CENTRE DE DROIT
BANCAIRE ET FINANCIER

Payment services

Viktor Vekselberg v PostFinance

Par Yannick Caballero Cuevas le 3 March 2022

Following the US sanctions against Russia for its annexation of Crimea, the Federal Supreme Court, in its ruling 4A_84/2021, examined the scope of the grounds justifying a refusal of the payment services falling under the universal service of the Post Office.

In April 2018, Viktor Vekselberg, a Russian citizen and Swiss resident, was placed on the list of *Specially Designated National and Blocked Persons* (SDN) by the *US Office of Foreign Assets Control* (OFAC) as part of the sanctions against Russia. These sanctions prohibit *US Persons* from carrying out transactions with SDNs or with companies in which SDNs have a controlling interest of more than 50 %.

On 2 October 2018, Viktor Vekselberg sent PostFinance a request to open a private account in Swiss francs and euros. The bank approved this request. On 3 December 2018, Viktor Vekselberg received his bank card. However, the next day, PostFinance informed him that it was terminating their business relationship. In a letter dated 4 December 2018, it stated that his customer profile did not correspond to the bank's strategy and that his file did not allow the bank to comply with due diligence requirements.

Viktor Vekselberg applied to the Commercial Court of the Canton of Bern to maintain his banking relationship with PostFinance. On 17 November 2020, the Bern court rejected his request.

Viktor Vekselberg then lodged a civil appeal with the Federal Court. He argued that the universal service within the meaning of Art. 43(1) OPO should be provided to him for the Swiss franc account.

The Federal Court began by recalling that, in accordance with art. 32 para. 1 LPO, Swiss Post provides a universal service throughout Switzerland by providing payment services. Art. 43 para. 1 OPO specifies the scope of this service. These payment services include, in particular, the execution of domestic payments in Swiss francs. However, cross-border payments are excluded. The Post Office may nevertheless restrict the provision of these services in its general terms and conditions (art. 32 para. 2 POA). The grounds for refusing a customer are set out exhaustively in art. 45 OPO. In addition, these must be included in PostFinance's general terms and conditions.

The Federal Supreme Court then examines the former art. 45 para. 1 OPO, which applies in the

present case. According to this provision, only a contradiction with national or international legislation on the financial markets, money laundering or embargoes can justify termination of the relationship (letter a). The Federal Court adds that a disproportionate burden does not constitute legal or reputational damage within the meaning of letter b.

In the case in question, PostFinance states in its general terms and conditions that 'the total or partial exclusion of a customer from the aforementioned services is possible in particular (…) if the monitoring of customer relations imposes a disproportionate burden on PostFinance with a view to fulfilling its due diligence obligations (…)'. This justification does not appear in the provision (art. 45 aOPO), but is inferred from the ordinance.

In its ruling, the Bern court held that the explanatory report of 2012 relating to the OPO expressly states that Swiss Post should not be forced to establish customer relationships that result in unjustified relationship monitoring costs, for example. The explanatory report of 2020 relating to the partial revision of the OPO specifies what is meant by disproportionate burden. PostFinance would therefore be entitled to claim an exception to its obligation to contract, even though this reason is not expressly provided for in Article 45 aOPO.

However, for the Federal Court, such a solution contravenes the principles of interpretation of the standard. On the one hand, a literal interpretation of the provision does not allow such a reason for exclusion to be invoked. On the other hand, the system and purpose of the law do not provide any indication that would allow for a departure from the letter of the provision, which is clear on this point. Moreover, it does not appear from historical interpretation that the legislator intended to provide for grounds other than those indicated in the provision.

Although Viktor Vekselberg did not dispute the applicability of the exception, the Federal Supreme Court noted that the merits of this exception are a question of law. It therefore concluded that the termination by PostFinance is not admissible under Article 45 aOPO.

In the meantime, this provision has been revised and provides that PostFinance may refuse a customer '(…) if compliance with this legislation entails disproportionately high costs for [PostFinance]'. As the Federal Supreme Court points out, the new wording of Art. 45(1)(a) OPO is not applicable retroactively. Thus, PostFinance must comply with its obligation to contract, as it was not entitled to invoke such a reason at the time of termination, namely 4 December 2018. However, the Federal Supreme Court notes that the bank may proceed with a new termination. Its admissibility will have to be examined, if necessary, in the light of the revised provision.

Therefore, the Federal Supreme Court admits the appeal, specifying that the banking relationship must be maintained within the framework of the universal service.

Our High Court nevertheless leaves open the question of whether the current Art. 45 para. 1 let. a OPO constitutes a sufficient legal basis, and under what conditions PostFinance could cite disproportionately high charges as grounds for refusal. In our opinion, the general terms and conditions play an essential role in assessing the admissibility of a termination based on this ground.