CENTRE DE DROIT
BANCAIRE ET FINANCIER

Fraudulent obtaining of "COVID-19" credits

The Federal Supreme Court confirms the classification as a fraud

Par Romain Dupuis le 31 May 2024

Since March 2020, more than 100,000 Swiss companies have made use of the bonded loans set up by the Confederation to make up for a lack of liquidity following the COVID-19 pandemic. The Swiss authorities' desire to respond quickly to an exceptional situation and to ensure rapid access to funds led them to introduce a facilitated procedure, based essentially on a self-declaration by the credit applicant, which has unfortunately seen its share of abuses.

In a recent ruling to be published, the Federal Supreme Court is called upon to rule – to our knowledge for the first time (after refusing to enter into the matter on an identical complaint in ruling 6B_244/2023 of 24 August 2023) – on the criminal classification of the fraudulent obtaining of "COVID-19" loans (ruling 6B_271/2022 of 11 March 2024) : is it fraud within the meaning of Article 146 of the Swiss Criminal Code ? The Federal Court answers in the affirmative.

To understand the reasoning of our High Court, it is worth briefly recalling the legal framework in which these credits were granted.

On 25 March 2020, the Federal Council adopted the Ordinance on joint and several guarantees linked to COVID-19, which offers the self-employed and SMEs rapid access to bank loans and therefore to the liquidity they need to meet their fixed costs. The system introduced by the government is based on joint and several guarantees granted by the four recognised guarantee organisations, which are ultimately guaranteed by the Confederation.

Provided certain conditions are met, applicants can obtain a loan of up to 10 % of 2019 sales (and a maximum of CHF 20 million). Naturally, the funds obtained may only be used to cover the financial requirements linked to the company's operational activity.

The granting procedure is simplified and standardised. The credit applicant fills in a form available online, certifying that the information provided is complete and true. They then submit this form to their bank. Based on this self-declaration, the application is not subject to any detailed verification. The bank merely checks the completeness of the information provided and the signing authorities, and ensures that the amount of credit requested does not exceed 10 % of the 2019 turnover communicated by the applicant.

In short, if the form is filled in completely and formally correctly, the bank will grant the loan. For

loans in excess of CHF 500,000, the bank is also required to carry out a credit check in accordance with industry practice.

Recognising the potential for abuse arising from the granting of credit solely on the basis of self-declaration, the law punishes with a fine anyone who obtains credit by intentionally providing false information, provided that this is not a more serious offence under the Criminal Code.

In the case in question, A and B fraudulently obtained – on behalf of their companies or sole proprietorships – four “COVID-19” credits totalling more than CHF 1.5 million, each time stating a fictitious turnover for 2019 that was much higher than the actual figure. In three cases, at the bank’s request, a falsified balance sheet reproducing the fictitious amounts was attached to the application.

Convicted of fraud at first instance in respect of the four loans obtained, A and B were partially acquitted by the Ticino Court of Appeal in relation to the obtaining of two of the four loans.

On appeal by the Public Prosecutor’s Office, the Federal Supreme Court examined the constituent elements of fraud within the meaning of art. 146 of the Swiss Criminal Code. The discussion revolved mainly around the concepts of deception and damage.

With regard to deception, the Federal Court previously refused to find that a bank had committed deception when it granted small loans solely on the basis of information provided by the applicant, without requiring any supporting documents or carrying out any checks (Federal Court ruling 6B_383/2019 of 8 November 2019, c. 6.5.4). Given the specialisation of their bodies and staff, banks are required to exercise greater vigilance (Federal Court ruling 6B_244/2023 of 24 August 2023, c. 4.1).

However, the Federal Court reached a diametrically opposed solution in the case in question. According to the Court, although the “COVID-19” loans were granted solely on the basis of information provided by A and B, verification of this information by the bank was neither planned nor required. The loans in question were conceived as immediate aid to SMEs, governed by specific regulations, subject to precise conditions and made available solely on the basis of a self-declaration. Given the exceptional situation and the mechanism put in place to deal with it, the Federal Court concludes that, in this specific case, mere false information constitutes clever deception.

The same applies to the loan granted after the introduction of SECO’s ‘anti-abuse’ plan, under which – in the case of loans granted to new customers – banks were required to identify the customer and comply with money laundering regulations (and therefore to carry out more thorough checks). The falsified balance sheet provided in this context was in fact sufficient to establish clever deception, despite the presence of troubling elements that would have required the bank to exercise a degree of caution in processing the application.

On the question of damage, the Federal Court points out that damage can take the form of endangerment of assets when the borrower misleads the lender about his ability to repay the loan. As temporary damage is sufficient, repayment of the loan in accordance with the contract is not sufficient to eliminate the reduction in assets that had already occurred when the contract was entered into.

In this case, the Ticino Court of Appeal had denied the existence of any damage in connection with one of the loans, insofar as – at the time the loan was granted – the company had sufficient funds in its account to repay it (and had finally repaid it on the instructions of the Public Prosecutor). The Federal Court was not convinced by this reasoning and considered that the false information provided on the form demonstrated a reluctance to repay and therefore a risk of non-recovery that already constituted damage.

In view of the foregoing, the Federal Court allowed the appeal and set aside the acquittals on appeal.

In our view, the reasoning of the Federal Court, which is in line with the almost unanimous practice of the cantons, should be endorsed. Although there was no particular sophistication to the trickery in this case, the perpetrators had abused an extraordinary situation and the emergency measures taken to limit its negative consequences. Since the granting procedure deliberately does not involve any material control by the bank, which the perpetrators took advantage of, it is logical that the requirements regarding the trickery in relation to bank loans should be lowered.
