

Supervisory Board CDB

Case law for the second half of 2023

Par Valentine Delaloye le 23 May 2024

A few days ago, members of the Swiss Bankers Association (SBA) were given an overview of the CDB Supervisory Commission's (hereinafter referred to as the Commission) "leading cases" for the period from 1 July to 31 December 2023. Despite the relatively limited content, a few points are worth noting.

On procedural issues, the only decision mentioned by the Commission recalls that, pursuant to article 13 of its rules of procedure, it decides in principle on the basis of the file drawn up by the Chargé d'enquête. The provision also states that the supervisory authority may, "of its own motion, at the request of the Chargé d'enquête or the Bank", administer other evidence. The Commission adds that it is not, however, an investigating authority and is therefore not empowered to establish the decisive facts itself. In this case, as the facts were not sufficiently clear, the authority could only "encourage" the Investigating Officer to carry out further investigations.

On the merits, the first decision deals with a bank's breach of its obligation to repeat the verification of the beneficial owner (art. 46 CDB 20). In the context of an ongoing business relationship with a domiciliary company, a bank requested a new Form A, signed by a certain Mrs X. The extract states that on the same day, another form, entitled "Controlling Persons", was signed by the same Mrs X, but also by her daughter. While this document probably concerns the bank's tax obligations, the extract does not specify whether it concerned FATCA, EAR and/or other aspects (the content of this type of document differs from one banking establishment to another). In any event, as the Commission considered the two statements to be contradictory, it took the view that the bank should clarify this discrepancy. In our opinion, this case raises a question and an observation. On the one hand, we wonder whether the situation would have been judged differently if there had been a longer period of time between the signing of the two forms. On the other hand, this state of affairs is a reminder of the complexity engendered by the multiplication of banking documentation, as well as the risk of confusion when it comes to a financial institution assessing compliance with its obligations.

In another decision, the Commission pointed out that, more generally, a bank is required to repeat or carry out additional checks where there is confusion as to the true identity of the beneficial owner, at the risk of failing to meet its obligations. This is the case, for example, when B. and C. both declare that they are the beneficial owners of a domiciliary company at the time the business relationship is established, but five years later only B. still appears on the updated Form A.

Finally, the Commission considers that a form considered to be defective (in this case signed by an unauthorised person) does not constitute a breach of the rules of the CDB if it has been unnecessarily renewed. In a footnote, the authority states that this applies in all cases where the new Form A contains no changes to the declarations previously obtained regarding the beneficial owner.

The publication of these leading cases is interesting because it allows practitioners to form a clear opinion on how to apply their due diligence obligations, particularly with regard to the precise content of the documentation required. In the best of all possible worlds, so that financial players can benefit as much as possible from the content of the document, this summary would undoubtedly deserve to be a little more fleshed out.

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