CENTRE DE DROIT
BANCAIRE ET FINANCIER

Sealing proceedings

The bank is not involved

Par Katia Villard le 3 February 2022

The sealing route is not open to the bank, some of whose employees are being prosecuted for violating the obligation to communicate (art. 9 and 37 LBA). The Federal Supreme Court (FSC) ruled in this way in two (surprisingly) similar cases, which were the subject of three rulings, the first dated 14 December 2021, the second two dated 20 December 2021 (1B_49/2021, 1B_461/2021 and 1B_243/2021). For ease of reading, the following lines focus on the first decision.

On 7 November 2019, FINMA filed a complaint with the Federal Department of Finance (FDF) against 'those responsible' at Bank A. AG 'as well as any other persons involved'. The complaint was accompanied by documents that Bank A. AG had submitted to the regulator as part of the supervisory procedure.

The administrative authority consequently opened administrative criminal proceedings for breach of the duty of disclosure against unknown persons. It is understood from the decision of the FSC that the prosecution is directed against natural persons – in particular the bodies – and not the bank itself, but that those responsible have yet to be determined (cf. c. 2 and 4.4).

For its investigation, the FDF has, among other things, asked the Office of the Attorney General of Switzerland (OAG), through mutual assistance between authorities, for access to the criminal proceedings file concerning the bank's clients. The requested documents were handed over to it on 28 February 2020.

At the same time, the FDF also asked the bank, by means of an order to produce documents, to hand over certain documents to it. The bank complied, but sent the documents sealed with a password. In March 2020, the FDF requested that the seals be removed.

The bank also requested that the documents provided by FINMA and the OAG be sealed. The FDF affixed the seals and submitted a second request to the Federal Criminal Court (FCC) to lift the seals in May 2020.

The judges in Bellinzona joined the two proceedings, granted the first request to lift the seals and did not consider the second on the grounds that the FDF did not in any case have to seal the documents submitted by FINMA and the OAG.

The bank unsuccessfully appealed to the FSC against the decision of the FCC handed down on

21 December 2020 (BE.2020.6, BE 2020.10).

With regard to the first aspect, the TF denied the bank a legally protected interest in challenging the removal of the seals and therefore did not consider this point (cf. art. 81 para. 1 let. b LTF).

In short, it considered that the bank could not claim any secrecy legally protected by the provisions on the prohibition of sequestration and sealing (art. 248 and 264 CPP ; c. 4.3). Furthermore, it could not assert any secrets and rights to refuse to testify to which third parties – bank employees or customers – might be entitled (c. 4.4.).

With regard to the second part, the bank's standing to bring proceedings was accepted since the consequence of the FCC's decision was to deny the bank the right to a sealing procedure, which was likely to constitute a formal denial of justice (c. 3 and 5.3).

On the merits, the Mon Repos judges have confirmed the FCC decision. The bank did not hold the documents handed over (spontaneously) by FINMA and (upon request) by the OAG to the FDF. The fact that these documents were initially produced by the bank in the criminal proceedings and the supervisory law proceedings does not change anything. Moreover, the bank was free – *according to* the FCC – to assert any rights to the protection of secrets or to express its interest in having the documents sealed in the context of these proceedings.

The case law under which persons other than the holder of the documents may have them sealed is not applicable, as it assumes that the interest in protecting secrets is immediately recognisable. In the case in point, the bank did not assert any secrets of its own within the meaning of Articles 170 to 173 CPP (c. 5.7).

Nor can the financial institution derive anything from the Federal Supreme Court's decision of November 2019 admitting that documents originating from an *enforcement action* and transmitted by FINMA to the public prosecutor's office could be the subject of a sealing procedure (1B_268/2019 of 15 November 2019, commented on in cdbf.ch/1105/). The constellation was not the same, the Federal Supreme Court emphasising in particular that, in the case that gave rise to the aforementioned judgement, FINMA had not spontaneously transmitted the documents to the prosecution authority, but only at its request and by drawing its attention to the fact that the documents contained sensitive data (para. 5.9).

The result reached by the Federal Court does not seem shocking to us, but the reasoning seems to call for clarification and two remarks.

Firstly, both banking secrecy and commercial confidentiality are, in principle, part of the secrets protected by the sealing procedure, even if they generally give way to the interest in the manifestation of the truth (cf. art. 173 para. 2 CPP). However, it is true that, unlike commercial confidentiality, it is not the bank that holds the banking secrecy.

Secondly, to criticise the bank for not having asserted any secrets in the context of the criminal proceedings concerning its clients or in the FINMA supervisory proceedings does not seem fair to us : the financial institution (probably) had no interest in doing so, nor could it have asserted any legally protected interests.

Thirdly, given the bank's status – materially somewhat uncertain – in the administrative criminal

law proceedings, it is, in our view rightly, that the TF does not legally derive much from the fact that the bank is not formally notified (cf. in particular c. 4.3).
