CENTRE DE DROIT
BANCAIRE ET FINANCIER

Bank Failure

What powers does FINMA have ?

Par Sébastien Pittet le 5 April 2023

To what extent can the customer of a bank in bankruptcy request the segregation of his assets from FINMA when his request has been initially rejected by the liquidators ? In ruling B-2367/2020 of December 13, 2022 (now in force), the Federal Administrative Court (FAT) addresses this question, analyzing in particular FINMA's powers in a bank failure.

On October 21, 2015, a customer of a banking institution instructed his bank to immediately transfer his entire fiduciary deposits to another bank. The same day, the customer receives confirmation that the order will be executed on October 23, 2015. On October 23, 2015, FINMA withdraws the bank's authorization and declares it bankrupt with effect from October 26, 2015. At the same time, the authority appoints two liquidators. On October 26, 2015, the day of the bank's bankruptcy, the liquidators stop all transactions. The customer's order of October 21 has in fact not yet been executed, and the customer's fiduciary deposits are paid into the bankrupt estate.

The customer contacts the liquidators to request the segregation of his deposits and the execution of his order. Following a negative response from the liquidators, the customer applied directly to FINMA. In a decision dated March 4, 2020, FINMA took the view, firstly, that the customer had no right to obtain a decision from FINMA on the liquidators' position and, secondly, that FINMA had no autonomous competence to order the segregation of the customer's assets in contradiction with the liquidators' position.

Following FINMA's decision, the customer appealed to the Federal Administrative Court, which had to determine (i) whether the customer could appeal to the Federal Administrative Court or (ii) to FINMA against the liquidators' refusal to order the segregation of the customer's assets, and (iii) whether FINMA could, independently of the liquidators' position, itself intervene autonomously in the bankruptcy proceedings and satisfy the customer's request.

According to art. 6 para. 2 OIB-FINMA, "decisions" of persons to whom FINMA has entrusted certain tasks (e.g. liquidators) are not to be considered as decisions within the meaning of art. 5 AP. The TAF therefore considers that it has no jurisdiction to hear appeals against the liquidators' decision.

Secondly, art. 6 para. 1 OIB-FINMA provides for the possibility of reporting to FINMA the conduct of a person to whom FINMA has entrusted certain tasks. This provision excludes the whistle-blower from being a party to the whistle-blowing procedure. This means that the client

can (and did) report the behaviour of the liquidators, but has no party status in the supervisory proceedings following his report, and cannot appeal against FINMA's position.

Finally, the TAF is still analyzing whether, irrespective of the liquidators' position, FINMA is competent to order the segregation of the client's assets from the bankruptcy estate. The client believes that FINMA's competence to do so can be inferred from two provisions : art. 33 para. 2 BL and art. 34 para. 3 BL.

According to art. 33 al. 2 LB, FINMA appoints liquidators who are subject to its supervision and who report to it at its request (obligation to appoint one or more liquidators). At first sight, this provision could conflict with art. 12 OIB-FINMA, according to which FINMA appoints a liquidator in bankruptcy by means of a decision if it does not itself assume the corresponding tasks (possibility of appointing one or more liquidators). While the TAF has already had occasion to clarify that FINMA has the option of appointing liquidators, it had not yet specified whether, notwithstanding the appointment of one or more liquidators, FINMA could continue to take decisions in connection with the bankruptcy proceedings autonomously. The Federal Administrative Court (TAF) has now settled this question, ruling that when FINMA appoints one or more liquidators, the authority loses the ability to take decisions that fall within the liquidators' remit. FINMA's involvement in the liquidators' activities is thus limited to its action in a potential whistle-blowing procedure (art. 6 OIB-FINMA).

According to art. 34 BL, bankruptcies are carried out in accordance with the rules of the LP, unless otherwise stipulated in the BL. However, this provision specifies that FINMA may take decisions and measures derogating from these rules. FINMA's competence must be interpreted as the possibility of derogating from certain formal rules of the LP, but not of the BL. As the segregation of the assets of the bankrupt estate falls within the competence of the liquidators under art. 37d BL, FINMA cannot take decisions derogating from this provision on the basis of art. 34 BL.

In short, (i) the liquidators' decision on the segregation of assets cannot be appealed to the administrative courts, (ii) the liquidators' position can be reported to FINMA, but the creditor is not a party to the reporting procedure (and cannot appeal against a subsequent decision or inaction by FINMA), and (iii) once it has appointed liquidators, FINMA loses the ability to decide on the segregation of assets autonomously.

In the light of these facts, creditors may well ask themselves what means they have at their disposal to contest the segregation of assets in the bankruptcy estate. According to the doctrine cited in the judgment, it is in principle up to the liquidator to set a deadline for the customer to bring an action in the bankruptcy forum in accordance with art. 242 para. 2 LP. The TAF therefore invites the customer to take action before the civil courts.
