CENTRE DE DROIT
BANCAIRE ET FINANCIER

**Prohibition of disclosure**

# Are the minutes of the board of directors worthy of protection ?

Par Célian Hirsch le 26 December 2021

What procedural protection can be granted to the minutes of the board of directors (and other internal information) of a bank ? In ATF 148 III 84 (4A_58/2021), the Federal Tribunal specifies the scope of the measures that a civil court may order in order to protect the interests worthy of protection of a party.

A Guernsey company is suing a Swiss bank for damages before the Zurich *Commercial Court*. In its response, the bank asks the court to prohibit the company, under penalty of the penalty provided for in Art. 292 PC, from disclosing to third parties various information contained in its response and in the documents produced. This relates in particular to the minutes of the board of directors, a committee of the board and the audit committee, as well as various emails and internal reports, particularly in relation to the strategy to be adopted concerning the dispute with the US *Department of Justice* (DoJ).

The *Commercial Court* rejected the bank's request. Not only had the bank not sufficiently alleged that its interests worthy of protection were concretely endangered, but also the requested measure was disproportionate. The bank then appealed to the Federal Court.

Art. 156 CPC stipulates that the 'court shall order measures to prevent the taking of evidence from infringing the protectable interests of the parties or third parties, in particular business secrets'.

Firstly, does the bank have a protectable interest within the meaning of Art. 156 CPC ?

With its request, the bank wants to protect itself from the reputational risk it would incur if the information produced in its response were to be made public or if unauthorised third parties could gain knowledge of it.

The Federal Court emphasises that this information concerns the bank's internal decision-making over a long period (several months). Given that it notably contains information on the strategy adopted with the DoJ, it goes without saying that it could potentially be very interesting for third parties. The fact that the bank is listed on the stock exchange, and therefore subject to transparency requirements, does not limit its right to protection of the formation of its will. On the contrary, much of the information concerning it is already public. This would make it even easier to cross-check the information related to the formation of the internal will with the public

information.

Therefore, the bank has an interest worthy of protection within the meaning of Article 156 CPC.

In order to judge the merits of the bank's request, the Federal Court must decide on the following five questions of principle :

1. Does art. 156 CPC allow the court to issue a disclosure ban (under penalty of art. 292 CP) ?
2. Can this ban continue after the end of the proceedings ?
3. Can this ban also apply to written documents, and not just to evidence ?
4. Does the party seeking the granting of this ban have to allege a concrete risk to its interests worthy of protection, or is an abstract risk sufficient ?
5. What degree of proof is required to admit the existence of such a risk ?

After examining the various doctrinal opinions, the Federal Court considers that art. 156 CPC allows the court to issue a ban on disclosure (under penalty of art. 292 CP) (1), but that this ban cannot last beyond the proceedings (2).

Furthermore, Art. 156 CPC is in principle aimed at evidence, not pleadings. That being said, it is possible that certain titles are detailed, or even cited, in the pleadings. The protection of Art. 156 CPC must therefore be able to extend to the parties' pleadings in exceptional cases (3).

Regarding the risk and its proof, the Federal Court considers that a theoretical risk is not sufficient. The applicant must therefore allege the existence of a concrete endangerment of its interests worthy of protection (4). Finally, it is sufficient to make the existence of such a risk likely. Strict proof is therefore not required (5).

In the case in point, the bank alleged the existence of a reputational risk. It also made it likely that reputational damage would result from the publication of the information referred to in its request for protection.

In a final step of the reasoning, the Federal Court examined the proportionality of the measure requested by the bank. The *Handelsgericht* considered that redaction was more proportionate than the prohibition on disclosure with the threat of art. 292 CP. The Federal Court does not share its opinion. Indeed, unlike redaction, the prohibition on disclosure does not limit the opposing party's right to be heard. Furthermore, the documents produced by the bank cannot be completely redacted without losing their probative value.

Thus, without the granting of the measure requested by the bank, the latter would have found itself in the following dilemma : either it agrees to disclose information (and therefore endanger its interests worthy of protection), or it is considerably limited in its defence against the company's claim for damages.

The Federal Court therefore allowed the appeal and prohibited the plaintiff company from disclosing confidential information to third parties (with the exception of experts and other auxiliaries) during the proceedings.

This landmark ruling provides numerous clarifications on the scope of Art. 156 CPC, in

particular that the measures ordered by the court pursuant to Art. 156 CPC are limited to the duration of the proceedings. In the present case, the bank will probably have to consider whether other legal remedies are available to it to prevent the disclosure of confidential information after the proceedings.

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