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BANCAIRE ET FINANCIER

Fight against money laundering

Breach of duty to disclose and liability of the Board of Directors

Par Katia Villard le 8 January 2024

In ruling 6B_1176/2022 of December 5, 2023, the Swiss Federal Supreme Court overturns the acquittal of the former Chairman of the Board of Directors of a bank by the Court of Appeal of the Swiss Federal Criminal Court on the charge of violation of the duty to report under art. 37 para. 2 AMLA.

The background is as follows. Albert was CEO of a bank from September 1, 2008 to September 30, 2012, before becoming Chairman of the Board of Directors from October 1, 2012 to March 31, 2016.

In 2007, the bank entered into a relationship with Daniel, a Russian politician and businessman. The bank opened numerous bank accounts for him in the name of domiciliary companies, with Daniel or his sons designated as beneficial owners. Daniel was immediately identified as an "increased risk" client. From 2010 onwards, various events rendered the business relationship suspect. The relevant managers within the bank, in particular Bernard, the "Head of Compliance and Control of Business Operations", carried out investigations and kept the business relationship under increased surveillance, but no reports were made to MROS.

Albert, in his capacity as CEO, was aware of the situation and its evolution.

In July 2013, the bank received two orders from the Geneva Public Prosecutor's Office for the sequestration of banking documentation and a decision to proceed with a request for international mutual assistance from Russia. According to the latter decision, the Russian investigation highlighted Daniel's possible involvement in a major misappropriation of funds committed in Russia, as well as two suspicious transactions linked to this affair that allegedly took place within the bank. The bank forwarded the relevant documents to the Public Prosecutor's Office.

In autumn 2013, as part of criminal proceedings initiated in Geneva this time, the bank received sequestration orders for banking documentation and account assets linked to Daniel. The documents were forwarded to the Geneva Public Prosecutor's Office. The statement of facts retained by the Federal Court further specifies that "[a]ll banking relationships of which [Daniel] and his sons were beneficial owners were known to the authorities on October 18, 2013?. The criminal proceedings against Daniel in Switzerland were closed in 2017.

In the end, no communication was made to MROS.

By penal pronouncement of August 19, 2020, the Federal Department of Finance convicted Bernard for intentional violation of the obligation to communicate, committed from January 28, 2011 to October 18, 2013, and Albert for negligent violation of the obligation to communicate, committed from March 29, 2011 to October 18, 2013.

He will be followed by the Criminal Court of the Federal Criminal Court, but not by the Court of Appeal of the same court, which acquits Albert.

In its ruling of December 5, 2023, the Federal Supreme Court confirmed Bernard's conviction and upheld the Federal Department of Finance's appeal against Albert's acquittal.

With regard to the latter, the Federal Court first notes that, according to the Court of Appeal, for the period from March 29, 2011 to September 30, 2012, during which Albert held the position of CEO and was then, in accordance with the Bank's internal directives, responsible for reporting to MROS with the Compliance department, the facts are time-barred.

With regard to the period during which Albert was Chairman of the Board of Directors, the Federal Court noted that in this capacity he was no longer directly responsible for reporting to MROS.

However," continued our High Court, "he was nevertheless in a position of guarantor which made him liable for infringements committed by a subordinate, insofar as he could be accused of negligence (art. 6 al. 2 DPA).

The source of this liability is art. 716a para. 1 no. 5 of the Swiss Code of Obligations, which entrusts the Board of Directors with overseeing the management of the company. Citing legal doctrine, the Federal Supreme Court notes that, while the Board of Directors may delegate certain supervisory functions, its members continue to assume appropriate control over the proper execution of the delegated tasks.

The crux of the matter lies in the "intensity" of the supervision required of Board members. The Court of Appeal of the Federal Criminal Court ruled that Albert could not be accused of violating art. 37 of the MLA, as "[t]o conclude otherwise would be tantamount to requiring him to recheck all [the bank's] activities in detail, which would be strictly impossible". For its part, the Federal Court considers that the question depends on whether Albert received any feedback on the Public Prosecutor's 2013 requests. As this has not been established, the Federal Court refers the case back to the Court of Appeal to determine "whether the respondent, as Chairman of the Board of Directors, was aware of new elements that should have intensified the old suspicions already present and led to an announcement to the MROS or, at the very least, further explanations from the bank's relevant departments".

Finally, the Federal Court notes that if the Court of Appeal were ultimately to conclude that Albert had breached his duty to disclose as Chairman of the Board of Directors, this would raise the question of the statute of limitations on the conduct for which Albert could be held responsible in his capacity as Chief Executive Officer.

This is because breach of the duty to disclose is conceived as an offence of continuous

omission, so that the dies a quo of the time limit only begins to run when the omission ceases (in this case probably October 18, 2013, the date on which the prosecuting authorities were in possession of all the relevant information).

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