CENTRE DE DROIT
BANCAIRE ET FINANCIER

COVID-19 loan

The criminal classification of fraudulent obtaining

Par Katia Villard le 17 March 2025

In a judgement published on 31 May 2024, the Federal Court had already confirmed that the fraudulent obtaining of a 'COVID-19' loan constituted fraud (ATF 150 IV 169, commented *in* Dupuis, cdbf.ch/1353). On the other hand, its case law was fluctuating with regard to the commission of the offence of forgery in relation to the presentation of the false credit application form to the lending bank. The judgement 6B_95/2024 of 6 February 2025, intended for publication, provided the answer of any self-respecting lawyer : 'it depends'.

In a judgment not intended for publication of 1 March 2024, the 2nd Criminal Law Court of the Federal Court had first ruled that the absence of verification, as intended by the legislator, of the accuracy of the information on the COVID-19 loan application form conferred on the latter a guarantee of particular veracity (7B_274/2022 of 1st March 2024, c. 4.3). A false document therefore constituted the offence of intellectual forgery within the meaning of art. 251 PC, by '[falsely stating] in a title a fact with legal significance'. First of all, the approach was not contradicted by the 1st Criminal Court (6B_691/2023 of 1st July 2024, c. 3.3). However, the latter made a U-turn in a ruling 6B_262/2024 of 27 November 2024, intended for publication. Drawing a parallel with its case law on contracts, the judges of Mon Repos ruled that the content of the declaration did not have increased probative value because there was no guarantee that it corresponded to the real will of the credit applicant, particularly with regard to the destination of the loaned funds (in particular c. 1.7.4, 1.9.1 and 1.9.5). The misleading document did not therefore constitute an intellectual forgery. However, the Federal Supreme Court outlined the possibility of a different solution depending on the nature of the inaccurate information, for example in the case of the entry of a false turnover (c. 1.9.7). It confirmed this approach in its ruling of 6 February 2025.

The Federal Court notes in this regard that the applicant for COVID-19 credit had to indicate his turnover for the year 2019, based on the company's final or provisional balance sheet. It goes on to point out that, according to established case law, commercial accounts (even if not audited by the supervisory body and/or not approved by the general meeting) have the increased probative force necessary to establish the offence of document forgery. However, in this case, the indication of an inaccurate turnover in the COVID-19 loan application form takes on a particular guarantee of veracity, even if the document is not accompanied by any supporting documents.

This case law demonstrates, once again, the eminently casuistic and difficult-to-predict nature of forgery in the case of intellectual forgery.

With regard to the offence of fraud, it can also be noted that the Federal Supreme Court has once again confirmed that in the case of loan fraud, the damage occurs at the time the loan is granted. At that moment, the lender's assets are indeed placed at economic risk in such a way that it corresponds to financial damage within the meaning of Article 146 of the Penal Code. Thus, subsequent repayment of the loan does not affect the commission of the offence. Furthermore, the Federal Court indicates, to our knowledge for the first time in such a clear manner, that the injured party in the offence is not the bank but the guarantee organisations, even if, *ultimately*, it is the Confederation that covers the losses.

Reproduction autorisée avec la référence suivante: Katia Villard, The criminal classification of fraudulent obtaining, publié le 17 March 2025 par le Centre de droit bancaire et financier, https://cdbf.ch/en/1402/