CENTRE DE DROIT
BANCAIRE ET FINANCIER

Disloyal asset management

Retrocessions (once again) under the eye of the criminal judge

Par Philipp Fischer le 4 July 2023

Is an employee who fails to negotiate down the price of work awarded to a third party, and who receives retrocessions on the price paid to the third party, guilty of unfair management towards his employer within the meaning of art. 158 of the Swiss Criminal Code ? The Federal Supreme Court's decision 6B_280/2022, 6B_287/2022 of April 14, 2023 is in the affirmative.

The facts can be summarized as follows : between 2003 and 2012, two employees set up a scheme with a third party, which consisted in abusing the prerogatives they enjoyed to ensure the regular award of work to the third party, in exchange for retrocessions of CHF 99,600 and CHF 157,700 respectively.

The two employees were convicted by the two Vaud cantonal courts. Each lodged a criminal appeal with the Federal Court.

According to Art. 158 of the Swiss Criminal Code, anyone who, by virtue of the law, an official mandate or a legal act, is required to manage the financial interests of others or to oversee their management, and who, in breach of his duties, has damaged these interests or allowed them to be damaged, is guilty of disloyal management. There are five constituent elements of this offence : (i) a management position, (ii) a breach of management duties, (iii) damage, (iv) a causal link between the breach of management duties and the damage, and (v) intent.

The Federal Court, endorsing the reasoning of the cantonal court, held that the retrocessions were paid to the defendants by reason of their professional activity in connection with the awarding of works paid for by their employer. To this extent, the defendants were therefore subject to the obligation arising from art. 321b para. 1 CO to account for and return to their employer the amounts paid by a third party. In this respect, the defendants' legal position was similar to that of an agent obliged to account to his principal for everything he receives in connection with the mandate (art. 400 para. 1 CO ; see in this respect the jurisprudential saga on mandate law and retrocessions, cdbf.ch/1145/). Thus, by failing to inform their employer of the amounts they had received, the defendants had infringed their employer's pecuniary interests and violated their duty of management.

As for damage, our High Court reiterates the classic definition of damage, i.e. a decrease in assets, an increase in liabilities, a non-decrease in liabilities or a non-increase in assets. In this case, the employees wilfully failed to negotiate the contracts downwards, even though,

according to the facts retained by the cantonal authorities, they would have been in a position to obtain more favorable rates, i.e. a discount of at least 10 % on the services of the third party. However, the defendants had entered into an agreement with the third party whereby the amount corresponding to this discount would accrue to them and not to the company employing them.

It should be emphasized that the third party's services were not remunerated at an amount in excess of the market price. This being said, insofar as the third party was able to pay retrocessions to the defendants, while retaining sufficient margins to allow the operation of its business, the employees could have obtained, in favor of their employer, a more advantageous price. Thus, the damage does not consist of a premium paid by the employer to the third party in relation to the market price, but of a "surplus" in relation to the price that could have been obtained if the defendants had negotiated in their employer's interest and refused to collect retrocessions.

In sum, the Federal Court concluded that the defendants had been guilty of unfair management insofar as they had caused damage to their employer by deliberately failing to negotiate more favorable rates.

In addition, the defendants would probably also have been guilty of passive private bribery (art. 322novies CP), had the aforementioned provision – which came into force on July 1, 2016 – been in force at the time of the events. It should be noted that the Federal Court does not refer in its ruling to art. 4a UWG, which prohibits private bribery and which, at the time of the facts, was accompanied by a criminal sanction (abolished in 2016 with the entry into force of the provisions of the Swiss Criminal Code punishing private bribery).

The Federal Court does not address the question of whether, as in the law of agency (cf. ATF 144 IV 294 ; commented in cdbf.ch/1030/), the mere fact that an employee fails to reveal an undue advantage to his employer can already constitute unfair management within the meaning of art. 158 of the Swiss Criminal Code. This question should probably be answered in the affirmative, insofar as the employee's duty of accountability under art. 321b para. 1 CO is similar to that of an agent under art. 400 para. 1 CO.

With regard to the financial industry, this case law illustrates two observations :

after originating in civil law, the issue of retrocessions has moved into the field of regulatory law (art. 26 LSFin cum art. 29 OSFin), and is now also addressed by criminal law ; and
for the purposes of Art. 158 of the Swiss Criminal Code, proof that the financial service or product chosen by the financial intermediary for his customer (e.g. the class of units in a collective investment scheme in which the customer's assets are invested) is "in line with market prices" is not necessarily sufficient. Rather, it is necessary to show that there was no economically more favorable alternative for the customer, which could have been chosen in the absence of retrocessions.

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