

Is the wrongful Indication of Beneficial Ownership of Bank Accounts Punishable under Swiss Law?

The purpose of this overview is to describe how the **wrongful¹ declaration of beneficial ownership** of a bank account in Switzerland is to be assessed under Swiss criminal law. In the following remarks I do not seek to provide a complete and absolute rendering of this subject but merely to give a basic outline. As will be apparent, a fuller treatment is only meaningful in the context of a specific set of circumstances.

(I) General Remarks

a) **The Recording of Beneficial Ownership**

1. When a bank account is opened in Switzerland it is a legal requirement that the beneficial ownership of the funds held in that bank account be recorded by the bank. The legislative aim is to enable money flows through bank accounts to be traced and to ensure that the economic entitlement to assets in banks is attributable to known (named) individuals².
2. While there are various provisions dealing with this subject it can be said as a generalisation that in Switzerland today a *duty of care for bankers and financial intermediaries* has been established, compliance to which has to a large degree become ritualised in practice. The salient requirements are to obtain exact and useable identification of the client, to record this (which generally means file a passport copy) and to get the same information about the “beneficial owner” of the assets. This, of course, implies being aware of who the beneficial owner is, which the banker learns by asking his client.

b) **Shell Corporations**

3. The impact of these requirements on the banker/client relationship depends on the specific circumstances of the individual case. It is, however, possible to group cases according to certain criteria, and one such group are *accounts opened by shell corporations*. In the following I shall concentrate exclusively on this group of cases.
4. “Shell corporations”³ as the term is used here refers to corporations with no business activity of their own, set up in jurisdictions that under their laws neither require corporations to have substantial equity, nor to file tax returns

¹ In the sense of „knowingly false and/or misleading“.

² This requirement more or less corresponds to legal requirements in other Western countries that for the sake of convenience can be called the “*know your customer rules*”.

³ Otherwise also known as „Offshore Corporations“. The term is misleading because it is always relative, a Delaware corporation would be „offshore“ in Switzerland, a Swiss corporation in the US. The important criterion is whether the corporation has business activity of its own or whether it merely serves as a shell or vehicle to hold an account.

requiring audited accounts. Such corporations lend themselves particularly to open and hold bank accounts because they are cheap to get and to maintain and because given that they have no formalised financials, money can easily pass through their accounts without having to be reflected in their books. It is, therefore, hardly surprising that large numbers of Swiss bank accounts are held by such corporations, and that in many cases the holding of a bank account is the only thing a shell corporation does.

5. In the case of a shell corporation holding a bank account the actual “client” of the bank in the sense of the bank’s contractual partner, is the corporation itself⁴. Under the “know your customer rules” the bank will thus have to obtain identification for the corporation, its directors and for the persons empowered to sign on its behalf towards the bank. However, given the nature of a shell corporation this information is largely meaningless and the issue arises whose assets are being held on the account⁵. It is conceivable for a shell corporation to have various accounts⁶ and banks will seek information regarding beneficial ownership for each account.

From the above it is apparent that the declaration by the “client”, i.e. the person(s) running the shell corporation (signing over its account), regarding the beneficial ownership of funds placed with a bank is of crucial importance in allowing the bank and its staff to comply with their duties under the anti money laundering provisions. There is a certain duty of bankers and financial intermediaries to check any information given, especially regarding the commercial background of funds deposited and the whether the profile⁷ of the beneficial owner is compatible with the sums involved, but the extent of these duties is ill-defined and the real possibilities of research for bankers very limited. Baring obvious discrepancies between what the banker is told and the facts as they appear, the bank relies and must rely on what it is told by the client.

If the declaration of beneficial ownership by the client is “wrongful” this has the consequence that the bank is unable to fulfil its duties of identification properly.

⁴ This means that the account opening forms are signed and submitted by persons (the directors of the corporation) the bank subsequently has little if any contact with and who in turn have little or nothing to do with the money held on the corporation’s account. The vast majority of all shell or „off-shore“ companies are managed by professional trust companies with professional directors serving in a nominee capacity on very many boards.

⁵ The term “account” is used here for the sake of brevity to mean all and every kind of account or deposit with a bank.

⁶ Unusual because the scant inner organisation of the typical shell corporation would not normally suffice to safeguard one account holder from the risk of having some other account holder bankrupting the corporation (as the legal holder of the funds on its account). Such corporations are thus normally “dedicated” to one client/account holder.

⁷ Used here to mean the sum of all known characteristics of a person or entity.

(II) False Declarations

a) Money Laundering

6. Historically, the law in this field has developed as an onus on bankers and financial intermediaries, who are duty bound to obtain and record the identity of their clients. One result of this is that the “client” himself is not focussed on in the law and the various anti-money laundering provisions do not contain a general obligation of the “client” to identify the beneficial owner of the funds correctly. If a generally vigilant banker is misled by a wrongful declaration, he is not in breach of the law. Swiss law does not know the concept of “conspiracy” but only of inciting and of aiding others to commit unlawful acts. Thus, if the banker himself has not committed any such act, the client is also not guilty of inciting or abetting.⁸ There is thus no general provision rendering the mere false declaration by a client punishable under money laundering rules.

7. Two provisos must be made:

7.1 It is not clear who is to be deemed a banker or a financial intermediary in connection with the opening and operation of a bank account by a shell corporation in Switzerland. I tend to believe that a professional routinely handling other people’s money in Switzerland would fall into the category of financial intermediary for the purposes of Swiss anti-money laundering legislation even if he is not based in Switzerland and comes here only to open an account. If this is true, this person would be in breach of the law if he submits a false declaration, because he would have the same duties to identify and record the beneficial owner as the banker himself has^{9 10}.

7.2 The law explicitly provides¹¹ that any act which will render more difficult the tracing of the origins of assets or which would render it more difficult for

⁸ The reverse is also true, if a client gets his banker to accept a false declaration knowingly, both the client and the banker are in breach of the law. Here obvious issues of proof arise.

⁹ **Art. 305^{ter} of the Swiss Penal Code (“SPC”)** provides for a jail sentence or a fine for any person who accepts or helps invest assets of others on a professional basis and who neglects to identify the beneficial ownership of these assets with the appropriate degree of care. Applying this provision to the declaring of beneficial ownership of assets held by a shell corporations raises two questions: Does the mere fact that substantial assets are being held through a shell corporation trigger a requirement for a higher degree of care? Probably not, see para. 4 above. Does it suffice for the purposes of this provision if the FI himself knows the true beneficial ownership of the assets, or is he bound to share this knowledge with the bank? While it is clear that the bank has a duty to record the true beneficial ownership, it is less clear that the FI is obliged to assist this. Art. 305^{ter} SPC is in force since 1990. There are only few reported cases, one BGE 125 IV 139 et seq. concerns the liability of a banker who accepted a wrongful declaration of beneficial ownership though he had doubts how true it was. There is no record of the person actually submitting the wrongful declaration being prosecuted.

¹⁰ Note that being found to be a (non admitted) FI in Switzerland would trigger a heavy fine for the person concerned, irrespective of whether or not he falsified declarations of beneficial ownership.

¹¹ **Art. 305^{bis} SPC** (in force since 1990)

them to be found or confiscated, is punishable if the person concerned knew or must have known that the assets are derived from a crime. Note that this is addressed to all persons, and not just to bankers and financial intermediaries. In cases where the perpetrator is acting professionally as a money launderer or in conjunction with organised crime the punishment is more severe.

However, tax evasion may well not constitute a crime for these purposes. The simple non-payment of taxes *per se* is not a crime under Swiss law, but ancillary acts committed in furtherance thereof (such as falsifying bills or accounts etc.) may make it into a crime.

Arguably, making a wrongful declaration regarding beneficial ownership will fulfil the requirements of this provision, provided the person so doing knew or had to know that he was hiding the proceeds of a crime.

b) **Falsifying Documents**

8. It is a crime in Switzerland to falsify documents¹². Under “falsification” the law expressly includes the false recording of a substantive fact.

It is clear that the identity of the beneficial owner is a “substantive fact” in connection with the opening of a bank account.

I am not aware that this question has been tested in the courts and it could be that a court might find this provision as not being applicable to a false declaration of beneficial ownership. The main point at issue is that a mere “written lie” is not punishable as such. At the heart of the crime of “false declaration” is the misuse of trust by using a (more or less formal) document to create a misleading impression. Arguably, the form on which the beneficial ownership has to be declared (the so-called “Form A”) is a “document” as the term is understood in connection with this provision. It is my belief that submitting a wrongful declaration of beneficial ownership constitutes a false declaration in the meaning of this provision.

The penalty for false declaration is severe, up to five years penal servitude or some other jail sentence¹³. “False Declaration” is on the list of crimes in the US Swiss Legal Assistance Treaty defining for the prosecution of which crimes legal assistance will be granted¹⁴.

c) **Complex Circumstances**

¹² **Art. 251 SPC** This provision dates from 1974 but was in the law in similar form even before then.

¹³ The SPC distinguishes between normal jail sentences, which unless the law expressly provides are for a maximum of three years, and a harsher form of incarceration which I have called „penal servitude“ with potentially longer sentences.

¹⁴ The 1973 Treaty for Mutual Legal Assistance, Annex no. 23 a)

9. I have until now considered the legal effect of a false declaration of beneficial ownership *per se*. In fact such a false declaration may be given not as a mere stand alone act but as part of a wider scheme, quite possibly a fraud or embezzlement. In these circumstances the false declaration may well be punishable in Switzerland in conjunction with this wider scheme. Thus, falsifying documents to secret assets away from creditors could well be punishable in this context.

(III) Prosecution

10. It may as a practical matter be difficult to get the authorities in Switzerland to prosecute cases involving false declarations and money laundering, at least if there is no obvious victim. The application of the law to any specific case can be complex, especially with regard to Art. 251 SPC where there is a large body of case law with many differentiations. An obvious additional difficulty is that the bank at which the account is opened is hardly likely to be forthcoming with any help, because a finding of money laundering or even of falsification would affect the bank staff as well and might give rise to damage claims.

What could render prosecution more likely is a showing of systematic false declaration by a perpetrator making a business out of illegally “parking” assets in Swiss banks under false declarations. This is likely to be picked up as a manifestation of “organised crime” and because it is to some extent also a security risk.