Council of State, 9th - 10th joint chambers, 10/15/2020, 432873

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Reading for Thursday, October 15, 2020

Rapporteur
Mrs. Cécile Viton

Public Rapporteur
Mrs. Céline Guibé

Lawyer(s)
SCP LYON-CAEN, THIRIEZ; SCP MATUCHANSKY, POUPOT, VALDELIEVRE

Full text

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

In view of the following procedure:

By a request and additional briefs, registered on July 23, 2019, October 2, 2019 and February 3, 2020 at the litigation secretariat of the Council of State, the Banque d'escompte requests the Council of State:

1°) primarily, to order the holding of mediation in application of the provisions of Article L. 114-1 of the Code of Administrative Justice, in the dispute between it and the Sanctions Commission of the Prudential Supervision and Resolution Authority, which, by its decision of July 11, 2019, issued a reprimand and a financial penalty of 200,000 euros against it and decided to publish its decision for five years in the official register of the Authority in a nominative form;
2°) alternatively, to annul or, failing that, to reform the decision of 11 July 2019 of the Sanctions Committee of the Prudential Supervision and Resolution Authority;

3°) to order the Prudential Supervision and Resolution Authority to publish the decision to be taken by the Council of State on its website, in the event that the Council of State orders its annulment or reformation;

4°) to order the State to pay the sum of 4,500 euros under Article L. 761-1 of the Code of Administrative Justice.

Having regard to the other documents in the file;

Having regard to:
- the Declaration of the Rights of Man and of the Citizen;
- the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015, in particular Article 60 thereof;
- the Monetary and Financial Code;
- the decree of 3 November 2014;
- the code of administrative justice;

After having heard in public session:

- the report of Ms Cécile Viton, master of requests in extraordinary service,

- the conclusions of Ms Céline Guibé, public rapporteur;

The floor having been given, before and after the conclusions, to SCP Lyon-Caen, Thiriez, lawyer for the Banque d'escompte and to SCP Matuchansky, Poupot, Valdelièvre, lawyer for the Prudential Supervision and Resolution Authority;

Considering the following:

1. It results from the investigation that following an inspection carried out by the Prudential Supervision and Resolution Authority (ACPR) from 4 May to 7 September 2017, concerning the compliance of the anti-money laundering and counter-terrorist financing system implemented by Banque d'escompte, disciplinary proceedings were opened against this credit institution. By a decision of 11 July 2019, the Sanctions Committee of this authority issued a reprimand and a financial penalty of 200,000 euros to Banque d'escompte and ordered the publication of this decision in the ACPR register, for five years in a nominative form, then in an anonymous form. Banque d'escompte requests that mediation be ordered or, failing that, that this decision be annulled and, alternatively, that the amount of the financial penalty imposed on it be reduced and that the additional publication penalty be annulled.

On the submissions seeking an order for mediation:

2. Under Article L. 114-1 of the Code of Administrative Justice: "When a dispute is brought before the Council of State in the first and final instance, it may, after obtaining the agreement of the parties, order mediation to attempt to reach an agreement between them (...)". There is no need for the Council of State, in the circumstances of this case, to propose mediation to the parties.

On the regularity of the contested decision:

3. Firstly, under the terms of Article L. 612-38 of the Monetary and Financial Code: "The member of the supervisory board or the resolution board designated by the body which decided to open the sanction procedure is summoned to the hearing. (...). He may submit observations in support of the grievances notified and propose a sanction." The option thus given to a member of the board who took part in the investigation phase prior to the disciplinary proceedings to submit observations and propose a sanction must be regarded as the possibility of issuing an opinion, which is not binding on the sanctions committee either as to the principle itself of the imposition of a sanction or as to the quantum of the sanction. Having regard to the nature and modalities of the procedure followed before the Sanctions Committee and the opportunity given to the persons prosecuted to express their views in the final instance, neither the adversarial nature of the procedure nor the principle of the rights of the defence recalled both by Article 16 of the Declaration of the Rights of Man and of the Citizen and by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms implies, contrary to what is argued, that the proposal for a sanction formulated during the hearing by the member of the panel should be communicated in advance to the persons prosecuted. Thus, the argument based on the fact that the procedure was irregular due to the failure to communicate to the applicant, prior to the hearing, the proposal for a sanction formulated by the representative of the panel, must be dismissed.

4. Secondly, if the decision by which the Sanctions Committee makes public the sanction imposed has the character of an additional sanction, it does not have to be the subject of specific reasons, distinct from the overall reasons for the main sanction. This overall reasoning cannot be considered, in this case, as insufficient, which Banque d'escompte does not dispute. Consequently, the argument based on the insufficient reasoning of the contested decision, insofar as it imposes an additional sanction of publication, must be dismissed.

On the merits of the contested decision:

With regard to the complaint relating to the inadequacies in the assessment of the risks of money laundering and terrorist financing:

5. Article L. 561-4-1 of the Monetary and Financial Code provides that banks "shall define and implement systems for identifying and assessing the risks of money laundering and terrorist financing to which they are exposed, as well as a policy adapted to these risks" and that they "shall, in particular, develop a classification of the risks in question based on the nature of the products or services offered, the transaction conditions proposed, the distribution channels used, the characteristics of the customers, and the country or territory of origin or destination of the funds."

6. Firstly, by considering that these provisions require financial institutions carrying out fund transfer operations to identify the risks of money laundering and terrorist financing specific to each of the countries or territories of origin or destination of the funds, the Sanctions Committee did not disregard the scope of the provisions of this article.

7. Secondly, it follows from the investigation that Banque d'escompte had not carried out a separate assessment of the risks represented by the transfers of funds according to the countries concerned by its fund transfer activity to emerging countries. The applicant company is not justified in arguing that all the countries concerned by this activity presented the same degree of risk, since, in particular, it is common ground that three of the countries concerned were identified as countries presenting higher risks than the others by the Intergovernmental Action Group against Money Laundering in West Africa (GIABA) and by the Financial Action Task Force (FATF). Furthermore, although Banque d'escompte invokes an internal instruction imposing a policy of enhanced vigilance on all fund transfer operations to emerging countries, this circumstance cannot justify a failure to comply with the obligations resulting from Article L. 561-4-1 of the Monetary and Financial Code, which requires financial institutions to classify the risks to which they are exposed. Consequently, the Sanctions Committee was legally able to find that there had been a failure due to the lack of risk classification based on the destination countries of the fund transfers.

8. Thirdly, credit institutions are required to develop a risk classification, regardless of the nature of the activities concerned. Consequently, the Sanctions Committee, whose decision is sufficiently reasoned on this point, was legally able to find that there had been a breach due to the failure to identify the risks resulting from transactions carried out in relation to banks, without the applicant company being able to usefully argue that this activity did not, where appropriate, correspond to transactions on behalf of third parties.

With regard to the complaint relating to the inadequacy of periodic monitoring:

9. Article L. 561-32 of the Monetary and Financial Code requires credit institutions to implement internal control measures to ensure compliance with their obligations to combat money laundering and the financing of terrorism. Article R. 561-38-4 of this code provides that this system includes at least permanent internal control, on the one hand, and periodic internal control, on the other hand, which must be carried out independently by dedicated persons. Article R. 561-38-2 of the Monetary and Financial Code provides that the institutions concerned may entrust an external service provider with the performance, in their name and on their behalf, of these control activities, according to a contract whose mandatory clauses are specified by an order of the Minister responsible for the economy. Article R. 561-38-2 of the Monetary and Financial Code provides that the internal control system is adapted to the size, nature, complexity and volume of the credit institution's activities. It also follows from the provisions of Article 11 of the decree of 3 November 2014 relating to the internal control of companies in the banking, payment services and investment services sector subject to the control of the Prudential Supervision and Resolution Authority that the system for controlling internal operations and procedures has the particular objective, under optimal conditions of security, reliability and completeness, on the one hand, to verify that the operations carried out by the company, as well as the internal organisation and procedures, comply with the provisions specific to banking and financial activities, whether legislative or regulatory, national or European, directly applicable, or whether they are professional and ethical standards, or instructions from effective managers taken in particular in application of the strategies and policies governing the taking, management, monitoring and reduction of risks as well as the guidelines and supervisory policy of the supervisory body and, on the other hand, to verify that the decision-making and risk-taking procedures, whatever their nature, and the management standards set by the effective managers, within the framework of the policies and guidelines of the supervisory body, in particular in the form of limits, are strictly respected.Finally, it follows from Article 25 of the same decree that the resources allocated to periodic monitoring must be sufficient to carry out a complete cycle of investigations of all activities over as limited a number of financial years as possible and that a program of monitoring missions is established at least once a year, integrating the annual objectives of the effective managers and the guidelines of the supervisory body in terms of monitoring.

10. The Sanctions Committee found that Banque d'escompte had failed to comply with its periodic monitoring obligations, as it had not subjected its traditional banking and online brokerage activities to them. Although the applicant company relies on an "investigation monitoring table" drawn up in May 2016 by an independent service provider, this mission, the purpose of which was limited to monitoring the recommendations set out in a letter from the ACPR dated 19 April 2012 following a previous inspection, cannot be considered a periodic inspection carried out under the conditions set out in the provisions mentioned in point 9. In these circumstances, and while the applicant company does not otherwise dispute the lack of periodic monitoring of its online brokerage activity, the Sanctions Committee, whose decision is sufficiently reasoned on this point, was legally able to consider that this failure was established.

With regard to the complaint relating to the insufficient identification of the beneficial owners of certain business relationships:

11. Article L. 561-2-2 of the Monetary and Financial Code defines the beneficial owner as "the natural person or persons: / 1° Who ultimately control, directly or indirectly, the client; / 2° For whom a transaction is executed or an activity carried out". L. 561-5 of the same code provides: "I. - Before entering into a business relationship with their client or assisting them in the preparation or completion of a transaction, the persons mentioned in Article L. 561-2: / 1° Identify their client and, where applicable, the beneficial owner within the meaning of Article L. 561-2-2; / 2° Verify these identification elements upon presentation of any written document of a probative nature". When the client of the establishment concerned is a company, Article R. 561-1 of the same code defines the beneficial owner as "the natural person or persons who either hold, directly or indirectly, more than 25% of the capital or voting rights of the company, or exercise, by any other means, a power of control over the company within the meaning of 3° and 4° of I of Article L. 233-3 of the Commercial Code". If these criteria do not allow a natural person to be identified, the same article provides that the beneficial owner is the legal representative of the company. Finally, under the terms of Article R. 561-7 of the same code: "The persons mentioned in Article L. 561-2 identify the beneficial owner of the business relationship, where applicable, by appropriate means and verify the identification elements collected on the latter by collecting any appropriate document or supporting evidence, taking into account the risks of money laundering and terrorist financing. They must be able to justify their due diligence to the supervisory authorities. They keep these documents or supporting evidence (...). "

12. It follows from the investigation that Banque d'escompte was unable to demonstrate, during the inspection carried out by the ACPR, that it had identified the beneficial owners, within the meaning of the provisions cited in point 11, of certain companies before entering into business relations with these entities, in particular due to the lack of documented information on the distribution of the capital of these companies. Although the applicant company claims that it met the directors of these banks and that the context of business relations in this country did not allow it to obtain more written information, these circumstances cannot be usefully invoked to justify a failure to fulfil its obligations. Furthermore, while it is established that these relationships were established at the instigation of the public authorities, the Sanctions Committee was legally able to consider that this circumstance was not such as to rule out the existence of a failure to comply with the obligations to identify beneficial owners, insofar as it is also established that entering into a business relationship with these entities resulted from voluntary conduct on the part of Banque d'escompte. Finally, with regard to the trust, the bank cannot reasonably be considered to have complied with its obligation to identify its beneficial owner(s) in accordance with the provisions applicable to trusts in Articles R. 561-3 and R. 561-7 of the Monetary and Financial Code, since it did not have, at the time of the inspection, a copy of the trust agreement.

With regard to the complaint based on insufficient knowledge of customers in business relationships:

13. It follows from the provisions of Articles L. 561-5-1, L. 561-6 and R. 561-12 of the Monetary and Financial Code that, throughout the duration of the business relationship, credit institutions must exercise constant vigilance and carry out a careful examination of the transactions carried out, ensuring that they are consistent with the knowledge - which they must also update regularly - of their business relationship. During the audit, a representative sample of 74 files was examined, consisting, for private banking clients, of 55 natural persons and 19 legal entities. By upholding the complaint based on the bank's insufficient knowledge of its business relationship clients, on the grounds that 50 of the 74 files examined during the audit did not contain recent, precise and justified information on the assets and income of the persons concerned, the commission, which did not have to exclude from its sample either inactive business relationships or low-value transactions and also noted the absence of relevant information for 6 online brokerage clients and 9 clients who had made at least 10 fund transfers, correctly applied the aforementioned provisions to the facts submitted to it.

With regard to the complaint based on the failure to comply with the obligations of enhanced examination, initial declaration of suspicion and additional declaration of suspicion:

14. The argument based on the fact that the Commission was wrong to uphold the complaint based on the failure to comply with the obligations of enhanced examination, initial declaration of suspicion and additional declaration of suspicion, which merely refers to the bank's submissions during the disciplinary proceedings, is not accompanied by the details enabling its merits to be assessed, in particular in view of the detailed reasons given on these points by the Commission.

On the sanctions imposed:

With regard to the reprimand and the financial penalty of 200,000 euros:

15. Under Article L. 612-39 of the Monetary and Financial Code, in its applicable version, if a credit institution "(...) has infringed a European, legislative or regulatory provision with which the Authority is responsible for ensuring (...), the Sanctions Committee may impose one or more of the following disciplinary sanctions, depending on the seriousness of the breach: / (...) / 2° The reprimand; / (...). The Sanctions Committee may impose, either instead of or in addition to these sanctions, a financial penalty of up to one hundred million euros or 10% of net annual turnover."

16. It is for the Council of State, when hearing an application against a financial penalty imposed by the Sanctions Committee of the Prudential Supervision and Resolution Authority, to verify that its amount was, on the date on which it was imposed, proportionate to the seriousness of the breaches committed and to the conduct and situation, particularly financial, of the person sanctioned.

17. Firstly, it is clear from the contested decision that the Sanctions Committee upheld a total of eleven complaints. These breaches of obligations to combat money laundering and the financing of terrorism are, by their number and nature, of a certain seriousness. The Sanctions Committee rightly took into account in its decision, as mitigating circumstances, the fact that some of the failings found had to be put into perspective in relation to the notification of the grievances, concerning, on the one hand, the organisation of the system for detecting politically exposed figures and, on the other hand, the monitoring of transactions carried out in relation to certain banks, since these latter failings had to be assessed in the light of the context in which the applicant company had been led to take part in them and that corrective actions had subsequently been undertaken by the applicant company. On the other hand, given the purpose of the legislation relating to the fight against money laundering and the financing of terrorism and the nature of the failings alleged, Banque d'escompte cannot usefully claim that it had not benefited from the dysfunctions identified. Furthermore, while the situation of repeat offending constitutes an aggravating circumstance, the absence of a prior conviction is, conversely, not such as to mitigate the seriousness of the breaches found. Finally, the fact that the Sanctions Committee would have imposed lesser sanctions in comparable cases is, in any event, without impact on the merits of the contested decision.

18. Secondly, it follows from the investigation that the amount of the financial penalty imposed of EUR 200,000 represents approximately 15% of the annual net profit of Banque d'escompte for the year 2018, 0.5% of its equity and 1.7% of its net banking income.

19. In view of all of these elements, and in particular the seriousness of the facts alleged, the commission was able, without infringing the principle of proportionality of sanctions, to issue a reprimand and a financial penalty of 200,000 euros against Banque d'escompte.

With regard to the additional penalty of publication:

20. Under the last paragraph of Article L. 612-39 of the Monetary and Financial Code, in its applicable version: "The decision of the Sanctions Commission shall be made public in the publications, newspapers or media it designates, in a format proportionate to the fault committed and the sanction imposed. The costs shall be borne by the persons sanctioned. However, where publication risks seriously disrupting the financial markets or causing disproportionate harm to the parties involved, the Commission's decision may provide that it shall not be published."

21. Firstly, it follows from the very wording of the provisions cited in point 20 that the argument that the additional sanction of publication of the sanction decision in the ACPR register, itself posted online on the website of that authority, is devoid of any legal basis, can only be dismissed.

22. Secondly, by ordering the publication of the sanction in the ACPR register for 5 years in a nominative form, then in an anonymous form, the ACPR did not disregard the provisions of Article 60 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, which requires the publication on the internet for a period of five years of the sanctions imposed by the competent national authorities in this area. Article 60 of the same directive further provides that, where such publication is deemed disproportionate by the national authority, it is required, depending on the circumstances, to delay publication or to anonymise the published version, or even to refrain from publishing it. The argument that these provisions would create an automatic sanction contrary to the principle of individualisation of penalties must therefore be dismissed, without there being any need, in the absence of serious difficulty as to the validity of Article 60 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 in the light of Article 49 of the Charter of Fundamental Rights of the European Union, to refer the matter to the Court of Justice of the European Union.

23. Thirdly, in addition to its punitive scope, the purpose of the decision by which the Sanctions Committee makes public, at the expense of the person concerned, the sanction it imposes, is to bring to the attention of all interested persons both the irregularities that have been committed and the sanctions that these have called for, in order to satisfy the requirements of general interest relating to the protection of the clients of the institutions concerned, the proper functioning of the financial markets and, in the present case,to the effectiveness of the fight against money laundering and the financing of terrorism.

24. On the one hand, Banque d'escompte claims a high reputational risk with its traditional private management clients, which represent the bulk of its business. However, the small size of the institution and the personal relationship established with its clients - the only elements cited by the bank to establish this risk - do not in themselves establish that the publication of the sanction decision in a nominative form would cause it disproportionate harm in light of the public interest attached to such publication, whereas a significant proportion of the breaches sanctioned concern, contrary to what is claimed, its private management activity.

25. On the other hand, Banque d'escompte maintains that the association of its name with a sanction imposed for breaches of obligations to combat money laundering and terrorist financing committed in connection with transactions carried out with a certain country entails a risk of breach of the agreements concluded with the outsourced service providers that it is required to use, due to its small size, to provide banking services to its customers. However, it is clear from the investigation that the difficulties invoked by the applicant company, which are moreover poorly substantiated, result from the very exercise of an activity with that country during the years in question, which constitutes public information, and that its customers, its institutional partners and the public were informed of the cessation of this activity at the end of 2018, which the contested decision expressly notes. The sanction decision also notes that these activities were carried out at the instigation of the public authorities.

26. Furthermore, the ACPR states in its defence that the public version of the decision will not include the names of clients or companies outside the procedure, nor the names of the countries concerned by the transactions in question. While the Bank does not contest, in the event that its request to annul the publication of the sanction is rejected, the anonymisation of these various elements, it emphasises that the draft decision to be published, in the version annexed to the Authority's submissions to the Council of State, also provides for the deletion of two elements of sentences which are nevertheless likely to attenuate, in the eyes of the public, its responsibility in the complaints upheld, since it mentions that transactions "were carried out at the initiative and under the supervision of the public authorities" (recital 20 of the sanction decision) and that business relationships with certain banks were entered into "in conjunction with the public authorities" (recital 30 of the same decision).

27. These publication methods are indeed likely to have an impact on the public's perception of the Sanctions Committee's decision. Consequently, the Council of State must verify that these methods strike a balance between the requirements of general interest cited in point 23 and the interests of the company. In the circumstances of the case, it is appropriate to grant the company's request mentioned in point 26 and to order the reinstatement in the published version of the relevant clauses. In these conditions and subject to this reservation, it does not follow from the investigation that the publication of the sanction decision in a form mentioning the name of the bank would be likely to cause disproportionate harm.

28. It follows from all of the above that Banque d'escompte is not entitled to request the annulment of the decision by which the Sanctions Committee decided to publish the sanction imposed in a nominative form. It is therefore appropriate to reject both the Bank's submissions for an injunction and its submissions seeking the application of the provisions of Article L. 761-1 of the Code of Administrative Justice.

29. It is appropriate, however, to order the Banque d'Escompte to pay the sum of 3,000 euros for the costs incurred by it and not included in the costs.

DECIDES:

Article 1: The application of the Banque d'escompte is dismissed.
Article 2: The publication in the register of the Prudential Supervision and Resolution Authority of the sanction imposed on 11 July 2019 against the Banque d'escompte will be carried out in accordance with the procedures set out in points 26 and 27 of this decision.
Article 3: Banque d'escompte will pay the Prudential Supervision and Resolution Authority the sum of 3,000 euros pursuant to Article L. 761-1 of the Code of Administrative Justice.
Article 4: This decision will be notified to Banque d'escompte and the Prudential Supervision and Resolution Authority.
A copy will be sent to the Minister of the Economy, Finance and Recovery.

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Analysis

Abstracts

Summary

Case law references