CENTRE DE DROIT
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Loan agreement

No misappropriation if the use of assets is not sufficiently defined

Par Sébastien Pittet le 29 January 2025

A borrower who uses the loaned funds for a purpose other than that specified in the contract may exceptionally be found guilty of breach of trust (Art. 138 para. 1 of the Swiss Criminal Code). For this to happen, the purpose for which the assets were lent must be clearly defined in the contract, which was not the case in ruling 6B_240/2024 of 9 January 2025.

On the basis of a *loan agreement , a* company lends USD 300,000 to another company. The parties do not specifically provide in the contract that the funds must be used for a specific purpose. On the due date of the loan, it was not repaid and the lending company commenced civil proceedings against its debtor. The civil proceedings took their course and, due to a lack of ability to repay, the borrowing company was finally declared bankrupt a few years later.

A few months after the bankruptcy was declared, the lending company filed a criminal complaint against the former director of the borrowing company. The complaint alleged that the director had used the loaned funds for a purpose other than that specified in the loan agreement. At first and second instance, the Geneva authorities concluded that the director had indeed used the funds in a manner contrary to the contract and held that all the elements constituting a breach of trust had been met. The manager appealed to the Federal Court.

A person commits a breach of trust – within the meaning of art. 138, para. 1, para. 2 of the Swiss Criminal Code – if, without right, he uses assets entrusted to him for his own benefit or for the benefit of a third party. The offence thus presupposes that a value has been entrusted. For this condition to be met, the perpetrator must, on the one hand, have acquired the ability to dispose of the assets. Secondly, the use of the asset must be specifically determined by an agreement (express or tacit) or another legal relationship. The perpetrator is therefore committing a criminal offence if he or she uses the assets contrary to the instructions received. If the assets are entrusted to a legal entity,art. 29 let. a of the Criminal Code makes it possible to punish the body that has used the assets for purposes other than those provided for in the contract.

In the context of a loan, if the borrower uses the money lent contrary to the agreed purpose, he may exceptionally be found guilty of breach of trust. The offence is only possible if (i) the use of the assets loaned has been clearly predefined and (ii) this use serves to cover the lender's risk or, at the very least, to reduce his risk of loss.

The offence does not require a detailed description of the nature of the agreement between the parties and the intended transaction. The factual situation must nevertheless 'allow it to be delineated with a sufficient degree of precision to enable the two points mentioned above to be examined'.

In this case, the Federal Court considered that it was 'impossible to determine – even vaguely – what transaction was envisaged by the parties'. The conditions necessary for the application of art. 138 ch. 1 al. 2 CP were therefore not met. The Director's appeal was allowed, the judgment set aside and remitted to the cantonal court.

In reaching this conclusion, the Federal Court addresses a number of interesting issues of contractual interpretation not covered in this commentary. In particular, the judgment addresses the possibility of taking into account facts subsequent to the conclusion of a contract in order to determine its content (para. 4).

On the question of abuse of rights, two lessons can in our view be drawn from this decision.

On the borrower's side, even if the offence of breach of trust is not ultimately upheld, this judgment is a reminder of the criminal risks to which a borrower who does not respect the purpose of a loan in the use of the funds is exposed. Case law has already confirmed the application of this criminal provision following a loan where the sum lent, intended to finance construction work, was used to pay various invoices (TF 6B_827/2008 of 7 January 2009, c. 1.4). In another decision, a loan granted for the purchase of land and the construction of a building was used to settle personal debts (ATF 124 IV 9, c. 1a).

On the lender's side, this ruling highlights the importance of accurately describing the purpose of a loan in the contractual documentation. If the use to which the assets are to be put is made sufficiently clear in the contract, a sword of Damocles hangs over the head of any borrower who contemplates departing from the contract. The possibility of a criminal penalty may encourage the borrower not to use the funds lent for a purpose outside the scope of the contract.

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