CENTRE DE DROIT
BANCAIRE ET FINANCIER

Administrative criminal procedure

Unsealing of an internal investigation report prepared for FINMA

Par Katia Villard le 13 June 2023

The Federal Supreme Court's decision 1B_92/2023 of May 11, 2023 is in line with case law : at the sealing stage, the right not to incriminate oneself does not preclude the use, in (administrative) criminal proceedings, of an internal investigation report drawn up by a bank on behalf of FINMA. The case of inexploitability of the evidence is not clear-cut and the question must therefore be dealt with by the trial judge.

In 2017, FINMA sent a criminal complaint to the Federal Department of Finance (FDF) for breach of the obligation to report a suspicion of money laundering (art. 37 AMLA) within a bank. In support of the report, a redacted version of an internal investigation report was attached, which the bank had submitted to FINMA on the basis of its duty to cooperate (art. 29 FINMASA). The report contained factual elements and a legal assessment of the situation, carried out by the bank itself. It is this second part that FINMA has redacted.

In 2021, the FDF opened administrative criminal proceedings against unknown for violation of the duty to report. It requested various documents from the bank under an information and editing mandate. The bank produced the documents on a USB key, which it simultaneously requested to be sealed. The FDF and the bank agreed on the fate of certain documents, but not others, in particular the full version of the internal investigation report drawn up for FINMA. The Complaints Court of the Federal Criminal Court accepted the unsealing of the document. The bank appealed to the Federal Supreme Court, which rejected the appeal.

It argued that the report had been drawn up at FINMA's request, as part of its information and reporting obligations under art. 29 FINMASA. Violation of these duties exposed it to the criminal sanctions provided for in art. 49 para. 1 let. b BL and art. 45 FINMA. The first provision imposes a fine on anyone who intentionally fails to provide FINMA with the information he was required to provide. The second punishes the provision of false information to FINMA.

The Federal Court noted that FINMASA does not provide for criminal sanctions in the event of refusal to provide information within the meaning of art. 29 FINMASA, and that the addressee of the latter provision – whether a natural or legal person – has the right to refuse to cooperate in the event of a criminal risk. Drawing an (obvious) distinction between "keeping quiet" and "lying", the Mon Repos judges state that the violation of art. 29 FINMASA is not sanctioned by art. 45 FINMASA. As for the application of art. 49 para. 1 let. b BL, the Federal Court "takes a back seat". It merely pointed out that the bank, assisted by two professional representatives,

did not claim to have exercised its right to silence before FINMA, and also appeared to have spontaneously provided the regulator with legal assessments and evaluations of the situation, which, according to its own indications, went beyond its AMLA obligations. The Mon Repos judges concluded that “without further explanation, it cannot be assumed (…) that these additional elements would have been transmitted under duress of a criminal sanction”.

This commentary is an opportunity to emphasize that, as of the entry into force of the revised Swiss Code of Criminal Procedure, currently scheduled for January 1, 2024, the principle of nemo tenetur se ipsum accusare will no longer be a ground for placing items under seal. Indeed, while the current art. 248 al. 1 CPP, relating to the sealing procedure, refers to the “right to refuse to give evidence”, the reference disappears from the new version of the provision. The new version aligns the grounds for sealing with the prohibitions and restrictions on sequestration set out in art. 264 para. 1 letters a to d of the Swiss Code of Criminal Procedure, which makes no mention of the right to remain silent set out in art. 113 of the Code.

This being the case, the Federal Court could not, in our opinion, avoid examining the applicability of art. 49 BL, in connection with FINMA’s practice of granting its supervised persons a right not to deliver self-incriminating statements to FINMA. Indeed, if FINMA’s practice excludes art. 49 BL in a case such as the present one, the Federal Court’s result seems to us to be correct, at least at the sealing stage. The answer would be different if the criminal law were to apply notwithstanding the right to remain silent before FINMA (which would, in our view, enshrine a contradiction between practice and the law). In the latter case, the bank is indeed obliged to cooperate under threat of criminal sanction, so that the result of this cooperation must be considered manifestly unworkable against the bank.
