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Bank liability

Art. 305bis of the Swiss Criminal Code as a protective provision (under civil law), a welcome clarification from the Federal Supreme Court

Par Philipp Fischer le 17 December 2022

To what extent can a bank be held liable for the fraudulent conduct of a pseudo-independent asset manager towards the latter's clients when they have no contractual link with the bank (TF 4A_603/2020 of November 16, 2022) ?

In 1999, a financial intermediary opened an account in his own name with a Swiss bank. He then opened an account in his company's name in 2004. He declares that he is the beneficial owner of the assets deposited. The accounts were to be used solely to receive commissions from his professional activity, to the exclusion of customer assets. In reality, the financial intermediary promised his customers very high annual returns, and fraudulently used the money entrusted to him by new customers, which he deposited in the two accounts, to pay other customers (Ponzi scheme).

The financial intermediary died in 2007, bringing criminal proceedings against him to an end. In 2014, the customers filed a criminal complaint against the bank. This case was dismissed the following year due to the statute of limitations. The customers then initiated civil proceedings against the bank. They were unsuccessful at first instance, but were upheld on appeal.

Following an appeal by the bank, the Swiss Federal Supreme Court analyzed the bank's liability in tort, given the absence of any contractual relationship with the customers.

The bank's liability in tort can be considered from two angles : (i) liability for the unlawful acts of its organs (art. 55 CC cum art. 722 CO) and (ii) employer liability (art. 55 CO cum art. 41 CO).

The first possible ground of liability is ruled out from the outset in this case : "[at] no time was there any question of wrongful acts on the part of the company's organs", notes the Federal Court.

According to art. 55 CO, a legal entity (the custodian bank) may be held liable if one of its employees has committed an unlawful act in the course of his work, unless the legal entity proves that it had taken all measures to avoid the damage (observance of the three curae : choice, instruction and control).

According to the jurisprudence of the Swiss Federal Supreme Court, when the claimant (the customer) seeks compensation for damage to his assets in connection with an unlawful act (unlawfulness of conduct), he must demonstrate that a norm specifically designed to protect his assets has been violated.

In casu, the Federal Court must determine whether a money laundering offence (art. 305bis CP) has been committed, as case law has held that this provision constitutes a standard of protection for the assets of those injured by the offence prior to the money laundering (clients, ATF 129 IV 322).

Money laundering can be committed by omission if the offender had a legal obligation to act by virtue of his position as guarantor. For example, the MLA imposes an obligation on the bank (a financial intermediary within the meaning of the MLA) to clarify the beneficial owner (art. 6 MLA) or to report well-founded suspicions to MROS (art. 9 MLA). A bank may therefore be accused of money laundering by omission if, as guarantor, it breaches its obligations under the MLA.

In the second instance, the cantonal court had found that the bank's conduct could be characterized as money laundering by omission and possible fraud, since the bank had failed to clarify the background to a business relationship that was nonetheless unusual. As a result, the bank had to be held liable for an unlawful act, and thus for civil liability towards the customers who had suffered as a result of the prior offence.

The Swiss Federal Supreme Court takes a different view, stating that it is not the bank's conduct that must be analyzed, but the intentional conduct of a specific bank employee. Art. 55 para. 1 CO concerns the unlawful act of an employee. Customers must therefore prove that one or more specific employees were guilty of money laundering, in this case by omission. The difficulty is twofold : it must be possible to accuse – via a standard of imputation – a specific person or persons of having violated the MLA duties applicable to the bank (financial intermediary within the meaning of the MLA). In addition, it is necessary to prove their criminal intent (possible fraud being sufficient).

In this respect, the Federal Supreme Court points out that Art. 29 of the Swiss Penal Code defines a limited circle of natural persons who can be accused of having breached a particular duty incumbent on the legal entity (in this case, duties imposed on the bank by the MLA). This circle includes, for example, a natural person who acts in the capacity of (i) a corporate body, (ii) a senior executive or (iii) an employee with independent decision-making powers in a business sector.

The Federal Court ruled that, on the basis of the evidence in the case file, no money laundering offence could be attributed to a specific employee, since (i) the persons concerned do not, a priori, fall within the scope of art. 29 of the Swiss Criminal Code and (ii) no criminal intent can be established.

The Federal Court therefore rejected the customers' claim against the bank.

A customer suing the bank for damages for money laundering by omission cannot simply allege that the bank's conduct as a whole constitutes an act of money laundering. He must prove a money-laundering offence committed by a specific individual, typically an employee "with independent decision-making authority in the area for which he is responsible" (art. 55 CO cum

29 CP) or an organ (art. 55 CC).

The outcome of the case brought before the Federal Court would undoubtedly have been different if the case file had shown that a particular employee had engaged in criminal conduct, provided that this employee fell within the circle of persons covered by art. 29 of the Criminal Code. In this respect, the fact that no criminal investigation was completed due to the death of the financial intermediary and the statute of limitations on criminal proceedings probably greatly complicated the clients' task.
