CENTRE DE DROIT
BANCAIRE ET FINANCIER

Money laundering

Compliance officer convicted of negligent breach of reporting obligation

Par Katia Villard le 17 February 2021

In a judgment published on 11 January 2021, the Federal Supreme Court (FSC) upheld the conviction of the head of the compliance unit for French-speaking Switzerland at a bank for negligent breach of the obligation to report suspected money laundering (Art. 37 para. 2 AMLA) between 16 May and 6 June 2011 (6B_786/2020). Initially convicted by a criminal ruling of the Federal Department of Finance (FDF), this person, whom we will call Arthur, was then acquitted by the Criminal Division of the Federal Criminal Court (FCC) (SK.2018.32), before being found guilty by the FCC Appeals Chamber (CA.2019.7).

The facts underlying this case are relatively complex but can be summarised as follows. Corinne opened an account with the bank on 11 May 2011. The following day, a French company paid EUR 350,000 into this account. On the same day, Corinne went to a bank counter to withdraw CHF 100,000 in cash and gave instructions to make several urgent bank transfers. She stated that the EUR 350,000 was a loan intended to liquidate her business in Switzerland.

The withdrawal was refused and the business relationship was blocked internally pending clarification in accordance with Art. 6 para. 2 AMLA.

On 13 May 2011, Corinne sent the bank various documents, including a loan certificate (which turned out to be a forgery). On the same day, Corinne's lawyer contacted the bank to request the release of the funds.

On 16 May 2011, the case was referred to Arthur. After consulting the documents provided by Corinne, Arthur and Danièle, the compliance officer who had been following the case from the outset concluded that there were insufficient indications of money laundering at that stage (TF, 6B_786/2020, c. 3.2).

On the same day, Corinne requested that the account be closed and changed her transfer instructions to other recipients than those she had designated on 12 May 2011. In particular, she ordered a transfer of CHF 270,000 to GG LTD to an account opened with the bank. The orders were executed between 16 and 18 May 2011 and the account was closed on the latter date without the compliance department being informed.

On 18 May 2011, criminal proceedings involving Corinne – but which were not *a priori* related to

her relationship with the lending company – were initiated by the Public Prosecutor's Office of the Canton of Fribourg (MP). On 20 May 2011, the MP requested the bank to produce documents relating to its relationship with Corinne and to freeze the account (SK.2018.32, B. 12 to 15).

Arthur was informed of the closure of the account, the transactions carried out and the MP's orders on 23 May 2011 (SK.2018.32, c. 4.5.7., 8e §).

On 1 June 2011, the public prosecutor requested information on the transfers made between 16 and 18 May 2011. On 3 June 2011, he ordered the seizure of the amount of CHF 270,000 transferred on Corinne's instructions to GG LTD. The remaining balance of approximately CHF 2,000 in GG LTD's account was frozen by the bank on 6 June 2011.

No communication was made to MROS.

Corinne was ultimately convicted of money laundering and forgery in connection with the transfer of EUR 350,000. (SK.2018.32, B. 21 to 26, see Federal Supreme Court ruling, 6B_111/2015 of 3 March 2016, partially published in ATF 142 IV 196).

For the same set of facts, the public prosecutor's office opened criminal proceedings against the bank and two of its employees, including Danièle, for money laundering by omission. It dismissed the case in 2015 on the basis of Art. 53 of the Swiss Criminal Code, following compensation by the bank to the lending company and the subsequent withdrawal of the complaint.

The Criminal Division of the Federal Supreme Court ruled that the compliance department had fulfilled its obligations to clarify the matter and that the information available to Arthur on 16 May was not sufficient to justify the suspicion that triggered the obligation to report the matter to MROS. The Court of Appeal, however, ruled that Corinne's explanations had not dispelled the initial doubts, so that, in view of the current case law on the interpretation of the concept of reasonable suspicion, a report to the MROS was necessary.

In its judgment, the Federal Supreme Court first examined whether, in light of the criticism levelled at the doctrine, a reversal of its case law according to which the criminal ruling of the DFF entails an interruption of the limitation period was justified. It answered in the negative.

With regard to the concept of 'reasonable suspicion' triggering the duty to report, the Federal Supreme Court rejected Arthur's complaint based on the principle of legality and non-retroactivity of criminal law. While it does not deny that this concept has been subject to 'evolving interpretation', our High Court considers that 'the clarifications provided by case law with a view to defining the contours of the undefined legal concept of "reasonable suspicion" can reasonably be included in the original conception of the offence' (c. 2.3.2). The idea that suspicions that remain unresolved at the end of the clarification procedure must be reported was already found in the Federal Council's 1996 message. It also emerges from the MROS's 2007 annual report and from a 2008 ruling of the Federal Supreme Court (albeit in a civil case), both of which predate the alleged offence.

Although we do not believe that these two documents should be decisive in assessing the concept of reasonable suspicion as a central condition for criminal liability within the meaning of

Art. 37 AMLA, we consider that the current approach is not contradicted by the Federal Council's 1996 message or, for that matter, by the letter of the law. Indeed, the approach of considering that suspicions that have not been ruled out by the specific clarifications in Art. 6 para. 2 AMLA are well-founded does not seem to us to be an overly broad interpretation of the legal text.

The reasoning of the Federal Supreme Court does not therefore appear to us to be open to criticism.

We are surprised, however, that the judges at Mon Repos did not rule on the question of whether the obligation to report would have ended on 20 May 2011 rather than on 6 June 2011, given that the criminal authorities had been notified. In view of the request for information from the criminal authorities and the seizure order, it is indeed questionable whether a report to the MROS would not have constituted unnecessary duplication at that point (see SK.2018.32, c. 4.5.9).
