CENTRE DE DROIT
BANCAIRE ET FINANCIER

Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence

Supervisory Board case law 2017-2021

Par Valentine Delaloye le 20 December 2022

In its recent activity and case law report covering the years 2017 to 2021, the Supervisory Board of the Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB) reminds us at the outset that the provisions of CDB 20 apply only if a new business relationship is opened, or a repetition of due diligence obligations occurs, after January 1, 2020 (art. 69 para. 1 and 70 para. 2 CDB 20). As a result, the latest publication of case law relates mainly to breaches of CDB 16 (44 decisions handed down during the period under review). A few interesting points, summarized below, caught our attention.

I. Procedural aspects

A notable procedural change introduced with CDB 16 concerns the statute of limitations (5 years) : whereas under CDB 08 this period only began to run from the time the violation was remedied or the business relationship ended, CDB 16 provides that it starts to run from the time the Convention is violated. This change undoubtedly explains the low number of convictions for breaches of the obligation to verify the identity of the contracting party, as the majority of convictions relate to the obligation to renew due diligence obligations.

CDB 16 also introduced a summary procedure, already used in 30 % of the decisions handed down by the Supervisory Board in 2021. This procedure has so far enabled decisions to be reached within six months, and has significantly reduced the costs incurred by banks.

Finally, the investigator's report and conclusions are not binding on the Supervisory Board. This authority remains autonomous, both in terms of gathering further evidence and in terms of completing the file and sanctioning breaches of the CDB.

II. On the merits

The Supervisory Board does not consider itself bound by the Commentary on the CDB. It states that it takes the Commentary into account in its decisions, but that it is free to interpret the provisions of the Convention as it sees fit. This position is far from theoretical : in a decision concerning the identification of the beneficial owner, the Commission concluded, for example, that the bank was systematically obliged to obtain a Form S in the case of an ideal-purpose foundation within the meaning of art. 39 para. 4 let. a CDB 16, contrary to the Commentary (it should be noted that the same article and the same interpretation appear in CDB 20 and its

Commentary). On the other hand, the Commission cannot impose a sanction if it departs from the Commentary in its decision. Thus, the bank may be in breach of the CDB, but it cannot be accused of any wrongdoing.

On a different note, transactions that exceed the financial capacity of the contracting party, or a custodian bank that becomes aware of changes in the signing, shareholding or representation relationships of a contracting party (in this case, the departure of a managing partner of a limited liability company authorized to sign individually), are considered unusual findings. Insofar as they give rise to doubt, they entail an obligation to repeat the ADE identification procedure.

With regard to documentation governing the power to bind when establishing a business relationship with a legal entity, documents drawn up by the contracting party itself are admissible (internal regulations, etc.), unlike verification of the contracting party's identity, which requires an extract from an official register. In the case of a trust, the Commission points out that the trustee must confirm in writing that he is authorized to establish a business relationship on behalf of the trust.

If the bank is authorized to use its own forms, the failure to mention Art. 251 of the Swiss Penal Code and the consequences of intentional misrepresentation, as well as a Form K which does not contain a section concerning the holding of assets in a fiduciary capacity, are incompatible with the requirements of the CDB.

Finally, the setting of a contractual fine is based on the bank's financial situation, and primarily on its equity capital. In the event of a merger of the offending bank prior to the pronouncement of the decision, the pre-merger economic situation is exceptionally taken into account. In addition, a violation of the CDB due to organizational shortcomings has an aggravating effect on the sentence.
