CENTRE DE DROIT
BANCAIRE ET FINANCIER

Money laundering

Criminal conviction for an irregular ICO

Par Vaïk Müller le 29 March 2023

In a ruling dated December 1, 2022 (CA_2022.10), the Appeal Chamber of the Swiss Federal Criminal Court (TPF) found the director (A.) of a company (the issuer) guilty of failing to prevent tokens issued after an ICO from being transferred to participants' wallets, even though neither the issuer nor A. were affiliated to a self-regulatory organization (SRO) in accordance with the MLA. A. was convicted of having intentionally exercised a financial intermediary activity, in a professional capacity, in violation of art. 44 al. 1 LFINMA cum 14 al. 1 LBA.

According to its White Paper dated November 2, 2017, the issuer intended to develop a blockchain-based payment platform enabling payment in any crypto-currency for goods and services (the Platform). The White Paper also envisaged the issuer issuing its own crypto-currency, freely tradable, but freely usable and convertible on the Platform (the M tokens). The White Paper stated that M. tokens had no ab initio function, and could only be used as a means of payment once FINMA had been duly consulted. M. tokens could not be used to acquire a stake in the issuer, and the issuer had no obligation to redeem them.

To finance the development of the Platform, the issuer carried out an ICO between November 2 and 20, 2017. On December 5, 2017, i.e. after the execution of the ICO, but before the issuance of the M. tokens, FINMA's Enforcement Division wrote to the issuer to inform it that FINMA suspected an issuance contrary to law and its practice, which at the time was summarized in Supervisory Communication 04/2017. FINMA's letter, accompanied by a questionnaire that the issuer was invited to complete concerning the ICO and the M. token (the Letter, respectively the Questionnaire), further specified that the exercise of an activity in the areas governed by the laws on financial markets without authorization or registration was punishable under art. 44 LFINMA.

Pro memoria, the publication of the Practical Guide to ICOs by FINMA occurred on February 16, 2018 (see cdbf.ch/998/) and the current Art. 4 para. 1bis let. c OBA, which considers virtual currencies used actually or according to the intention of the organizer or issuer as means of payment for the acquisition of goods or services or used for the transmission of funds or securities to be illiquid means of payment, was not yet in force at the time.

On December 12, 2017, a meeting was held between representatives of the issuer, including its lawyer, and staff from FINMA's Fintech Desk. The discussion covered various projects, but not specifically the ICO, and the Letter was not discussed. On December 22, 2017, A. responded to the Questionnaire, indicating that the M. token was both a utility token (access to the Platform)

and a means of payment.

The issuance of the M. tokens and their transfer to the wallets of the ICO participants took place between December 28, 2017 and February 12, 2018 after the completion of a KYC (know your customer) procedure, which did not, however, comply with the material rules of the AMLA (lack of systematic identification of beneficial owners or lack of risk profile, among other violations). The holders of the M. tokens could dispose of them freely and use them as a means of payment, without the issuer being able to exercise any control.

In law, the TPF considers that the references to the KYC process in the ICO documentation show that A. was aware that the AMLA could potentially be applicable, so that his subsequent denials are not tenable.

The TPF further notes that the Letter and the reference to the potentially reprehensible nature of the ICO in the latter should have alerted A. to the fact that the KYC could potentially be applicable. By deciding to issue the M. tokens without waiting for FINMA's definitive response and without proceeding with ICO membership, a risk was knowingly taken. On the basis of this Letter, the TPF also rules out any error as to illegality, as A. should have doubted the legality of the ICO and the issuance of the M. tokens.

Furthermore, even though art. 4 para. 1bis let. c OBA was not yet in force at the time of the events, the cardinal principle of legality in criminal law (nulla poena sine lege certa) was not violated. Indeed, the former art. 4 al.1 let. b OBA, which did not explicitly cover "virtual currencies", but rather "non-liquid means of payment" in general, was sufficient in terms of this principle : A. could draw no other conclusion than that the AMLA had to be applied, from the moment of issue.

Finally, the TPF rejects A.'s arguments, stating that he had based himself on the meeting with FINMA on December 12, 2017, which had not given rise to any particular recriminations about the ICO (the Letter having apparently not been discussed during this meeting), as well as on the advice of his lawyer D. who, among other reassuring advice [despite the mention of residual risks], is said to have drafted the answers to the Questionnaire, which were then adopted by A. In the TPF's view, given the circumstances, in particular the Letter, A. could not have relied solely on the meeting with FINMA and on legal advice favorable to the issuer.

In conclusion, in addition to endorsing FINMA's practice with regard to payment tokens, at least from the criminal angle, this case law constitutes a salutary reminder of the scope of this practice and of that of legal provisions whose general and abstract nature often proves sufficient, including in criminal law, to typify behavior.
