CENTRE DE DROIT
BANCAIRE ET FINANCIER

Internal investigation within a bank

The scope of attorney-client privilege

Par Katia Villard le 11 April 2023

In a ruling 1B_509/2022 of March 2, 2023, the Federal Supreme Court was called upon to clarify the scope of attorney-client privilege in the context of internal investigations within financial institutions, an issue it had already outlined, albeit in less detail, in two previous cases (one giving rise to ruling 1B_85/2016 of September 20, 2016, the other to rulings 1B_433/2017 of March 21, 2018 and 1B_453/2018 of February 6, 2019, cf. cdbf.ch/1053).

The Geneva Public Prosecutor's Office has been conducting money laundering proceedings against a bank since 2017, in connection with embezzlement committed by an employee of the bank to the detriment of customers of the financial institution.

In November 2021, the prosecuting authority requested various documents from the bank, including : a) internal or external reports relating to the management of various assets by the offending employee ; b) internal audit reports relating to the department in which the employee worked during the period under investigation ; c) the bank's internal anti-money laundering guidelines during the period under investigation. On February 1, 2022, the financial institution handed over two USB sticks. The first, which was freely accessible, contained internal reports, the bank's anti-money laundering guidelines, AMLA audits and reviews, and documents on the income generated by the employee's activities. The second contained in particular documents falling into category a) above ; invoking mainly attorney-client privilege, the bank requested that they be sealed.

The Enforcement Court partially accepted the Public Prosecutor's request to unseal the documents. It considered that the investigation reports drawn up by the bank for its advisors, as well as the documents produced by an auditing firm and an investigation agency, fell within the scope of the bank's duties under money laundering legislation. As for the documents drawn up by a first law firm, commissioned to analyze the situation following the discovery of the acts of which the employee was accused, they related to the bank's supervisory tasks or internal management, but had to be redacted of their legal considerations. As for the documents drawn up by a second law firm, they could be used by the Public Prosecutor's Office, as they did not contain any legal advice.

The Federal Court partially upheld the bank's appeal.

From a legal point of view, our High Court recalls two points in particular concerning so-called mixed mandates : 1) when, in the same mandate, the lawyer mixes typical and atypical activities

– in this case, legal advice and control and auditing tasks in connection with compliance with anti-money laundering duties – the question of the extent of professional secrecy must be resolved in the light of a concrete examination of the different activities ; 2) as the distinction between these activities can be delicate, the lawyer is obliged to take the necessary organizational measures to separate them.

It is also worth noting – particularly with a view to future decisions – the sentence with which our High Court concludes its major decision : “Certainly, the clarification of the facts and the advice given to the bank to determine the legal considerations of the misappropriations made by its employee fall within the scope of the lawyer’s typical activity, but the same cannot be said of the findings made independently, in particular in order to detect any failings on the part of the bank itself”. It is hard to see why the clarification of facts committed by the employee would be subject to professional secrecy, but not that relating to the bank’s failings, given that the criminal proceedings in this case are directed against the financial institution itself.

At the subsumption stage, the Federal Court classifies the documents into three groups : 1) those drawn up by the bank for the attention of its lawyers ; 2) those drawn up by a law firm and containing both factual findings and legal advice ; 3) those drawn up by a law firm or an auxiliary thereof and containing only factual findings.

The first group of documents is not covered by professional secrecy, as the bank has not demonstrated that the documents were prepared for the sole purpose of enabling its lawyers to advise or defend it. The documents in the second group, on the other hand, are protected by secrecy in their entirety (i.e. including the parties in fact), contrary to the decision of the Court of Constraint. The documents in the third group, which are purely descriptive, are not covered by professional secrecy.

If there is a lesson to be learned from this decision at this stage, it seems to be that the lawyer who drafts an investigation report is well advised, from the point of view of secrecy protection, not to limit himself to a factual analysis and to add legal considerations.
