CENTRE DE DROIT
BANCAIRE ET FINANCIER

Supervisory Board CDB

Case law from the second half of 2024

Par Valentine Delaloye le 14 July 2025

For once, the publication of the case law of the Banking Supervisory Commission (hereinafter : the Commission) for the second half of 2024 contains a little more substance than usual.

On procedural aspects, it is mainly issues related to the burden and the degree of proof required that seem to have occupied the authority. In the first case, the Commission emphasizes that it is all the more incumbent on the bank to prove that it has fulfilled its due diligence obligations when it invokes an exception, in this case in connection with the identification of the beneficial owner (hereinafter : BO). More specifically, the authority had to remind a regulated entity that the presumption that the co-contracting party is also the BNE of the assets is no longer valid since the repeal of CDB 08. It also confirmed that since the entry into force of CDB 16 and the change in practice it has implemented in this area, the bank is required to determine and document, using the appropriate form, that its co-contractor is a domiciliary company or a company with operational activity. Failure to do so exposes the institution to the risk of violating Articles 27 and 44 of the CDB 20.

With regard to the degree of proof required, the Commission considers that the principle of full conviction also applies in the context of a CDB procedure and refers in this regard to ATF 140 III 610, c. 4.1. The supervisory authority specifies that, in this regard, it considers that proof has been provided once it is convinced of the veracity of a factual allegation, while adding that "*absolute certainty* cannot [however] be required." Thus, it is sufficient that there are no longer any "serious doubts" as to the existence of the fact or "that the remaining doubts appear to be weak." These two statements appear somewhat contradictory and would certainly have merited clarification in the context of the facts in question.

On the substance, the report contains several elements that deserve some attention. In particular, we note that a holding company within the meaning of Art. 39 para. 4 let. b CDB 20 cannot be considered a domiciliary company and must therefore be subject to the same clarifications as an operational company. Consequently, Form K must be obtained in such cases. On another note, a bank faced with "unusual findings" must consider that there is doubt giving rise to an obligation to report within the meaning of Art. 46 CDB 20. Although this is a textbook case, the authority adds that the same applies to a cash transaction involving a six- or even seven-figure amount.

With regard to penalties, it should be noted that a violation of the CDB is more serious in terms of determining the (conventional) penalty when the problematic situation persists over time.

Similarly, the accounting of large disputed amounts aggravates the penalty.

Finally, a comment related to the case under section 4.2 (last paragraph) of the report is particularly noteworthy. It was ruled that the elements constituting the offense of active assistance in tax evasion were not met in the case of a bank that paid a six-figure sum in cash to a customer, even though it was noted in the file that the funds were undeclared and probably even of criminal origin. The authority nevertheless points out that such conduct is similar to that criminalized in Chapter 7 of the CDB 20 and adds that it would be consistent with the purpose of the standard in such cases to sanction institutions for active assistance in tax evasion and similar acts. That being said, it also considers that the “narrow wording” of the provisions of Chapter 7 means that conduct such as that of the bank in question does not fall within the prohibition on active assistance in tax evasion within the meaning of the CDB. It concludes simply that the conduct of the bank in question is incompatible with the clean money strategy pursued by Swiss institutions since the tax dispute with the United States. We find these comments all the more puzzling given that just a few paragraphs later in the report, it is stated that a bank seriously violates the CDB rules when its conduct breaches fundamental rules and thus damages the reputation of the Swiss financial center.

In conclusion, while we hope that the Commission’s modest efforts to share its practices more widely will continue in the future, we regret the few somewhat confusing passages in the report, which will not help to improve practitioners’ understanding.
