with which the Bank / customers of the Bank have business relationships. What measures do you take?**

**Approach: (i) examination of all business relationships (targeted sanctions); (ii) check how Switzerland reacts; (iii) Investigation of connecting criteria of EU/US sanctions (citizenship; accounts; cash flows); documentation of measures taken including controls.**

# Attorney-Client Privilege

## Penal Sanctions:

⇒ Art. 321 Criminal Code



## Right to Refuse Testimony:

⇒ 1 November 2011: Art. 160 CPC, Art. 264 CrimPC

⇒ 1 May 2013: Art. 13 para. 1<sup>bis</sup> as well as Art. 17 second sentence APA; Art. 40 second sentence CartL, Art. 51a FCP, Art. 264 para. 1 lit. c and d CrimPC, Art. 46 para. 3 APL

## In-house Counsel Privilege?

## Case 21

**You, a lawyer, use your bank account to implement a settlement. The settlement provides that kick-backs are to be refunded. You open a settlement account for your clients under the header „Escrow Settlement A/B“. Key issues? Form A or form R?**

**Approach:  
FCR 1P.32/2005**

**Form R in CDB 16 mentioned, but not appended**

# Comparison USA - Switzerland



**“Legal Advice**  
External lawyer  
In-house counsel  
Internal discussion of advice  
Documents held by the Company

“Business Advice”

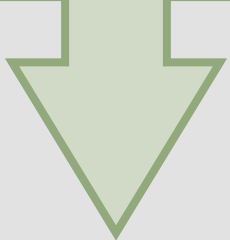


To be disclosed



Position as (freelance) lawyer

Commercial activity  
Legal advice  
Files at the company



To be disclosed

# In-house Counsel Privilege?

## Legal Opinion Niggli in 2006

- ⇒ Failure In-house Counsel Act in 2009
- ⇒ Failure Introduction in context with CPC/CrimPC in 2011
- ⇒ Failure i.c.w. Sovereignty Protection Act in 2013

## Meaning in the International Context

- ⇒ PDL Biopharma v. Genentech 2012
- ⇒ Trusz v. UBS Realty 2011
- ⇒ Morgan Stanley v. Jecklin 2011
- ⇒ In re Rivastigmine (Novartis) 2006

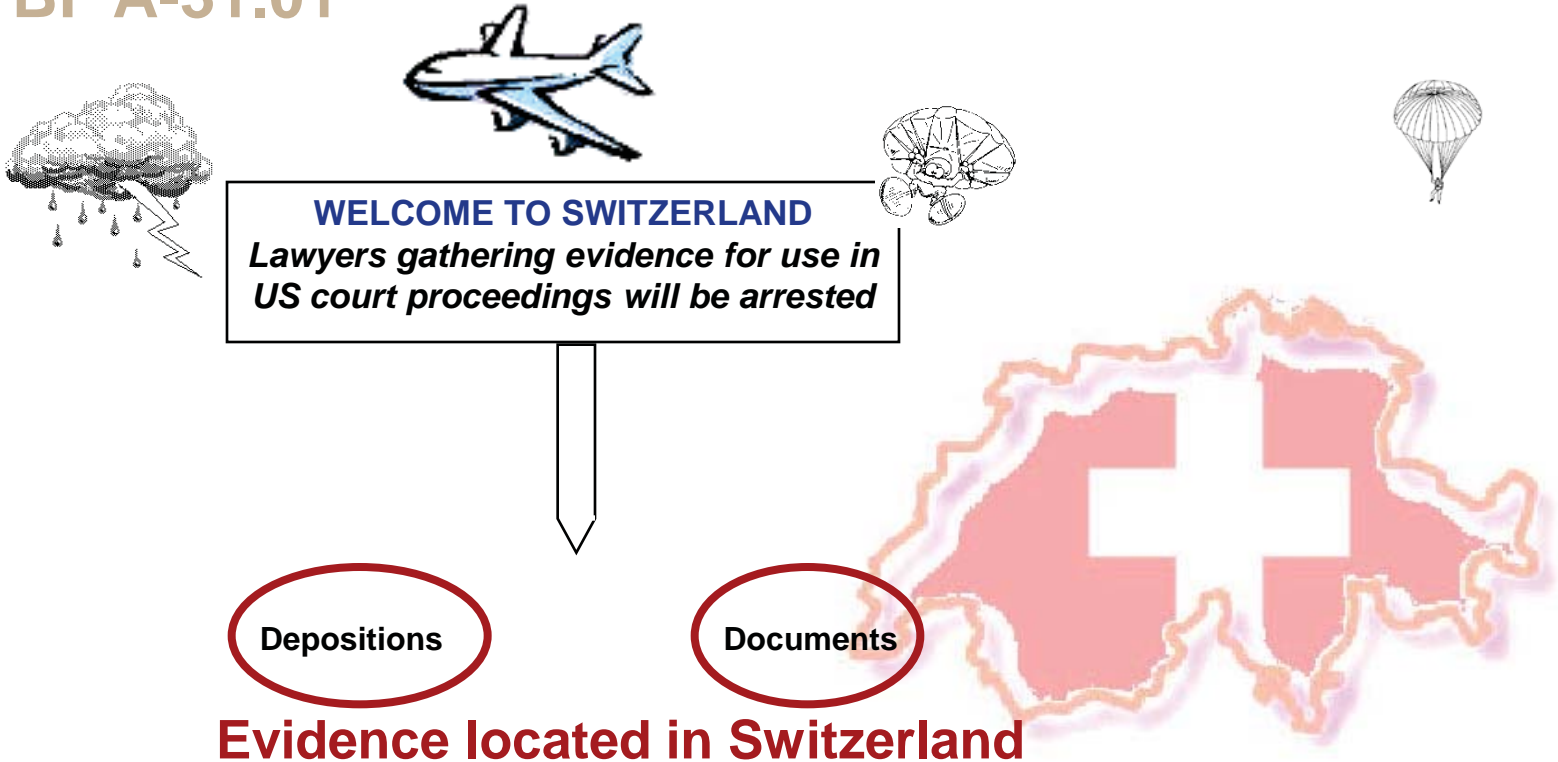


## Statement General Counsel: «...»

# Arts. 271 + 273 Criminal Code

## Source

BF A-31.01



# Art. 271 Criminal Code revised

## Collection of Documents:

- ⇒ Documents in own Possession
- ⇒ Assessing Chances
- ⇒ No Sanctions (subpoena etc.)



## Examination of Witnesses (Deposition etc.)

- ⇒ Physical, Video Conferencing
- ⇒ Hand Notes
- ⇒ Konstanz, Evian

## 271-exemption: FFD or FOJ?



# Current Perception in den U.S.

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## «Wallstreet Judge» Jed Rakoff:

«Although the Court finds Article 47 of the Swiss Banking Act worthy of substantial deference, the Court rejects the banks' argument that similar deference is due to Article 271 of the Swiss Penal Code, which speaks only tangentially to the production of documents and, according to the Swiss Federal Department of Justice and Police, does not create criminal liability for a bank that adheres to a U.S. court's order to search for bank account documents located in Swiss bank ranches.»

**Motorola Credit Corp. and Nokia Corp. v. Uzan, 2014**

# Reporting to Foreign Regulators

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## Case 22

You are a RM at a bank in Zurich. The client is a Luxembourg-based life insurer. The bank contractually agrees to report to the Luxembourg regulator information such as account information and to block assets upon hints of the Luxembourg regulator. What must be taken into account?

### Approach

**Fulfilling contractual obligations is not an «official act», Art. 42c FINMA Act**

# Suspicious Activity Report (SAR)

## Case 23

You are **General Counsel** at bank A in Zurich. The subsidiary/branch in New York suspects that client Z has committed grand style insider trading in New York by using shell companies, holding accounts in New York and Zurich. The subsidiary/branch in New York is keen to file a SAR including bank records from Zurich. Key issues? Solutions?

## Approach

**SAR not an official act**

**Art. 6 para. 4 AMLO-FINMA**

# Art. 273 Criminal Code Revised

## Guideline of the Attorney General's Office:

- (a) Insofar as the information concerns exclusively facts which only the person giving the information has an interest in keeping secret, it is a matter for such person to decide whether to proceed with the disclosure or not.
- (b) **Swiss secrecy provisions, however, prohibit and make it an offense to furnish information to foreign entities if,**
  - (i) there is a direct and general Swiss interest in keeping them secret, or if
  - (ii) **a third party who has not given his/its formal and prior agreement to a disclosure has a legitimate interest in keeping them secret.**

## Inland-nexus

# US-style Discovery



## Case 24

You are an associate at a Zurich based law firm. In connection with a U.S. pre-trial discovery, your client – a multinational company with headquarter in Switzerland and subsidiaries in the U.S. – is requested to produce loads of documents to the opposing U.S. lawyers. Key issues? Solutions?

### Approach

**Arts. 271 and 273 Criminal Code. Hague Evidence Convention.**

**VPB 1/2016 of Jan 26, 2016, Decision FOJ of Feb 12, 2014**

<https://www.admin.ch/gov/de/start/bundesrecht/verwaltungspraxis-der-bundesbehoerden/2016.html>

# Affidavit



## Case 25

**You work at a Basle law firm. A Swiss pharmaceutical company asks you to draft an affidavit on the facts/the law for a US civil case. Key issues?**

## Approach

**Arts. 271/273 Criminal Code to be complied with in case of affidavit on the facts**

# State of Necessity?



## Case 26

You work at the legal department of a multinational. The U.S. Department of Justice (DoJ) requests documents from the company's U.S. subsidiary. These documents are stored in Switzerland. The DoJ is threatening draconian sanctions in case of non compliance. Can you argue a state of necessity?

### Approach

**BSI Case (30 years ago)**

**Arts. 17 and 18 Criminal Code**

# Offence Committed Abroad and «Inland-nexus»

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## Case 27

**You are RM at Swiss Bank. German Tax Authorities ask you to participate in interrogations in Germany, the subject of which will be accounts held by German customers with your bank. What is permissible under Arts. 271/273 Criminal Code (and Art. 47 Banking Law)?**

**Approach**

**FCR 141 IV 155**



# „Advance Assistance“

## Case 28

**You work at the Swiss Federal Tax Administration. A U.S.-American colleague is investigating a tax fraud matter. He intends to seek mutual assistance and beforehand your help in the following respects: general discussion concerning a specific matter, preliminary examination of the request for assistance, hints concerning optimizing of the request, drafting by the FTA. What is permissible?**

### **Approach**

**Preview draft request. Dictation of request?**

# Blocking Orders: Sovereignty Protection

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## Statement of the Federal Council:

**„The issuance of such «Blocking Order» would be one of the most far reaching statutory defense measures that would allow the Swiss authorities to prevent criminal offenses rather than prosecuting offenses ex post.“**

Report of June 4, 2010 discharging Motion 07.3281 of the Commission for Legal Matters of the National Council, Federal Gazette 2010 4095, p. 4099-4100.

## **Art. 184 para. 3 Federal Constitution**

# Criminal Law on Corruption

## **Corruption of Government Officials**

- ⇒ Active und Passive Bribery
- ⇒ **Illegal Granting/Acceptance of Advantages**
- ⇒ Arts. 322<sup>ter</sup> - 322<sup>octies</sup> Criminal Code

## **Private Corruption/Bribery**

- ⇒ Still Offense Punishable by Petition only
- ⇒ **Lex FIFA: Art. 322<sup>octies/novies</sup> Criminal Code**
- ⇒ Referendum ended 14 January 2016

## **Criminal Liability of Company**

- ⇒ **Implementation of Anti-Corruption Directives!**

# Invitation to the FIFA World Cup 2018 (Russia)

## Case 29

**You work at company A, an official sponsor of the FIFA World Cup 2018 that receives hospitality tickets. The company's CEO asks you to pass on the tickets to domestic and foreign government representatives, suppliers and customers. Key issues?**

### **Approach**

**Bribing officials, home country/abroad. Bribing a private person. 5 x 150 Rule, 24h Rule**

# Worldwide Applicable Anti-Corruption Laws

**FCPA & UK Bribery Act**

**Worldwide Application**

Novartis matter

FIFA matter

Paul Volcker ...

**„The legal profession must actively defend against corruption to avoid complicity“**

... the Key Note Speaker at the IBA  
Congresses of October 2013



# Potential Costs Involved With FCPA



## IBA Global Insight (Oct/Nov 2013):

“In the first quarter of 2012, Wal-Mart reportedly spent \$1.6m per day on an FCPA investigation and compliance review.”



**per day!**

# Art. 47 Swiss Banking Act

- 1 Whoever intentionally does the following shall be imprisoned up to three years or fined accordingly;
  - a. discloses confidential information entrusted to them in their capacity as a member of an executive or supervisory body, employee, representative or liquidator of a bank, as member of a body or employee of an audit firm or that they have observed in this capacity
  - b. attempts to induce such infraction of the professional secrecy;
  - c. discloses confidential information to third parties or uses this information for own benefits or the benefit of others.
- 1bis Whoever enriches themselves or others with an action in accordance with (1)(a) or (c) shall be punished with imprisonment for up to five years or fined accordingly.
- 2 Whoever acts in negligence shall be penalized with a fine of up to CHF 250,00.
- 3 ...
- 4 The violation of the professional confidentiality shall remain punishable even after a bank license has been revoked or a person has ceased his/her official responsibilities.
- 5 The federal and cantonal provisions on the duty to provide evidence or on the duty to provide information to an authority shall be exempted from this provision.
- 6 Prosecution and judgment of offenses pursuant to these provisions shall be incumbent upon the cantons. The general provisions of the Swiss Penal Code shall be applicable.

# Art. 321 Criminal Code: Breach of professional confidentiality

1. Any person who in his capacity as a member of the clergy, lawyer, defense lawyer, notary, patent attorney, auditor subject to a duty of confidentiality under the Code of Obligations<sup>1</sup>, doctor, dentist, chiropractor, pharmacist, midwife, psychologist or as an auxiliary to any of the foregoing persons discloses confidential information that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty.

A student who discloses confidential information that has come to his knowledge in the course of his studies is also liable to the foregoing penalties.

A breach of professional confidentiality remains an offence following the termination of professional employment or of the studies.

2. No offence is committed if the person disclosing the information does so with the consent of the person to whom the information pertains or on the basis of written authorization issued in response to his application by a superior authority or supervisory authority.
3. The federal and cantonal provisions on the duty to testify and on the obligation to provide information to an authority are reserved.



# Art. 271 Criminal Code

## Unlawful Activities on Behalf of a Foreign State

1. Any person who carries out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official,  
any person who carries out such activities for a foreign party or organization,  
any person who encourages such activities,  
is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.
2. Any person who abducts another by using violence, false pretenses or threats and takes him abroad in order to hand him over to a foreign authority, party or other organization or to expose him to a danger to life or limb is liable to a custodial sentence of not less than one year.
3. Any person who makes preparations for such an abduction is liable to a custodial sentence or to a monetary penalty.

# Art. 273 Criminal Code: Industrial espionage

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Any person who obtains a manufacturing or trade secret in order to make it available to an external official agency, a foreign organization, a private enterprise, or the agents of any of these, or,

any person who makes a manufacturing or trade secret available to an external official agency, a foreign organization, a private enterprise, or the agents of any of these,

is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year. Any custodial sentence may be combined with a monetary penalty.