Bundesverwaltungsgericht
Tribunal administratif fédéral
Tribunale amministrativo federale
Tribunal administrativ federal

Cour II
B-5586/2013

Federal Administrative Court Decision of October 4, 2016

Composition	Jean-Luc Baechler (Presiding Judge) Stephan Breitenmoser, Francesco Brentani, Judges, Ivan Jabbour, Clerk of Court.
Parties	**A. _______SA,** represented by Maîtres Michèle Wassmer and Michel Barbey, appellant, versus **Federal Financial Market Supervisory Authority FINMA** Laupenstrasse 27, 3003 Berne, a subordinate authority.
Subject of the Appeal	Violation of anti-money laundering law due diligence obligations

The Facts:

A.

A._______SA (hereinafter: A ________ or the appellant) is a company based in Geneva whose object according to the entry in the companies' register is the operation of a commercial and management bank. Its previous company names were successively B _______, C.________, D________, and finally E._______ which in 2003 merged with F._______ to form G._______.

B.

At the beginning of 2009, the US Federal Agency, the Securities and Exchange Commission (SEC), filed suit against Robert Allen Stanford and the companies of the Stanford Financial Group he managed accusing them of organizing a fraud based on a Ponzi scheme. Robert Allen Stanford and several of the companies in his group held accounts with A.______. On 19 February 2009, the latter informed the Federal Financial Market Supervisory Authority FINMA that it had frozen all the accounts concerned and informed the Money Laundering Reporting Office.

C.

Following clarifications obtained in 2012, in a letter dated March 18, 2013, FINMA notified the appellant that it had begun coercive measure proceedings against it for suspected violation of the due diligence obligations imposed by anti-money laundering legislation. Having received the requested documents and explanations from the appellant, on May 22, 2013 FINMA sent it a draft provisional statement of facts in respect of which it took a position in a letter dated June 17, 2013, stating in particular that the amount of time that had elapsed since the banking relationships concerned were established would need to be taken into account in the appraisal of the anti-money laundering checks carried out, which would reveal the steps taken in that regard and explain the reasons that led the appellant to classify Robert Allen Stanford and the companies of his group as low risk. At the appellant's request, a meeting was held on August 20, 2013, in the FINMA office building.

D.

In a decision of August 30, 2013, FINMA found that A. ______ had committed a serious violation of the law governing market supervision of matters related to money-laundering (para 1 of the findings), ruling that the auditor must conduct an additional audit to verify that corrective measures had been taken by the appellant

(para 2 of the findings), ordering the appellant to pay costs of 65,000 francs (para 3 of the findings) and revoking the right to stay proceedings pending any appeal that may be lodged against para. 2 of the findings (para. 4 of the findings).

FINMA noted that A. ________, at that time B. _________, had first entered into contact with Robert Allen Stanford in 1986; since then, and until 2008, he and the companies of the Stanford Financial Group had opened 14 accounts with the appellant, of which 9 had remained active until they were frozen or closed after April 1, 1998, the date the anti-money laundering law came into force. FINMA pointed out that the bank's file for account n° 1._______ - opened by Guardian International Bank Ltd - later Stanford International Bank Ltd (hereinafter: SIBL) based in Antigua-and-Barbuda – was opened by SIBL on September 17, 2002, and its management entrusted to the company H._______SA. Account n° 3. _____ - opened on August 29, 2005 and closed on December 2, 2005- as well as n° 4 _______ - opened on June 30, 1990 and closed on December 20, 1998- contained a *Certificate of Incorporation and of Good Standing,* and also a document attesting to the existence of the company, as well as copy of its internal anti-money laundering regulations and SIBL's annual reports for the years 2002 - 2007; however, there was no client profile nor had any of the information been updated or new information added in respect of those accounts. According to FINMA, a report dated September 5, 2000, submitted by I.________at the request of A.________ stated that SIBL had a dubious reputation and had been used by drug cartels to launder money from criminal sources but had never been the subject of any official action; the report also mentioned that no criminal complaint had been ever been made against Robert Allen Stanford or the companies he controlled. The appellant nonetheless appeared not to have taken any additional steps in reaction to that report; furthermore, a search of the World-Check database carried out on October 13, 2004 in connection with the opening of a personal account by Robert Allen Stanford revealed him to be a politically exposed person (PEP). The computer software programs installed by the appellant for control purposes - called J. ______ and K. _________ - had apparently generated thirty-nine alerts for that account since 2004, under the various check headings, concerning transactions the bank classified as "intergroup transfers" in its internal documents without attaching any document to corroborate that classification.

FINMA then explained that the manager responsible for account n° 5 _______ opened on April 7, 1987 by Stanford Financial Group Inc.

(hereinafter: SFG), based in Antigua-and-Barbuda, had cursorily filled in an incomplete client profile form in 2003, attaching a brief note concerning the bank's business relationship with the companies belonging to Robert Stanford; the file also contained the company's articles of incorporation, the *Certificate of Incorporation and of Good Standing,* its annual report for 2003 and also documents relating to a credit facility granted by the appellant to Robert Allen Stanford. FINMA pointed out that the file contained no documents showing that the bank's compliance cell had checked any of the information, that any of it had been updated with the passage of time and that the business relationship had not been classified in the high-risk category. FINMA added that, since 2004, the J._______ and K. ________software programs had generated thirty-four alerts of which one concerned a transaction on April 1, 2004 relating to a sum amounting to 24,999,990 USD, which had not been clarified. For the other alerts, the transactions had apparently been cursorily justified without, save for one exception, any kind of corroborating evidence being attached to the internal notes. Furthermore, the bank appeared not to have queried the reasons why certain payments were made by the client to the firm that audited the accounts of Robert Allen Stanford's companies or asked for copies of the agreements that bound them.

With regard to account nº 6._______ opened by the Bank of Antigua Ltd. (hereinafter: BOA) on July 30,1993, FINMA also found that the manager had filled in the client profile form in a very lax manner in 2003, that the file contained no document showing that the compliance cell had carried out any kind of check, and that the information it did contain had not been updated. The IT department had apparently generated five alerts since 2004 for which no document had been filed that was capable of confirming the information contained in the internal notes.

FINMA noted that, from September 23, 1996 until November 19, 1999, Robert Allen Stanford was the holder of account nº 7._______ for which no client profile form existed. During a visit to the bank on October 11, 2004, this client opened account nº 8.________ whose client profile form was not fully completed by the account manager and was not subsequently signed by the people named on the form used. According to FINMA, it was stated under the heading covering the origin of funds that the appellant had known Robert Allen Stanford since 1986, that he had opened the account with a view to granting a loan and that the source of the funds was a "substantial fortune"; in the section entitled "high-risk client", it was stated that the client was not a PEP. The client had apparently provided the appellant with copies of letters of recommendation in his favor, one of which was from the company

L.________ stating that it had analyzed the companies of the Stanford Group and was confident that they complied with the banking regulations as well as those governing the measures to be taken to combat money laundering. The appellant subsequently granted Robert Allen Stanford a credit facility amounting to 95,000,000 USD with a view to acquiring a Venezuelan bank, Banco Galicia, and also to making subsequent investments. The credit was increased by 10,000,000 USD in 2007 and then repaid on December 16, 2008 with a transfer from account nº 5. ________. FINMA noted that the appellant had failed to ask the client for a copy of the purchase agreement with the Venezuelan bank or any additional documents when the credit facility was increased; according to FINMA, the purpose stated in the credit agreement actually contradicted that stated in the letter of recommendation supplied by the company L.________ and in the one supplied by three members of the US congress which stated that it was to enable Stanford Bank Holdings to obtain an international banking license. FINMA noted that Robert Allen Stanford had not been classified as a PEP even though the results of a World-Check search carried out on October 13, 2004 and attached to the client profile classified him as such, adding that the file contained no note explaining that choice and that it had not been reviewed with the passage of time. FINMA finally pointed out that the J.________ and K.________ software programs had generated twelve alerts for that account since 2004.

With regard to account nº 9.________ opened by Stanford Bank (Panama) SA (hereinafter: SBP) on April 4, 2008, FINMA stated that the account manager had filled in the client profile form recording only that the beneficial owner, Robert Allen Stanford, was well-known to A.________ and that the funds originated “certainly from Stanford Bank (Panama) SA”; the question as to whether the client had been shown to be a PEP had been cursorily answered in the negative. According to FINMA, the file contained no evidence to show that the compliance cell had checked any of the information; it did however contain the client’s consolidated accounts for 2006 and 2007, but nothing had been updated subsequently. A search of the Lexis-Nexis database produced no information of any importance, as did the World-Check searches carried out using exactly the same search terms, i.e. “stanford bank (panama) sa” and “stanford international holdings (panama) sa”. The account was frozen on February 19,2009 and closed on February 12, 2010. Two alerts had been generated by the K________ program, one of which was described in an internal note as an “intergroup transfer of liquidities for investment”, without any documentation being produced in connection with that transaction.

FINMA concentrated its analysis on the observance by A.________of its obligations in money-laundering matters, as applicable in the period between 2003, the year the requirement to classify business relationships came into force, and the date the accounts were frozen in 2009. It considers that the appellant failed to comply with its due diligence obligations because of its failure to identify its relationships with SIBL, BOA and SBP as high-risk and by providing them with services as a correspondent bank. Furthermore, despite the appellant being aware of the report by I. _________, making known its suspicions about SIBL, the appellant took no additional steps, even though it could not have been content simply to consider the accusations as merely relating to the past. FINMA points out that the appellant ought to have classified Robert Allen Stanford – and consequently the companies he controlled – as a PEP due to his ties with the then prime minister of Antigua-and-Barbuda, at whose request he had made recommendations concerning new money-laundering legislation in that country. Instead of doing so, the appellant simply disregarded that classification, despite the fact that the World-Check search had identified him as a PEP and had subsequently failed to conduct an annual review of the relationship. The additional clarification obtained, as required in high-risk cases in order in particular to verify information provided by clients and to understand the background to business relationships, just as the documents obtained within that context, were deemed to be insufficient by FINMA. The file notably contained two incomplete organizational charts showing the companies in the group. FINMA also considered that, as was the case for the relationships, the appellant failed to identify and adequately clarify the transactions presenting a high-risk. It also failed to react appropriately to the alerts generated by the computer programs by asking the clients in particular to produce documents able to show the reasons for the transactions and contented itself with justifying them with cursory internal notes. According to the appellant's internal money-laundering directive, in its July 10, 2008 version, it was required to appoint an outside agency to conduct an inquiry whenever the total amount of assets held in any account or involved in a transaction exceeded the sum of 1,000,000 francs; however, it did nothing of the kind.

FINMA found that these failings revealed shortcomings in the organization of the appellant, which took excessive risks by accepting business relationships of a commercial nature with Robert Stanford and the companies of his group – even when as a *private bank* it lacked the necessary competence to manage them. This deficient anti-money laundering organization, at the time of the events in question,

prevented its compliance with the regulations governing banking activity. FINMA also pointed out that A._________ had taken steps to improve its anti-money laundering measures, which should nonetheless be verified by appointing an auditor to check that the standards governing those measures are being met. In addition, the nature and repetitive character of the observed substantive and procedural violations justified the decision that the appellant was in serious breach of the law governing market supervision.

E.

In a motion dated October 3, 2013, A. _________ appealed to the Federal Administrative Court against this decision, claiming mainly, in addition to costs and expenses, that it should be overturned. As a preliminary issue, the appellant argues that the right to stay proceedings pending any appeal should be enforced, with the exception of para. 2 of the decision's ruling, and also that FINMA should be prohibited from informing third parties of the existence of the procedure until the final outcome of the case is known. In support of its appeal, A. __________ disputes having committed a serious breach of the law governing market supervision, citing incomplete and erroneous presentation of the facts by FINMA as well as violation of the right to be heard.

The appellant states that, like numerous other banks, it was duped by a financial group that appeared to be first-rate. It cites the fact that it had immediately frozen the Stanford Group's accounts, following the criminal complaint filed by SEC on February 17, 2009, particularly against Robert Allen Stanford, and had spontaneously alerted the Money-Laundering Communication Office (MROS) and FINMA. The appellant considers that the latter ought to have taken into account the context at the time and the circumstances surrounding all the business relationships binding it to the members of the group, instead of focusing *a posteriori* on individual transactions and accounts.

The appellant further states that its banking relationships with SIBL, BOA, SFG and SBP were in connection with wealth management, such that it could not be considered as acting as a correspondent bank. Furthermore, this conclusion by FINMA, besides contradicting the evidence in the case file, did not appear in the draft statement of its position regarding the violation of the right to be heard. The appellant explains that it failed to take steps following the report by I._______ because no criminal charge had been brought against Robert Allen Stanford or any company he controlled, that the case linking SIBL to a drug cartel had been resolved

and that the state of Antigua-and-Barbuda had made progress in anti-money laundering matters, thereby meriting it no longer being classified as an uncooperative country. The US Treasury's FINCEN directive of April 1999, calling on financial institutions to show evidence of their particular vigilance in the presence of transactions linked to Antigua-and-Barbuda, was withdrawn in August 2001 on the ground that that state had introduced major reforms to its anti-money laundering legislation, a fact that FINMA failed to point out. In the World-Check database, consulted in October 2004, Robert Allen Stanford was certainly shown as a PEP due to his ties with a former prime minister of Antigua-and-Barbuda, Lester Bird, who had asked him to identify suitable measures to strengthen the country's fight against money-laundering. The appellant alleges that Robert Allen Stanford could not however have been classified as a PEP based on the regulations applicable at the time of the relevant facts: on the one hand, he was not a close associate of Lester Bird, given that he had no business dealings with him, and on the other, the latter had no longer been occupying a public office since March 2004.

The appellant refers to its successive directives and re-organization in the light of changing anti-money laundering legislation and argues that it failed to classify the business relationship with SFG, BOA and SBP as presenting a high risk because it was acting in compliance with its internal directive at the time, D(….)1, which had been validated by external auditors. The risk level of a relationship was in particular determined by a calculation method that took into account three criteria; namely nationality or place of residence, activity sector and the total amount of the client's personal assets. If the calculated value exceeded 2.25 on a scale of 4, the relationship was classified as presenting a high risk. However, according to these criteria and based on the information the appellant had to hand at the time, the calculation for the various relationships with Robert Allen Stanford and also the companies of his group produced a value of 1.68 which corresponded to a low risk. Also, the appellant considers that the relationships with SIBL, BOA and SFG were not subject to the LBA (MLA) because they were foreign financial intermediaries subject -in Antigua-and-Barbuda like Panama – to oversight equivalent to that applicable in Switzerland. If, however, those relationships were to be considered subject to the LBA, the degree of due diligence with regard to his companies should at least be reduced bearing in mind their own obligations in relation to money-laundering matters.

The appellant states that it was well aware of the origin of the fortune and activities of Robert Allen Stanford, from information obtained in particular from the media and confirmed by numerous recommendations in his favor. It adds that no one doubted the nature of the financier's dealings, claiming that FINMA is accusing it, arguing arbitrarily *a posteriori,* of having failed to verify what was unverifiable and undisputed at the time. The appellant believes it adequately monitored the disputed relationships and met its obligation, in accordance with its directives, to establish a check sheet for companies of the Stanford Group, given that it had a *compliance package* for BOA and SIBL, as well as an organizational chart showing the links between stockholders, and that the majority of transactions did not require such a sheet or additional clarification because they consisted of inter-account transfers by the same client which, in a few cases, were between companies belonging to the group. The appellant states that it created an economic background sheet (EBS) for every transaction identified by the alert system software it had installed. In connection with the accusation that it had allegedly obtained insufficient clarification and documentation concerning the credit granted to Robert Allen Stanford, the appellant explains that it met the client and drafted a lengthy handwritten note concerning the use of funds, and received or consulted various documents, among which 12 letters of recommendation in his favor, as well as his tax statements. In this regard, it disputes the existence of any contradiction between the purpose of the credit and that mentioned in certain of the letters of recommendation. One of the purposes of the credit, namely the purchase of a bank in Venezuela, had moreover subsequently been realized. The appellant adds that, with regard to the Lombard credit, the rules did not require it to check the use of funds, unlike those applicable to commercial credit. Consequently, it considers that it cannot be accused of violating its obligation to obtain documentation.

The appellant disputes the existence of an organizational deficiency as the reason for the violations noted, declaring that it had established the necessary mechanisms – e.g. a *compliance cell,* and also issued directives and taken other steps, and again pointing out that the business relationships concerned wealth management in the case of SIBL, BOA, SFG and SBP, as well as the granting of Lombard credit to Robert Allen Stanford, and hence were related to its normal activity. FINMA was therefore wrong to take the view that the appellant was incapable of managing and supervising those relationships.

The appellant claims that FINMA exceeded its discretionary powers and disregarded the principle of proportionality in deciding that the violations were serious, and also questions the constitutionality of the *coercive measures* procedure whose consequence was a condemnation of a criminal nature in violation of a defendant's rights, such as the right not to incriminate oneself and the right to be informed in advance of the nature of an accusation.

F.

In interim decisions given on October 7 and 30, 2013, the Federal Administrative Court ruled that the appeal has the legal effect of staying proceedings, with the exception of para. 2 of the disputed decision in respect of which FINMA ruled that the suspensive effect does not apply, and that the appellant's motion seeking to prevent FINMA from making public the existence of the procedure is irrelevant to the matter in dispute.

G.

In its reply of November 19, 2013, FINMA states that the appellant had only carried out a special search with regard to Robert Allen Stanford on October 13, 2004, whereas it had had the obligation to do so since July 1, 2003 and was aware, thanks to the report from I. _________, that he was a close associate of Lester Bird, prime minister of Antigua-and-Barbuda until March 2004. The appellant appears to have subsequently ignored this client's classification as a PEP, despite the results of the World-Check search obtained on October 13, 2004, thereby being in breach of its obligation to identify relationships presenting an increased risk. FINMA points out that, within the context of its business relationships with foreign banks, the appellant executed intra-group transactions that gave rise to alerts and must be classified as correspondent bank transactions, which as a wealth manager it was incapable of managing and presented a high risk. It stresses that, contrary to what the appellant alleges, the LBA does indeed apply to banks and hence to the appellant. With regard to the plea on the ground of violation of the right to be heard, FINMA adds that it had had a meeting with the appellant's representatives on August 20, 2013; the latter's classification as a correspondent bank was based on a legal assessment and not on the draft statements of facts it had been sent.

H.
In its observations of December 9, 2013, the appellant states that FINMA had never contested its arguments to the effect that it had not failed in its duty to identify the provenance of the Robert Allen Fortune, to conduct a regular examination of the accounts, or to comply with its documentary obligations and internal directives; it accuses FINMA of having conducted an arbitrary evaluation of the facts. It maintains that, at the time in question, the notion of a PEP did not apply to close associates of a minister in retirement. It denies having acted as a correspondent bank and persists with its claim that its right to be heard has been violated. Subsidiarily, it states that even if it were found to have been negligent in monitoring the relationships concerned, its shortcomings could hardly be classed as sufficiently serious to warrant a decision to find it blameworthy and issue a formal warning .

The arguments presented by both sides during these proceedings will be re-examined later insofar as may prove to be necessary.

The Law:

1.
The Federal Administrative Court is required to examine *ex officio* and without constraint the admissibility of appeals submitted to it (cf. ATAF 2007/6 ground 1).

1.1 According to Art. 31 and 33 .e LTAF, together with Art. 54 para 1 LFINMA (RS956), the Federal Administrative Court is competent to judge appeals against FINMA decisions. The disputed decision constitutes a judgment as defined by Art. 5 PA. This court may therefore hear this case.

1.2 The appellant, who was a party to the proceedings before the lower authority, is adversely affected in particular by paragraph 2 of the decision given and therefore has an interest worthy of protection that it should be set aside or amended. Its right of appeal must consequently be recognized (Art. 48 para 1.a to c PA).

1.3 The legal requirements governing the time-limit for submission of an appeal, its form and content, as well as the advance payment of costs (Art. 50 para 1, 52 para 1 and 63 para 4 PA) have furthermore been respected.

The appeal is therefore admissible.

2.

It should first be pointed out that, at the time of the events in question, and since the disputed decision was given, certain applicable regulations have been revoked or amended; in particular, the former executive directive of December 18, 2002, that entered into force on July 1, 2003 and was issued by the Federal Banking Commission in regard to the fight against money laundering (RS 955.022, RO 2003 554, OBA-CFB), introduced a definition of the notion of a PEP (Art 1. Para 1.a OBA-CFB)by stating that business relationships with PEPs must in every case be considered as bearing an increased risk (Art. 7 para 3 OBA-CFB). Even before that, financial intermediaries were required to take particular care if they wished to enter into a business relationship involving the acceptance and safeguard of assets belonging to persons exercising important public offices in a foreign state, or people and companies who, in a recognizable way, were their close associates (cf. Federal Banking Commission circular: Directives relating to the prevention of money-laundering and the fight against it, dated March 26, 1998, cm 9). Under its Art. 6 para 1, the provisions of the executive directive were also to apply to relationships with correspondent banks, meaning that such relationships could also be classified as bearing increased risks (cf. Report of the Federal Banking Commission, dated March 2003, p. 35 [hereinafter: CFB Report 2002] concerning its executive directive on money-laundering dated December 18, 2002). In an amendment dated December 20, 2007, effective from July 1, 2008 (RO 2008 2017), Art. 7 para 3 OBA-CFB was complemented to the extent that business relationships with foreign financial intermediaries, in which Swiss financial intermediaries conducted transactions as a correspondent bank, would also have to be considered in every case as bearing increased risks. As a temporary provision, financial intermediaries were given until January 1, 2009 to comply with that article (Art. 32a OBA-CFB).With effect from the same date (RO 2008 5616 and 5619), the OBA-CFB became the executive directive governing the Federal Authority for the Supervision of Financial Markets, the Prevention of Money-Laundering and the Financing of Terrorism, as well as banks and dealers in financial securities and collective investments (OBA-FINMA 1), with no other major changes. In turn, it too was revoked in 2010.

According to the general principles, in cases where the legal rules change, we apply those in force at the time of the statement of facts

which must be considered by the courts or has legal consequences (cf. FC decision 137 V 105 ground 5.3.1). The examination of the appellant's respect for its obligations in matters related to the fight against money laundering will therefore be conducted in the light of the legislation and its related directives at the time of the relevant facts and having regard for their development. In the arguments that follow, and unless stated otherwise, reference will be made to the OBA-CFB and its version in force between July 1, 2003 and June 30, 2008.

3.
The appellant accuses FINMA of having failed to address the issue of the correspondent banking relationship, prior to reaching its decision, and takes the view that it was denied the opportunity to respond in connection with that issue, in violation of its right to be heard.

3.1 Guaranteed by Art. 29 para 2 Cst and Art.29 et seq PA, the right to be heard includes in particular the right of litigants to make a statement regarding pertinent facts before a decision is taken with regard to its legal status, producing appropriate evidence, participating in the process of adducing key items of evidence or at least expressing themselves on its outcome when it is such as to influence the decision to be given (cf. FC decision 137 IV 33 ground 9.3 and the cited references). On the other hand, it is incumbent upon the authority to consider all important allegations made by a party at the appropriate time before reaching the decision (Art. 32 para. 1 PA) and to admit the evidence presented by that party if it seems likely to elucidate the facts (Art. 33 para. 1 PA). The right to be heard relates in principle solely to the facts and not their judicial assessment or, more generally, the legal argument to be upheld. However, this right must be recognized and respected whenever judges are thinking of basing their decision on a legal norm or ground not mentioned in the previous procedure, upon which neither of the parties concerned has relied and upon whose *in casu* relevance it has reckoned (cf. FC decision 129 II 497 ground 2.2 and cited references, FC decision 115 Ia 94 ground 1b).

3.2 In this case, when FINMA, in its draft statement of facts sent to the appellant on May 22, 2013, mentioned the relationships existing between the latter and the Stanford Group of banks, it did not in fact classify them as correspondent bank transactions. However, it was not in principle required to do so, given that it was a legal assessment of the facts in question concerning which the appellant was able to respond. In fact, the draft contained the key information relating to the accounts and described the transactions upon which FINMA based its analysis in the

decision after taking into account the comments the appellant had sent in its letter of June 17, 2013. As for the notion of correspondent bank, it was covered by Art. 6 and 7 of OBA-CFB at the time of the events in question and subsequently by the same articles of OBA-FINMA 1 at the time written submissions were exchanged; it therefore constituted neither an unusual classification nor one that might not have been anticipated by the appellant.

3.3 FINMA was consequently entitled not to invite the appellant to comment on that issue without violating its right to be heard. Therefore, this ground of appeal must be dismissed.

4.

FINMA accuses the appellant of failing to classify its relationships with Robert Allen Stanford and his companies as presenting an increased risk; according to the authority, the former should have been classified as a PEP while the latter benefited from correspondent banking services. Consequently, the appellant failed to respect the due diligence obligations imposed by law in matters concerning the fight against money-laundering.

4.1 The LBA seeks to regulate the fight against money-laundering, increased vigilance in matters related to financial transactions, and also - since February 1,2009 (RO 2009 361, 362, 367) – to the financing of terrorism (Art. 1 LBA). It imposes on the financial intermediaries defined in Art. 2 LBA a certain number of duties including in particular due diligence obligations (Art. 3 to 8 LBA) which must always be respected both at the time a business relationship is established and subsequently. Financial intermediaries must in particular identify their co-contractors and the beneficial owners of securities they manage (Art. 3 and 4 LBA). They must also examine their clients' transactions and identify any that may be suspect (cf. Federal Council message of June 17, 1996 concerning the federal law governing the fight against money-laundering in the financial sector, FF 1996 III 1057, 1083; hereinafter: LBA message); to that end, they are required to set the criteria that will enable them to detect business relationships and transactions presenting increased legal risks as well as risks to their reputation (Art, 7 and 8 OBA-CFB). They are required to obtain certain clarifications whose extent depends on the risk co-contractors represent (Art. Para. 1 LBA). They must in particular clarify the background and purpose of a transaction or business relationship whenever there are indications leading them to suspect that personal wealth may be derived from the proceeds of crime or that a criminal

organization has power of disposal over them (Art. 6.b LBA in its version in force until January 31, 2009, reproduced without major amendment in Art. 6 para. 2b LBA). In the presence of high-risk relationships and transactions, additional clarification must be sought (Art. 17 et seq OBA-CFB). Intermediaries are also subject to a duty to document their actions: they must raise documents for all transactions carried out and also all clarification requested pursuant to the LBA, such that third party experts can obtain an objective idea of their transactions and business relationships as well as respect for the provisions of the law (Art. 7 LBA and 23 OBA-CFB). Finally, they must comply with the regulations governing their conduct whenever money-laundering is suspected(Art. 9 et seq LBA and 24 et seq OBA-CFB). All financial intermediaries are required to take the necessary measures to prevent money laundering and the financing of terrorism. They must in particular ensure that their staff receive adequate training and that checks are carried out (Art. 8 LBA). The nature and extent of these measures varies depending on the situation of each financial intermediary; all must in fact have an organization corresponding to their activity (cf. LBA message, FF 1996 III 1057, 1085). They are required to issue internal directives governing matters related to the fight against money-laundering and covering in particular the criteria for identifying high risks, the company’s internal organization and levels of competence, and also its policy with regard to PEPs (Art. 10 OBA-CFB). An efficient system for monitoring transactions must be in place as well as an internal department for handling anti-money laundering matters (Art. 11 et seq OBA-CFB). It should be pointed out at this stage that, contrary to what the appellant alleges, the LBA does indeed apply to it: the exception provided for under Art.2 para.4.d LBA, on which it relies, applies to financial intermediaries covered by para. 3 of that article whereas, as a bank, it is one of those covered by para.2.

The freedom given to financial intermediaries in terms of the choice of criteria they use to determine whether a relationship or transaction presents an increased risk is justified because the increased nature of the risk also depends on the information and resources they have at their disposal depending on their activity (cf. FC decision 6b_729/2010 of December 8, 2011 ground 3.5.6 not published in ATF 138 IV 1). These measures guarantee respect for and the implementation of the legislation governing the fight against money laundering. It follows therefore that a financial intermediary’s contravention of its own rules and directives on the matter constitutes in principle a violation of its due-diligence obligations as defined by the LBA.

The appellant's Directive D (…)1 – Anti-Money Laundering Regulations dated January 1, 2003, entered into force on July 1, 2003 and defined the various levels of responsibility in matters related to the fight against money laundering (Ch. 13): these stated that account managers were initially responsible for ensuring that standards of ethics and integrity were met; the compliance control cell, whose tasks were later taken over by the compliance department, was in particular expected to verify that account managers were carrying out the necessary checks and also check that the information they recorded was correct. The central filing registry was responsible among other things for holding all contract documentation, checking the integrity of databases relating to the clientele and amending any information that needed to be corrected; finally, the Client Examination and Acceptance Committee (CEAC) was responsible for the final approval and endorsement of all new client accounts opened by internal or external managers (cf. Directive M(…)5 of September 28, 2000, Ch. 3).

4.2 With regard to Robert Allen Stanford's classification as a PEP, the appellant argues that, according to the regulations applicable at the time of the events in question, it was not necessary to classify him as such.

4.2.1 According to Art. 1 para 1.a OBA-CFB, in the version current on July 1, 2003, politically exposed persons were understood to be the following occupants of important public offices abroad: heads of state or government, high-ranking politicians at national level, senior public servants in the administration, justice department, armed forces and political parties at national level , as well as senior executives of governing bodies controlling state enterprises of national importance (Ch. 1); also included were persons closely associated with the aforementioned people for reasons of family, personal or business ties (Ch. 2). When the people controlling a company (governing bodies, stockholders with controlling interests or beneficial owners) were qualified as PEPs, the company concerned also had to be classified as such since it was liable to be used for money-laundering purposes (cf. in this sense WYSS/ZOLLINGER, in Kommentar Geldwäschereigesetz (Comments on the Money-Laundering Law), 2nd ed, 2009, nº 5a ad art. 1 GwV-FINMA 1; the same opinion has been expressed in connection with OBA-CFB, cf. RALPH WYS, Kommentar Geldwäschereigesetz, 2003, nº 5 ad art. 1 GwV-EBK). As has been stated above, business relationships with politically exposed persons were to be considered in every case as bearing increased risks (Art. 7 para 3 OBA-CFB) and consequently imposing due diligence obligations, especially the requirement to obtain additional clarification; there were in particular grounds, in a measured way proportionate to the circumstances, for

establishing the origin of personal assets deposited, as well as the reasons for their withdrawal and the plausibility of sizeable deposits (Art.17 OBA-CFB). Pursuant to the transitional provision of Art. 32 para. 2 OBA-CFB, financial intermediaries were required to identify high-risk business relationships and classify them as such for internal usage by June 30, 2004 at the latest. This provision stated that, in principle, they could base their decision on current data and were not expected to conduct a retrospective analysis of transactions.

In its directive D (…)1, the appellant defines PEPs as "people who exercise -or have exercised – important public offices abroad, namely heads of state, high-ranking politicians, senior public servants (…) political organizations (…) and all those who in one way or another are closely associated with them, whether they appear in their own name or under cover of a company name (cf. Directive D(…)1, Ch. 3b). Following the revision of this directive on November 11, 2004, the phrase "or have exercised" was deleted. The appellant states that collaborating partners must scrupulously observe – among other provisions – the "Wolfsberg Principles" (cf. Directive (…)1, Ch 2); according to the anti-money laundering principles of the Wolfsberg Group, of whose parent company the appellant formed part, PEPs must be subject to more rigorous checks and are defined as "individuals who exercise or have exercised public functions, for example senior members of the government (…) or leading figures of political parties, etc., as well as their families and close associates"(cf. World anti-money laundering directives for private banking services, Revision 1, May 2002, Ch.2.2, accessible via http://www.wolfsberg-principles.com/pdf/french/privae-french.pdf).

In this case, it is not disputed that Lester Bird occupied the post of prime minister of Antigua-and-Barbuda until March 2004. Hence, he was still in that post for some ten months after the entry into force of OBA-CFB and the adoption of the definition of PEPs whose conditions he clearly met. The appellant states several times that Robert Allen Stanford had no business relationship with him – only a personal one – in order to explain the reason why it did not consider him to be a close associate of a PEP in the sense of Ch. 2 of Art. 1 para 1.a OBA-CFB. However, it is clear from the text of that article that whether the relationship is of a personal or professional nature is irrelevant; the only determining factor is the degree of closeness between the persons concerned. In its own Directive D(…)1, the appellant similarly classifies PEPs as people who "in one way

or another are close associates. In both report I.________(p. 9) and the World-Check sheet, it is specifically stated that Robert Allen Stanford was a “close associate” of Lester Bird. This description corresponds to the terminology used in the Wolfsberg Group Directives, namely people closely associated (in the English test *close associates*) with individuals who exercise or have exercised public offices. Consequently, contrary to the appellant’s assertion, Robert Allen Stanford can in principle be classified as a PEP. However, bearing in mind the transitional provision of Art. 32 para 2 OBA-CGB, granting financial intermediaries time to identify high-risk relationships, it cannot necessarily be concluded, as does FINMA, that the appellant violated its due diligence obligations between July 1, 2003, the effective date of OBA-CFB and Directive D(…)1, and the date Lester Bird left the office of prime minister in March 2004. However, it did fail to comply with its obligations after June 2004, because of his subsequent activity. In fact, having lost the elections in 2004, he remained at the head of his party, Antigua and Barbuda Labour Party, one of the country’s main parties and the one most often in government(cf.http://thecommenwealth.org/our-member-countries/antigua-and-barbuda/constitution-politics, https://en.wikipedia.org/wiki/Antigua_Labour_Party). He should therefore have been classified as a PEP, even after March 2004, given that the OBA-CFB definition of a PEP and also that of Directive D(…)1, as well as the Wolfsberg Principles, was also extended to senior figures of political parties at national level, which the appellant’s account manager or other competent departments ought to have been able to discover had they carried out a serious search and updated their information about the client. Moreover, they already had sufficient information to cause them to suspect the existence of corrupt acts, given that the World Check sheet concerning Robert Allen Stanford includes the sentence “Reportedly close associate of Former Antiguan Prime Minister Lester Bird – his financial and business dealings with the Antiguan Government under Bird, including major loans, generated reports of influence peddling and campaign contributions” and further on “1999 -criticised by US State Department and Treasury officials for using his financial and political clout in Antigua to gain control of the government office that regulated his and other banks”. According to Art. 4 OBA-CFB, it is prohibited for financial intermediaries to accept personal assets they know or must assume to be the proceeds of crime, especially corruption, misappropriation of public funds, abuse of authority or dishonest management of public interests. In those circumstances, the appellant ought at least to have taken note of the indicators leading it to suspect

that the personal assets were the proceeds of crime and consequently should have clarified the background and purpose of the business relationship (Art. 6 LBA cf. infra ground 6). However, nowhere does it mention the existence of those risks and it subsequently failed to take any specific steps. Instead, it contented itself with noting that Robert Allen Stanford had not been the subject of criminal proceedings; however, it is clear, both from the spirit of the law as well as the wording of Articles 6 LBA and 4 OBA-FINMA, that the simple presence of indicators that crime may possibly be the source of personal assets is sufficient for a duty of clarification to exist.

4.2.3 It follows from the foregoing that the appellant failed to classify Robert Allen Stanford – and also the companies he controlled – as PEPs due to the incorrect application of the law and its relevant directives. It also disregarded information that should have led it to suspect a criminal source of the funds it accepted. This business relationship was not seriously analyzed, either by the account manager in the first instance, or by the compliance departments who should have been monitoring procedures so as to ensure respect for due diligence obligations in this case. It is hardly surprising, therefore, that in such circumstances, the risk factor calculated by the software the appellant had installed produced a result that failed to indicate an increased risk; had Robert Allen Stanford been given the level 4 classification required for PEPs, the resultant risk factor would have been considerably higher.

4.3 The appellant also disputes the existence of a correspondent banking relationship with its clients, judging FINMA's conclusion to be arbitrary in this regard.

4.3.1 According to Art.6 para 1 OBA-CFB, the provisions of that executive directive also applied to relationships with correspondent banks. Following the December 20,2007 amendment that entered into force on July 1, 2008, Art. 7 para 3 OBA-FINMA stated that, besides business relationships with politically exposed persons, those with foreign financial intermediaries for whom Swiss financial intermediaries perform correspondent banking transactions were also to be considered in all cases to bear increased risks. By way of a transitional measure applicable to this new version, Art.32a OBA-CFB gave financial intermediaries until January 1, 2009 to comply with this new requirement. According to FINMA, the correspondent banking relationship was being used to execute payment transactions, manage liquidities and also loans and short-term investments; on the other hand, a relationship used to

manage personal assets belonging to the bank's clients but held with another bank did not constitute a correspondent banking relationship (cf. FAQ CFB https://www.finma.ch/FinmaArchiv/ebk/f/faq9.html referring to the 2002 Wolfsberg Anti-Money Laundering Principles for correspondent banks). The appellant did include the correspondent bank among the high-risk categories in the July 10, 2008 version of its Directive D(…) 4 – Regulations governing Anti-Money Laundering/Fight against the Financing of Terrorism (Ch. 3a and 3j) which entered into force on the same date.

4.3.2 Referring to FINMA's own definition of a correspondent bank, the appellant argues that the services it provided were solely those of a wealth manager rather than a correspondent bank. It appears however that not only were the accounts used to manage the personal assets of the Stanford group's clientele that were deposited with the appellant, bearing in mind the frequent payments between the various accounts belonging to the companies of the group that were identified as "inter-group transfers" – but should more accurately have been classified by the appellant as intra-group or intra-company transfers – they were also used for bank liquidity management purposes; funds were also invested in short-call financial securities, especially on the money market in the form of 48-hour call fiduciary investments, hence it cannot be concluded that the appellant's mandate was solely as a wealth manager to the exclusion of all other types of activity such as short-term investment. Consequently, the appellant was acting on behalf of its client members of the Stanford Group – at least in part -as a correspondent bank. FINMA's argument therefore appears to be well-founded and in no way arbitrary or derived from an incorrect interpretation of the facts. In any case, the appellant ought to have identified those relationships as presenting an increased risk by no later than January 1, 2009. But even before that, after the adoption of the OBA-CFB the due diligence obligations later specified in the LBA already applied to correspondent banking relationships; this meant that relationships or transactions conducted in that way might bear increased risks. The appellant therefore ought to have exercised adequate supervision of those accounts in order to comply with the LBA requirements; but, it is not clear from the case file – nor does the appellant so claim – that the account manager or the compliance cells did anything specific to that end. As for the supervision of the transactions on those accounts – and notwithstanding the existence of the installed software - that was weakened by the failure to follow up the alerts it generated, as will be revealed later (cf. infra ground 5).

4.3.3 By failing to classify its business relationships with the client banks as those of a correspondent bank, or to monitor them with the necessary care when it had a duty to identify increased risks, the appellant was in breach of its due diligence obligations

5.

FINMA accuses the appellant of having failed to adequately identify high-risk transactions by its clients; in particular, it did not appear to have adequately handled the alerts generated by its software programs. For its part, the appellant argues that the payments presented no added risk given that they were mainly transfers from one account to another belonging to the same client or between companies of the Stanford Group.

5.1 Just as for business relationships, financial intermediaries must take the necessary steps to identify individual transactions presenting increased risks (Art. 8 OBA-CFB; cf. above ground 4.1). Particular attention must be paid, depending on the financial intermediary's area of activity, to the following identification criteria: the size of deposits and withdrawals of personal assets; the existence of significant divergences compared to the type, size and frequency of transactions normally carried out within the context of comparable business dealings (Art. 8 para 2 OBA-CFB). Always considered high-risk are any transactions presenting money-laundering indicators, as defined in the Appendix to the executive directive (Art.8 para 3.b OBA-CFB), including an economically absurd structure formed by the dealings between a client and the bank (large number of accounts with the same institution, frequent transfers between different accounts, excessive liquidity, etc) or the withdrawal of personal assets shortly after they have been deposited in an account (transit account) (cf. Appendix covering money-laundering indicators, nº A20 and A30). In its Directive D(…)1 of January 1, 2003, the appellant specified that account movements must monitored on a permanent basis and clarification obtained and documented, especially when there are indicators such as those listed in the OBA-CFB executive directive, or signs of misconduct on the part of clients, their close associates or partners (cf. Directive D (…) 1 Ch. 7).

5.2 In this case, the appellant disputes the necessity for additional monitoring of the transactions, explaining that most of the transfers were

internal between clients or the Stanford Group. However, the fact that payments are between various accounts belonging to the same holder, or to related natural persons or legal entities, does not exclude or diminish the risk of money-laundering. To be persuaded of this, it suffices to generalize the appellant's behavior: if the other banks holding accounts involved in the transactions also take the view that in principle they present no additional risk, then the monitoring and clarification process to which those transactions is subject will only be minimal both for outflows and inflows of funds. Also, such procedures can complicate later inquiries by lengthening the trace on fund flows. These effects will be even greater in jurisdictions with less stringent legislation governing money-laundering matters than those applicable in Switzerland, as was very likely the case in Antigua-and-Barbuda notwithstanding the improvements noted in particular by the US Treasury. Furthermore, since FINMA, and before that CFB, have indicated that holding a large number of accounts with the same institution and also performing frequent transfers between various accounts constituted an indicator of money-laundering, it may be concluded that – independently of this case – without good reason, internal transfers cannot be classified as non-problematic from the money-laundering point of view. It should also be pointed out that there is nothing in the appellant's directives to indicate that internal transfers could be considered as never presenting an increased risk and therefore in no need of investigation prior to their execution (cf. infra ground 6.1).
Finally, as has already been explained, the appellant was in possession of information likely to be considered as indicators of misconduct and therefore should have sought to obtain additional clarification.

5.3 Consequently, it appears that the appellant incorrectly applied the criteria for identifying high-risk transactions.

6.
FINMA accuses the appellant of failing in its duty to obtain clarification in connection with the business relationships and transactions with increased risks and of having insufficiently documented the steps taken in that regard. The appellant defends itself by arguing that it did all that was necessary in the circumstances. It states that the documents attached in respect of relationship 1. ________ and its entry headings 2 _______and 3._________ were updated in 1992, 1994 and 2004; those of account 5._________ in 2004, whose client profile form the appellant admits was

incompletely filled in; those of account 6.________in 2000 and 2002, whose client profile form it admits was completed in a cursory manner. It claims that the information recorded on the economic background form was not corroborated by supporting documentation because it concerned intra-company or intra-group transfers; for the same reason, the transactions did not need to be examined by an outside agency. As for the payments to the auditor, there was nothing unusual about them and they did not reach the threshold of 1 million francs requiring clarification pursuant to its internal directives. In regard to the organizational charts of the Stanford group of companies it drew up, it states that they show respectively the entities belonging to the group regulated in the USA and elsewhere in June 2002 as well its clients in October 2004.

6.1 As has already been shown (cf. above ground 4.1), the LBA imposes obligations on financial intermediaries to clarify and document information. Besides general clarification obligations, such as checking co-contractors' identities and identifying the beneficial owners as well as those ordering transfers (Art.14 et seq OBA-CFB), additional clarification concerning relationships or transactions presenting increased risks is also required; depending on the circumstances, there is a requirement to establish in particular the purpose for which withdrawn personal assets are to be used, whether substantial credit transfers are plausible and if co-contractors or beneficial owners are politically exposed persons (Art.17 OBA-CFB, in particular paras 2.c, d and g). Clarification also includes, depending on the circumstances, obtaining written or verbal confirmation from co-contractors or beneficial owners, consulting sources and databanks accessible to the public or, if necessary, obtaining information from trustworthy persons (Art.18 OBA-CFB, in particular paras 1.a, c and d). Financial intermediaries are required to check that the results of the clarification measures are plausible and document them (Art. 18 para 3 OBA-CFB). According to Art. 7 para 1 LBA, details of the transactions carried out and clarification obtained pursuant to the extant law must be documented so that third party experts in the field can obtain an objective idea of the transactions and business relationships as well as verify that the provisions of the extant law are being respected. The appellant included the substance of Art. 17 and 18 OBA-CFB in ch 7 and 9 of its Directive D(…)1 which stipulate that account managers are required to conduct investigations and additional research themselves, as demanded by the circumstances, and to communicate the

results to the compliance cell – later replaced by the compliance department – which in turn is required to assess the plausibility as well as the probative value of the justification received. The obligation to document was defined in ch.8: all relevant information in the possession of account managers had to be the subject of a written report -a task considered to be an important aspect of the rules known as “Know your Customer” – and the necessary improvements made on an ongoing basis. The probative value of documents serving as justification for transactions exceeding the thresholds set by the internal directives and procedures had to be carefully examined. According to ch 6 of Directive D(…)1, in its version dated November 11, 2004, all transactions reaching the set thresholds – namely transfers whose amount exceeded 1 million francs (cf. Appendix 2 to the Directive governing Anti-Money Laundering Regulations as amended on November 11, 2004 – Criteria for the Classification of Clients and Monitoring of Transactions, ch 2.1)- had to be subject to written clarification on the form provided for that purpose (APE form). Client profiles for business relationships known as at-risk had to be reviewed by account managers a minimum of once yearly and be updated (ch 3.i); also, with regard to the requirement to document, this directive stated that account managers were required on an ongoing basis to make whatever improvements were necessary to ensure that client files contained confirmed and reliable information (ch 8). According to the world anti-money laundering directives, issued by the Wolfsburg Group, banks must ensure that client files are updated (ch 3, May 2002 version; cf. ground 4.2.1 *in fine*); this regulation was not just limited to increased risks. In ch 4e of the version dated July 10,2008 of its Directive D(…)4, the appellant stipulated that an inquiry by an outside agency approved by the CEAC should be automatically carried out in certain cases, in particular when the total amount of assets in an account or the total amount of credits or withdrawals exceeded the threshold of 1 million francs.

6.2 In this case, due to its failure to identify the increased risks presented by the business relationships and transactions, the appellant logically failed at the same time to seek the necessary clarification required by law and its own directives. Hence, the economic background of the transactions and their plausibility was in general not clarified and they were simply classified as internal with no further action being taken. In a few cases, the appellant obtained documents corroborating the reality and purpose of the transaction concerned, such as the purchase of a building by SFG and the use of the credit facility granted to Robert Allen Stanford. Although it cannot necessarily be concluded, as does FINMA,

that the corroboration of the purpose of that loan and its documentation was inadequate, it changes nothing in terms of the result, bearing in mind the other failings. To begin with, it should be noted with regard to this latter point that the main purpose of the information collected was to verify in the appellant's interest the solvency of the party to whom the credit facility had been granted and was not for anti-money laundering purposes. Similarly, the meetings and visits that took place and the corporate documents attached to the files are certainly some of the steps that need to be taken for clarification purposes, but they too are the kind of measures taken as standard practice in the management of bank relationships rather than specific measures taken to combat money-laundering.

However, the appellant's shortcomings cannot be looked upon as less serious simply as a direct consequence of its failure to classify clients as PEPs and correspondent banks, or its classification of payments as internal transactions within the group; there was a general failure to meet its obligations to clarify and document information concerning all its business relationships and transactions, even when they were classifiable as ordinary. Hence, numerous forms were not fully completed, reviewed or corrected by the central filing registry. By way of an example, the client profile form for account n° 8._______was not signed by the zone manager, branch manager or sales management, even though the form makes provision for it; the Lexis/Nexis book was ticked without a corresponding sheet being attached to the file; in the section dedicated to relationships with other accounts, only account n°5._________ is mentioned. The minutes of the CEAC meeting on October 14,2004 show that additional information needed to be added to the file, which the appellant claims was done; however, on the basis of the available exhibits, it cannot be established what information was judged to be missing and whether it was subsequently obtained. It nonetheless appears that there continued to be missing information, notwithstanding that committee's examination of the file. The client profile form for account n° 9 was signed by the account manager in that capacity as well as that of the zone manger or branch manager; it was of course counter-signed by the central filing registry, but this double signature by the account manager deprives the file of an additional check by a third-party and hence the relevance and value of the documentation. Only one page of the three comprising the Lexis/Nexis search results, with no information of particular interest in terms of compliance, was attached to the file. The World-Check search results on June23,2008 only related to "stanford bank (panama sa)" and "stanford international holdings (panama) sa", even though the account manager

was aware of the latter's ties with Robert Allen Stanford, which he ought to have included in the clarification.

The files contain no or very few documents showing that the information gathered had been investigated by the department responsible for compliance, even though the latter's responsibility for checking could not have been limited simply to those transactions judged by the account manager to be high-risk, since its role was general oversight of compliance with the standards applicable to measures taken to combat money-laundering. Contrary to its duty to document, nowhere in the client file does the appellant explain the reason why it failed to analyze I._______ and the World-Check sheet and concluded that Robert Allen Stanford was not a PEP, even though, in the light of the foregoing, the available information permitted the conclusion that such a classification ought to or at least could have been attributed to him. In an internal note of October 25, 2002, concerning account n°s 5._______ and 6.________, whose author is not mentioned but which, according to the appellant's letter to FINMA dated May 2,2012, could have come from the manager responsible for operational control at the time, several "points of discussion" were identified, notably: "The controversy surrounding the group's founder and his exposure as a quasi-PEP in a geographical area posing a problem", "The unusual practice of a bank operating a management account as a client of another bank (as opposed to a simple correspondent relationship) and "The request for an in-depth inquiry into the group in order to obtain a better overall appreciation of its APE [Principal Activity of a Company] and to back up the information on file". Entitled "Identified Risk", the note mentions the "occurrence of a major political problem in Antigua and/or an offensive of the US authorities". It therefore seems that that the relationships with SFG and BOA, as well as with Robert Allen Stanford, had been identified as risky; in another note written on November 11, 2002, mention is made of a conversation with the account manager who had answered certain questions without, however, examining the identified risks beforehand.

It must also be pointed out that the World-Check search carried out in October 2004 was in connection with the personal credit facility granted to Robert Allen Stanford; it is therefore highly likely that it would not have been carried out during the course of routine business with the clients – apart from SBP, for which a search was carried out in 2008, albeit incompletely– if that credit facility had not been requested. No other search was done subsequently, which – even admitting that there was no need for an annual update as the appellant required for PEPs – was negligent given the substantial amounts and movements of funds.

However, the lack of adequate searches bears the risk, in itself, that personal assets of illicit origin might not be discovered (cf. FT decision 6B-729/2010 of December 8, 2011, ground 4.4.5 not published in ATF 138 IV 1). The same applies to the examination of transactions by an outside agency: Directive D(…)4 provides for no exception covering internal payments to a client or group that would enable the appellant to ignore the requirement to conduct an inquiry. With regard to the organizational charts of the Stanford Group, those have not been updated since 2004; hence SBP does not appear on them because it only became a client in 2008. Had the appellant adhered to its own directives, and even supposing that the relationships were simply wealth management and not correspondent banking activity, it ought nonetheless to have updated the information on file. Nowhere does it explain why the loan granted to Robert Allen Stanford was classified as Lombard rather than commercial credit, thereby releasing it from its obligation to clarify.

6.3 The foregoing considerations reveal a general lack of rigor on the appellant's part in maintaining its files and overseeing its business dealings with Robert Allen Stanford and his companies, a failing which is incompatible with its due diligence obligations in matters related to the fight against money-laundering. FINMA justifiably concluded, therefore, that the appellant was in breach of the applicable regulations governing those matters.

7.

Based on the shortcomings noted, FINMA claims that the appellant's anti-money laundering organization was deficient and constituted a violation of Art. 3 para 2.a LB (RS952.0). It accuses it of having entered into business relationships it was incapable of managing and overseeing. The applicant's reply is that those relationships were part of its routine business activity, namely wealth management, for which it has the necessary organization. It reminds us that it has established an anti-money laundering department and issued the relevant directives. It considers that it has always taken appropriate risk-management steps.

7.1 According to Art. 3 para 2 LB, a license to trade as a bank is granted in particular when the bank's articles of incorporation, partnership agreements and regulations precisely define the scope of its business activity and make provision for a corresponding organization; when its corporate aim or the size of its business dealings so demand, the bank

must create on the one hand governing bodies, and on the other subordinate bodies subject to senior management oversight and control, and also define the responsibilities of each of them so as to guarantee appropriate managerial supervision (let. a). The licensing conditions must be respected at all times (cf. FT decision 2C_163/2014 of January 15, 2015 ground 2.3). The board of directors must, as a non-transmissible and inalienable attribute, exercise overall oversight of people given managerial responsibility in order to ensure in particular that they observe all statutory laws, bye-laws, rules and instructions (Art.71a para 2 Ch. 5 CO). It is incumbent upon the operational management to set in place appropriate internal systems and processes to ensure compliance (respect for standards) within the business. To that end, it must take all requisite steps and make whatever operational provisions may be necessary to ensure, in particular, that an adequate set of instructions is issued and that all employees involved, at whatever level, comply with them (cf. FINMA Circular 2008/24 – Internal supervision and control in the banking sector-dated November 20, 2008 and effective from January 1, 2009, cm. 97 et seq, reiterating Federal Banking Commission - Circular 06/6 - Internal supervision and control- dated September 27,, 2006, Ch. 97 et seq). The applicable standards in matters related to the fight against money-laundering obviously form part of the overall obligations with which the bank is expected to comply.

7.2 In this case, FINMA's conclusion may seem harsh to the extent that it is based solely on the case in question. However, that case concerns several clients holding a number of accounts over a considerable period of time; the sums deposited and transactions carried out involved very substantial amounts of money that could not be reconciled with routine account movements calling for no special attention. The case cannot therefore be reduced to a simple one-off failure or isolated event that might not call into question the bank's competence in terms of compliance. It is patently obvious that the work of the account manager was not overseen with a critical eye by another department, starting with the numerous evident gaps in the information held in the files, gaps that were not filled in. Although the necessary directives and departments have themselves been issued or created, it seems that their operational effectiveness leaves a lot to be desired; after all, the bank is required to ensure compliance with the provisions of the law, just as its own regulations, and to take appropriate organizational steps to that end, for example by exercising closer supervision by senior management of the processes employed to combat money-laundering or the decisions taken by first-line managers.

7.3 Consequently, even though it may not necessarily be found, as does FINMA, that the appellant lacked the necessary competence or experience to manage business on such a large scale, as was the case in this instance, it nonetheless remains that the shortcomings noted and their systematic nature reveal a deficient organization, in terms of respect for the principles governing due diligence obligations set out in the LBA, which is incompatible with the requirements of Art. 3 para 2.a LB.

8.

In finding the appellant guilty of violating its due diligence obligations, FINMA based its decision on Art. 32 LFINMA. The appellant argues that, even if the existence of its shortcomings has been established, they were not sufficiently serious to warrant FINMA's decision which, for that reason, should be overturned.

8.1 If, within the context of the oversight it is required to exercise pursuant to the laws governing financial markets, including the LBA (Art.6 para 1 together with Art. 1 para 1.f LFINMA), FINMA learns that the laws governing financial markets have been infringed, or if it notices other irregularities, it is required to take the necessary steps to restore legal order (Art.31 LFINMA). When the procedure reveals that the subject party has seriously infringed the law governing supervision and that no measure to re-establish the legal order needs to be taken, FINMA may find the party concerned blameworthy and issue a formal warning (Art. 32 LFINMA). The seriousness of a violation of applicable standards constitutes an undefined legal notion whose interpretation by FINMA will be considered by this Court which must respect the authority's margin for exercising discretion (cf. FAT decision B-6815/2013 dated June 10,2014 ground 6.1 and cited references). In choosing what measures to apply, FINMA must comply with the general principles governing any administrative action whose guiding principle is proportionality.

8.2 As the appellant contends, it should not be held responsible for the extent of the losses suffered due to the system created by Robert Allen Stanford and this must be disregarded in any assessment of the seriousness of the shortcomings noted. Those should only be measured in the light of any evident shortcomings in terms of its due diligence obligations. Nonetheless, the value of the clients' assets and amounts involved in their transactions must be taken into consideration. As has already been revealed, the appellant failed to correctly identify the increased risks or to ensure that the business relationships and transactions were adequately verified by the compliance departments.

It is clear from the explanations it has given, at least in the present case, that it applied a very narrow interpretation of the notions of increased risk and of PEP, despite having in place the means whereby it ought to have been led to reach a different conclusion. Certain measures were all the more necessary in this case given that the information the bank had should have enabled it to conclude that the client had ties with a number of politicians who throughout their careers occupied posts qualifying them as PEPs. The only major attempt to seek clarification that can be identified is report I. ________ that provided a certain amount of detail, some of which proved to be reassuring with regard to the legality of the Stanford Group's business affairs, but others, such as the links to a drug cartel and ties with a politician in Antigua-and-Barbuda, called for special attention.

The appellant seems therefore to have trusted the integrity of a long-term client and failed – at least with regard to him and his companies – to adapt in any substantial way to changes in the legal requirements governing matters related to the fight against money-laundering or to make any genuine attempt to seek the necessary clarification even when its own directives required it. Although it is understandable that the bank might not have done as much research into a client already known to it as it would for a new one, it nonetheless remains that it ought to have updated its information, especially concerning the potential for an increased risk to appear later during the course of the business relationship. To that end, it should have conducted regular searches in the appropriate databases, which would not have required any major effort on its part but would have enabled it to detect any changes in the client's situation.

Without prejudging the intention behind the account manager's behavior, his decision – which was questioned neither by the hierarchy nor compliance control – spared him the not inconsiderable effort of carrying out searches and updating requisite information, to the detriment of respect for the due diligence obligation to which the bank was subject. The documentation for the accounts concerned was generally raised, but was incomplete and had been casually filled in. Due to the lack of sufficient documentation, it is difficult to verify *a posteriori* whether the people responsible had considered or not the possible existence of increased risks in the relationships with Robert Allen Stanhope and his group. These shortcomings were present over a long period of time without the appellant's competent departments discovering them and taking steps to remedy them. Furthermore, bearing

in mind the circumstances, there are grounds for admitting that this situation would have continued had the fraud committed by the Stanford Group not been discovered.

8.3 Consequently, the appellant's violation of its due diligence obligations can be classified as serious given that FINMA – who moreover ordered nothing specific to be done to re-establish the legal order, but merely appointed an auditor to verify what steps the appellant has taken to improve matters– was within its rights to find it blameworthy and to issue a formal warning . With regard to the matter of respect for the principle of proportionality, it should be noted that the sanction applied seems to be perfectly adequate and necessary, given that the authority found the subject party guilty of a serious violation of the law and made that clear to it; at the same time, the sanction constitutes the least severe measure available to FINMA, one whose impact on the appellant's situation is not disproportionate to the public interest, which is to ensure full compliance with all due diligence obligations in matters related to money-laundering.

The finding of blameworthiness and the issuing of a formal warning is therefore ruled to have been fully justified and in accordance with the principle of proportionality.

9.

In one of its final grounds of appeal, and by way of recapitulation, the appellant accuses FINMA of presenting an incomplete and inaccurate statement of facts in connection with its alleged lack of competence to manage banking relationships outside its routine business dealings, its failure to lift the FINCEN alert in 2001, the existence of alleged correspondent banking relationships, its lack of documentation relating to the credit facility granted to Robert Allen Stanford, and its alleged failure to identify the source of his fortune. In this regard it relies on the prohibition of arbitrariness.

According to Art. 49 PA, an assessment of facts is incomplete whenever all the factual circumstances and determining items of evidence on which a decision is based have not been taken into account by the lower authority; it is inaccurate if the authority failed to adduce evidence in respect of a relevant fact, incorrectly assessed the effect of evidence adduced, or based its decision on inaccurate facts; within the meaning of the aforementioned article, determining facts are those with a decisive effect on the outcome of the litigation (cf. FAT decision B-921/2015 dated June 1, 2015 ground 3.1 and cited references).

As has been already stated, FINMA's findings with regard to the appellant's operations in connection with its client accounts were correct

and it did not claim to have found shortcomings in all the credit documentation. The lifting of the FINCEN alert in 2001 only concerned a secondary argument and was not a determining fact capable of influencing the outcome of the case. The same applies to the criticism - whose effect has been exaggerated by the appellant – that it had failed to identify the source of Robert Allen Stanford's fortune, FINMA having in fact merely criticized the deficient nature of the files. With regard to the lack of competence to manage banking relationships, that is a matter of legal rather than factual assessment.

Consequently, this ground of appeal by the appellant must be dismissed.

10.

Finally, the appellant alleges a violation of Art. 6 ECHR on the ground that the finding of blameworthiness and issuing of a formal warning constituted a criminal law sanction, imposed in breach of its due process rights as a defendant, particularly the right not to incriminate itself and to be informed in advance of the nature and cause of the accusation, and also denied it the opportunity to request an investigation to seek exculpatory evidence.

10.1 Even though Art. 6 ECHR does not mention it specifically, the right to remain silent and not to incriminate oneself (*nemo tenetur se ipsum accusare*) is a generally recognized norm at the heart of the notion of a fair trial pursuant to Art. 6 para 1 ECHR para 1 ECHR (cf. FT decision 1B_439/2015 dated January 20, 2016, ground 2.5.2; FT decision 2P.4/2007/2A.10/2007 dated August 23, 2007, ground 4.2). The guarantees provided by the ECHR do not exclude the obligation to provide the authority with information capable of giving rise to a criminal prosecution; they simply prohibit improper coercion, that is to say the disproportionate use of enforcement measures (cf. FT decision 2C_739/2015 dated April 25, 2016, ground 3.3 and cited references).

According to case law, an alleged offense is criminal in nature whenever, alternatively, the national law classifies it as criminal, the nature or seriousness of the alleged offense leads to that conclusion, or the degree of severity of the potential sanction calls for that classification (cf. FT decision 2C_739/2015 dated April 25, 2016, ground 3.4 and cited references). The Federal Court has ruled that prohibition from exercising a particular activity, for which Art. 33 LFINMA makes provision, is a sanction available to the supervisory authorities specified in legislation governing the granting of police licenses. Notwithstanding the repressive aspect of this prohibition, according to internal law it must be classed as an administrative rather than a criminal law sanction.

It does not apply to the general public, only to the specific trades and professions it wishes to ensure comply with the law governing their supervisory obligations while conducting business. The pronouncement of such a sanction does not tend therefore to punish an act judged to be blameworthy. The Federal Court has compared it to a temporary ban on practising decided by the supervisory authority pursuant to Art. 17 para 1.d of the law governing lawyers (RS 935.61, LLCA)in a case where a lawyer acted in violation of that law. The Federal Court concluded that a ban imposed pursuant to Art. 33 LFINMA cannot be classified as a criminal law matter within the meaning of Art. 6 ECHR (cf. FC decision 2C_739/2015 dated April 25, 2016, ground 3.4 and cited references).

10.2 Art. 32 LFINMA expressly authorizes FINMA to reach a finding that a subject party has seriously infringed a duty of care regulation if no measure to re-establish legal order is called for. It is an ex-officio ruling pronounced in the public interest which the supervisory authority is bound to protect, namely the full observance by subject parties of duty of care regulations. In this sense, it is a type of sanction to which the authority may also add a warning (cf. Message of the Federal Financial Market Supervisory Authority, FF 2006 2741, 2793). As to the matter of knowing if that measure should be considered from the point of view of criminal law, reference can be made to the Federal Court's arguments in the aforementioned case with regard to the ban on exercising a trade or profession; given that a finding of blameworthiness and the issuing of a formal warning constitutes a less incisive measure than a ban on exercising a trade or profession, there is still less reason for classifying it as a criminal law sanction. The finding also seeks to enforce the regulations governing the conduct of members of a specific profession. It is a voluntary and informed process whereby financial intermediaries agree to comply on an ongoing basis with certain obligations, especially to inform, associated with the obtaining of police licenses for which they apply in order to permit them to conduct business overseen by the State. The main aims of financial market supervision are to protect investors and safeguard the reputation of the Swiss financial market by overseeing the conduct and professionalism of those involved in its activities; pursuant to that of course is the will and necessity to punish, by means of criminal law sanctions, any misdemeanors or criminal acts that may be committed within that context, as well as to issue warnings and correct, through the application of administrative sanctions, any conduct that may jeopardize the interests protected by legislation. In particular, the option to apportion blame and issue a formal warning pursuant to Art. 32 LFINMA furnishes the authority, within the context of

its oversight of the duty of care, with an instrument enabling it to formally serve notice upon a subject party that its conduct has been judged to be a serious violation of the applicable law. This instrument, applied in the form of a decision, also provides the subject party with an opportunity to question FINMA's decision before the appeal authority. It is comparable to the attribution of blame in the sense of Art. 17 para 1.b LLCA. Consequently, the finding of blameworthiness and the issuing of a formal warning pursuant to Art. 32 LFINMA cannot be compared to a criminal law sanction in the sense of Art. 6 ECHR, given that the procedural guarantees provided by that article do not apply in this instance. To begin with, in this case FINMA has applied no abusive measure of a coercive nature; the appellant was aware of the purpose of the inquiry and was also able to present exculpatory arguments in its defence.

10.3 It therefore follows that the appellant's ground of appeal based on violation of the guarantees provided by Art. 6 ECHR must be dismissed.

11.

In the light of all of the foregoing, there are grounds for finding that the challenged decision did not violate federal law, was not an inaccurate or incomplete assessment of the relevant facts and was not inappropriate (Art. 49 PA). Being groundless, therefore, the appeal must be dismissed.

12.

The costs of proceedings, inclusive of court fees and expenses, are to be borne by the losing party (Art. 63 para. 1 PA and Art. 1 para. 1 of the regulation dated February 21, 2008 governing costs, expenses and allowances set by the Federal Administrative Court [FITAF, RS 173.320.2]). Court fees are calculated based on the amount in dispute, the scope covered by a case and its complexity, as well as the procedural steps taken by the parties and their financial situation (Art. 2 para 1, first sentence FITAF).

In this case, the appellant is the losing party in all its arguments. Consequently, it must bear the full costs of proceedings, amounting to 10,000 francs. With effect from the entry into force of the present decision, these will be offset by the advance of costs in the same amount already paid by the appellant.

In view of the outcome of these proceedings, the appellant is not entitled to claim expenses (Art. 64 PA).

For these reasons, the Federal Administrative Court:

1.
Dismisses the appeal.

2.
Orders the costs of proceedings, amounting to 10,000 francs, to be borne by the appellant. Once the present decision enters into force, this sum is to be offset by the advance of costs already paid for the same amount.

3.
Awards no costs.

4.
Orders this decision to be formally notified:

- To the appellant (by service of a writ)
- To the lower court (ref. n° G01002233; by service of a writ).

Presiding Judge: Clerk of Court:

Jean-Luc Baechler Ivan Jabbour

Avenues of Appeal :

An appeal against this decision may be made before the Federal Supreme Court, addressed to 1000 Lausanne 14 within thirty days of its service of notice (Art. 82 et seq, 90 et seq and 100 LTF). The appeal must be submitted in an official language, state the arguments and items of evidence to be produced, and be signed. The disputed decision and items of evidence must be attached to the submission, insofar as they may be in the appellant's hands (Art 42 LTF).

Date sent: October 13, 2016