CENTRE DE DROIT
BANCAIRE ET FINANCIER

Credit Suisse

Transparency to await completion of parliamentary inquiry

Par Christophe Hensler le 20 December 2023

On November 29, 2023, the Swiss Federal Data Protection and Information Commissioner (FDPIC) published nine recommendations relating to the acquisition of Credit Suisse by UBS. In essence, the Commissioner draws a distinction between, on the one hand, documents drawn up or communicated after the entry into force of the Necessity Ordinance of March 16, 2023 (Necessity Ordinance), access to which is expressly excluded under the Transparency Act (TransG) and, on the other hand, earlier documents which fall under TransG and are therefore in principle accessible. However, the Commissioner recommends deferring access to documents whose disclosure could significantly hinder the formation of the opinion and will of the Parliamentary Commission of Inquiry (CEP), until the end of the work in progress.

Between March 20 and June 26, 2023, several journalists submitted requests for access (art. 10 of the Swiss Federal Act on Transactions) to information and documents concerning this case, all of which were refused by the General Secretariat of the FDF and the State Secretariat for International Financial Matters, on the basis of art. 6 para. 3 of the Ordinance (which expressly excludes access to information and data under the Swiss Federal Act on Transactions), in conjunction with art. 4 let. a of the Swiss Federal Act on Transactions. At the end of the mediation procedure provided for in art. 13 LTrans, the Commissioner issued the above-mentioned nine recommendations, the content of which is largely similar (with the exception of one case where the authority allegedly failed to identify any official documents).

In his recommendations, the Commissioner begins by analyzing the applicability of therans act to the SNB and FINMA (in principle excluded under art. 2 para. 2rans act). Contrary to the reasoning adopted in a previous recommendation, the Commissioner considers that documents produced by FINMA or the SNB remain excluded from access under the LTrans, even if they have been communicated to an authority subject to this law. The only exception, applicable in the case in point, concerns documents which have not been drawn up in the performance of a public task, but in representation of or on behalf of an authority subject to the LTrans. The Commissioner wishes to prevent the Federal Council or its departments from undermining the principle of transparency by outsourcing federal administration tasks.

The Commissioner then examines the possibility of excluding the application of the Transparency Act by means of an ordinance, given that art. 4 let. a Transparency Act reserves this possibility to special provisions of a federal law. The Commissioner notes that the Ordinance is based on art. 184 para. 3 and art. 185 para. 3 of the Swiss Constitution, whose ordinances can replace a formal law and contain important provisions laying down rules of law

(art. 164 para. 1 of the Swiss Constitution), as well as serving as a basis for serious restrictions on fundamental rights.

The Commissioner also examined the temporal scope of art. 6 para. 3 of the Ordinance, which came into force on March 16, 2023. After noting that the Ordinance does not contain any provisions governing retroactivity, and that there is no evidence to suggest that genuine retroactivity was intended, the Commissioner concludes that art. 6 para. 3 of the Ordinance only applies to documents drawn up or received after its entry into force.

It is interesting to note that art. 6 para. 3 of the Ordinance has been repealed with effect from September 15, 2023, according to an amendment to the Ordinance adopted by the Federal Council on September 6, 2023. Although there are no longer any special grounds for exclusion, the general principles of transparency set out below still apply.

In fact, for all documents subject to the LTrans, it is still necessary to examine whether there is an exception allowing the right of access to be limited, deferred or refused (art. 7 LTrans).

The Commissioner accepted only the first ground invoked (based on art. 7 al. 1 let. a LTrans), considering that it is sufficiently plausible that the disclosure of certain documents or information could significantly hinder the free formation of the opinion and will of the CEP. The Commissioner therefore recommends that the authority undertake a sorting exercise to identify these documents, access to which may be deferred until the CEP has completed its work. For the time being, the actual investigative work is scheduled to last until the start of the 2024 spring session, and the final report is probably not expected before the summer of 2024 at the earliest.

On the other hand, the Commissioner rejects all the other exceptions (art. 7 para. 1 let. b, c, d, f, and g, as well as art. 8 para. 1 LTrans) because he considers that the arguments of the authority (which bears the burden of proof) do not, as they stand, attain a sufficient degree of substantiation and that the presumption in favor of free access has thus not been overturned.

At this stage, the next step for the plaintiffs is to obtain a decision subject to appeal. On the basis of art. 15 al. 2 LTrans, the Commissioner recommends that both authorities, if they decide to restrict access, issue decisions directly in accordance with art. 5 PA (these can also be requested within 10 days of receipt of the recommendations by the applicants, in accordance with art. 15 al. 1 LTrans). Decisions must be handed down within 20 days of receipt of the recommendations or requests for a decision (art. 15 al. 3 LTrans). Applicants may then appeal to the Federal Administrative Court within 30 days of notification of the decisions, before turning to the Federal Supreme Court if necessary.

As a result, transparency will have to wait at least until the CEP has completed its work, and probably even longer if all legal avenues have been exhausted.
