

CAN BANKS STILL KEEP A SECRET?

The duty to keep customer information confidential affects banks on a daily basis. Bank secrecy regimes around the world differ and multinational banks can find themselves in conflicted positions with a duty to protect information in one jurisdiction and a duty to disclose it in another. This problem has been heightened by the international trend promoting information disclosure in order to combat tax evasion, money laundering and terrorist financing. The US Foreign Account Tax Compliant Act (FATCA) is perhaps the most well-known. At the same time, data protection legislation is proliferating around the world. This book offers a holistic treatment of bank secrecy in major financial jurisdictions around the world, east and west, by jurisdictional experts as well as chapters by subject specialists covering the related areas of confidentiality in its broader privacy context, data protection, conflicts of laws, and exchange of information for the purposes of combatting international crime.

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Bank Secrecy in Financial Centres
Around the World

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To Peter Ellinger – colleague, mentor, friend

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FOREWORD

During the nineteenth and the first half of the twentieth centuries, the issue of bank secrecy remained of marginal importance. In early tomes on banking law, it was dealt with briefly and only in respect of the relationship between the bank and its customer.

The common law position was eventually clarified in *Tournier's* case, which recognised that, in certain circumstances, the bank was entitled to divulge customer information, *inter alia* when such disclosure was ordered by a court or was needed or required in the bank's own interest.

In many civil law jurisdictions, the issues related to bank secrecy were dealt with in specific statutes. These too were concerned mainly with the confidential nature of the relationship of banker and customer.

It would be mistaken to assume that bank secrecy was not used for purposes of tax evasion or illegal transactions in the nineteenth and early twentieth century. Numbered accounts, available in some European countries, enabled customers to avoid the declaration of revenues derived from deposits placed in such accounts or from securities (such as bonds) acquired through them. In some instances, bank secrecy enabled customers to hide some of their transactions even from their families.

Governments were aware of the situation but, in general, took the view that a customer's privacy – or the privacy of information – was of greater importance than enabling government bodies to access it. Indeed some bank secrecy laws were enacted with the express purpose of protecting customers from the searching eye of their own government. For instance, Swiss bank secrecy guarded the position of some German Jews who maintained accounts with Swiss banks during the World War II.

The perception of bank secrecy changed dramatically during the later years of the twentieth century. Three contributing factors are noteworthy. First, ever since the Bretton Woods Regime of 1945, countries started to repeal exchange control laws. Britain, for instance, repealed the Exchange Control Act 1946 in 1980. Inevitably, the increase in remittances meant an increase in money laundering. Some sectors were, and still are, particularly

prone. For instance, the dramatic increase of prices of objects of art (which were sometimes accepted for sale without adequately checking the 'collector's' title) played fairly and squarely into the money launderers' hand.

The second development that led to a change in the perception of bank secrecy was the internationalisation of the banking sector. Many banks that used to be primarily domestic have turned themselves into international banking institutions. While their current emphasis is on wealth management and investment banking, many banks are also engaged in retail banking in foreign countries.

One significant consequence of this development was that, in the absence of a regulatory body, a customer could move his holdings from one of his bank's branches (or offices) to another branch of the same bank and actually from jurisdiction to jurisdiction. In certain cases, such a remittance could be issued by means of a telephone call or an email. The ensuing ease in remittances has, of course, facilitated the transfer of funds for purposes such as tax evasion and money laundering.

The third development that has led to a change in approaches to bank secrecy is the emergence of the web. Naturally, most banks acquired their own computer (or IT) facilities. In turn, this led to the advent of electronic banking and speeded up the decline in branch banking. Customers who used to effect their transactions by visiting the branches where they maintained their accounts, were able to effect money transfers and other types of banking business, from home or even while overseas.

In due course – mainly towards the end of the twentieth and in the twenty-first centuries – government tried to combat the protection afforded to customers through bank secrecy by finding alternative routes to obtaining information which they considered relevant. By way of illustration, consider a citizen of the United States who maintains an account with a Swiss bank. Until the compromises sparked by high profile cases involving UBS and Credit Suisse, an attempt by the American tax authorities to obtain from the Swiss bank information respecting his revenues (which would be taxable under American law) would have failed as the customer's information was protected by Swiss provisions respecting bank secrecy. As yet, no alternative routes were in place.

It is possible that at that stage governments were not too concerned. Tax evasions by individuals and by local corporations were disconcerting but did not call for instant attempts to combat them.

However, the position underwent radical changes in recent years. The globalisation of international trade entailed widespread tax evasion and tax fraud. Indeed, many international bodies shopped around for forums

most suitable for their investments. The main objects were, invariably, to minimise tax and to ensure that information would be protected by local bank secrecy laws.

This situation became, in itself, a matter of concern. In addition, the activities of cross border crime syndicates became a menace. Throughout the entire Western World, governments searched for an arrangement which would require banks to supply customer information to local organisations which, in turn, would furnish it to appropriate authorities overseas.

The protocols and arrangements, instituted by organisations such as the G20, the OECD, the EU as well as specific strong arm tactics instigated by some economically leading countries, are discussed in detail in the excellent chapters of this book. Apart from the relevant overview of bank secrecy and treaties respecting the international exchange of tax information, the volume includes detailed analyses of the law prevailing in prominent jurisdictions.

Recent scandals that took place indicate that, in reality, any information supplied by means of alternative avenues ceases to be protected. In the first place, the confidentiality of such records may not meet with the customer's (or individual's) requirements. Secondly, the computer systems used by some countries are poorly protected and some (perhaps many) have been hacked into. A customer's details and personal information (which he readily supplied to his trusted bank) thereupon ceased to be private and protected.

The hacking incidents that took place in the course of the last two years suggests that bank secrecy, in its original form, may be a lesser evil than exposing bank customers' information to authorities with whom they are less safe than when kept solely by the bank.

The issue of finding the right balance between the customer's right of privacy and the right of the State to have his personal information may be an appropriate subject of future conferences. Indeed, political developments that may take place in the near future – such as a possible restructuring of the EU after Britain's exit – may lead to unforeseeable changes in the international scene, and many of the current treaties and arrangements may have to be re-examined.

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