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1MDB case

The Federal Court confirms (again) a 3-year ban on exercising a profession

Par Guillaume Braidi le 9 May 2023

The Federal Supreme Court's ruling 2C_747/2021 of March 30, 2023 provides an interesting description of the link between breaches of anti-money laundering duties of care and the imposition of a ban on practice under Art. 33 FINMASA.

On May 23, 2016, FINMA opened enforcement proceedings against Bruno, who worked as Head of Legal & Compliance at Banque de la Suisse Italienne (BSI). At the end of the enforcement proceedings, FINMA imposed a 3-year ban on Bruno (art. 33 LFINMA). The Federal Administrative Court rejected Bruno's appeal lodged on July 29, 2021, and ordered him to bear the costs of the proceedings in the amount of CHF 25,000 (case TAF, B-7186/2018). Bruno then lodged an appeal with the Swiss Federal Supreme Court.

FINMA accused Bruno of having seriously breached his duties of diligence with regard to the fight against money laundering in connection with accounts opened for clients of the Malaysian fund 1MDB.

Bruno's complaint to the Federal Court is based on procedural and substantive law.

From a procedural standpoint, Bruno argues that the enforcement proceedings constitute a criminal charge within the meaning of art. 6 ECHR, and complains of a violation of (i) the presumption of innocence, (ii) the right of the accused not to incriminate himself, and (iii) the right to ask exculpatory questions.

The Federal Court once again rejected this argument (cf. also ATF 147 I 57 commented in cdbf.ch/1111/). In particular, it considers that the aim of art. 33 FINMASA is to restore public confidence, not to repress its recipient. Furthermore, he considers that the fact that the current enforcement proceedings may have repercussions on Bruno's professional situation is due to the reality of the job market and not to the legal nature of the proceedings.

Bruno then argues that the lower court's presentation of the facts is incorrect. Without going into further detail, the Federal Court noted that, while Bruno was not formally designated as the bank's General Counsel, he reported directly to the Head of Compliance, who had headed the KYC Risk unit, which was designated as the bank's specialized anti-money laundering department.

Complaints that his procedural rights had been violated were therefore unfounded.

The Federal Court examines three material claims in turn : (i) the territorial application of the AMLA, (ii) the bank's breach of the obligations set out in art. 6 and 9 AMLA for the relevant period (2011 and 2015), and (iii) the imputation of these breaches to Bruno.

The TF begins by confirming the applicability ratione loci of the MLA. Although the Fund's accounts were opened in the books of the bank's Singapore branch, the KYC Risk function, as the compliance unit for the group, was based in Switzerland. However, this unit of the bank had provided a positive assessment for the opening of the accounts. On the question of the MLA's territorial connection, it will be recalled that in a ruling 2C_192/2019 of March 11, 2020, commented on by Katia Villard (cdbf.ch/1127/), the TF had considered that the connection with Switzerland was given, as the business relationships in question had been monitored by a client advisor in Switzerland.

In recitals 10 and 11 of the ruling, the Federal Court confirmed that the bank had seriously breached art. 6 AMLA (duty of special diligence) and art. 9 AMLA (duty to report). In particular, it points out that the overall assessment of the business relationship and the examination of plausibility must also take into account the destination of the outgoing funds. With regard to the duty to report, the Federal Supreme Court emphasized that, while the notion of well-founded suspicion is the subject of doctrinal controversy, a well-founded suspicion arises when initial suspicions (whether well-founded or not) cannot be dispelled by further clarification.

Finally, the Federal Court examines whether these violations are attributable to Bruno.

In this case, the Federal Court found that Bruno, as Head of Legal & Compliance, was involved in the chain of authorization for the opening of business relationships. The fact that other units of the bank (even those higher up in the hierarchy) had to give their authorization before the incriminated accounts could be opened was irrelevant, since in this case, only Bruno's obligations were under scrutiny. Furthermore, the fact that the auditing firm did not find any serious breach of supervisory law, or that FINMA did not intervene after the auditing firm's report had been concluded, is irrelevant. The Federal Court rightly emphasized that FINMA's failure to act did not have the effect of "relieving" the bank of the facts under investigation, nor of creating a basis of trust in the sense that the parties concerned could assume that their actions were in compliance with the law.

Lastly, the Federal Court considers that appeals dealing exclusively with questions relating to the imposition of a ban on exercising a profession are "non-pecuniary" disputes. As a small consolation for Bruno, the Federal Supreme Court reformed the contested judgment on the question of fees, reducing them from CHF 25,000 to CHF 5,000.

With the exception of this point, all Bruno's grievances were rejected by the Federal Court, which confirmed the TAF's decision.

This ruling reminds us that in the event of a breach of MLA duties, the person concerned is exposed to a criminal denunciation to the FDF and to enforcement proceedings, the economic and personal consequences of which can be disastrous. Practitioners must therefore ensure that the two procedures are properly coordinated.
*** Translated with www.DeepL.com/Translator (free version) ***

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