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**Withdrawal of accreditation**

# Administrative sanctions and art. 6 ECHR

Par Teymour Brander le 1 February 2024

An auditor whose accreditation has been withdrawn asks to be allowed to plead his case in open court ; the Federal Administrative Court rejects his request. On appeal, the Federal Court concluded that there had been a violation of the right to a public hearing enshrined in art. 6 par. 1 ECHR, and thus affirmed that the civil aspect of this provision applied to procedures for withdrawal of accreditation (TF 2C_384/2022 of November 14, 2023).

The Swiss Federal Audit Oversight Authority (ASR), noting a series of breaches committed in the course of audit work, withdrew the accreditation of an audit expert for a period of four years. The party concerned appealed to the Federal Administrative Court, requesting a public hearing. This was refused by the Federal Administrative Court, which stated that the right to a public hearing guaranteed by art. 6 par. 1 ECHR did not apply in casu. The dismissed auditor brought the case before the Federal Court.

The question to be decided by the Federal Court is whether the administrative procedure for withdrawal of approval falls within the scope of the civil component of art. 6 par. 1 ECHR. More specifically, is an auditor whose accreditation has been withdrawn by the ASR entitled to “a public hearing […] […] by an independent and impartial tribunal” (art. 6 par. 1 ECHR) ?

Before continuing with the Federal Court’s reasoning, it should be remembered that fundamental procedural guarantees apply to two distinct acts, namely (i) disputes concerning civil rights and obligations (the civil aspect) and (ii) criminal charges (the criminal aspect). One of the main distinctions is that the criminal aspect includes additional guarantees, such as the right not to incriminate oneself.

Let’s return to the judgment under review. The Federal Court emphasized that the notion of “civil rights” encompasses not only (i) civil law disputes in the strict sense, but also (ii) administrative acts by a public authority, insofar as these acts decisively affect private rights and obligations. Thus, so-called administrative sanctions may call for the application of the civil component of art. 6 par. 1 ECHR.

In casu, the Federal Court found that the withdrawal of the expert-reviser’s licence had serious consequences for the individual concerned (mainly in terms of his freedom to pursue a professional activity) and therefore represented an act infringing civil rights. The Federal Court therefore concludes that the administrative procedure for withdrawal of authorization is subject to the fundamental procedural guarantees enshrined in art. 6 par. 1 ECHR (civil aspect).

These guarantees include the right to a public hearing. Every litigant must have the opportunity to plead his case in open court if he so wishes, and the judge must in principle accede to this request (although exceptions do exist, notably in the case of a quibbling application).

In this case, there was no valid reason to oppose the auditor's request for a public hearing. In rejecting his request, the Federal Administrative Court therefore violated art. 6 par. 1 ECHR. This procedural defect led to the annulment of the judgment ; without examining the substantive grievances, the Federal Court referred the case back to the Federal Administrative Court for a public hearing and a new decision.

This decision confirms that, although administrative enforcement proceedings do not constitute criminal charges (ATF 142 II 243, c. 3.4, commented in Abrar, cdbf.ch/946/), they may have a civil character and therefore be subject to the civil aspect of art. 6 par. 1 ECHR. To our knowledge, this is the first time that the Federal Court has had occasion to affirm this (at least, so clearly). In our opinion, the same should apply to a ban on exercising and/or practising a profession (art. 33 and 33a FINMASA).

Another lesson can be drawn from this ruling, this time on the subject of the interest worthy of protection in the appeal. In short, the period of withdrawal of approval had expired before the Federal Supreme Court handed down its decision. This raised the question of the auditor's actual and concrete interest in having his appeal heard. Although the sanction had already expired, the Federal Court held that the auditor concerned still had an interest in having the legality of the withdrawal of his authorization examined. This is likely to cause reputational damage that persists beyond the expiry of the sanction. Once again, this reasoning should apply mutatis mutandis to a ban on exercising or practicing a profession imposed by FINMA (see also Zulauf, cdbf.ch/1006/).

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